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The Kansas Court of Industrial Relations

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THE KANSAS COURT OF INDUSTRIAL RELATIONS

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CHAPTER I

INTRODUCTION

The Kansas Industrial Court Act has the distinction of being the only one of its kind ever passed. The things it attempted to do had never been done before in just the same way, nor have they ever since been imitated. But, to many people, there had been previous experiments closely resembling the Kansas act of 1920. They pointed to various acts passed in the latter part of the 19th. century, and the early part of the 20th., in such places as New Zealand, Australia, Canada, and even in parts of the United States as being forerunners of the Kansas Industrial Court Law. These laws were passed to provide for the compulsory arbitration of industrial disputes. The Kansas Court of Industrial Relations, also, has many times been referred to as an attempt at the compulsory arbitration of industrial disputes. The men who drew up the Kansas act of 1920, however, always claimed that compulsory arbitration was not the underlying principle of the experiment. Instead, they called their plan compulsory adjudication of disputes occurring between labor and capital.

> It is not a court of arbitration or conciliation; it is a court of justice, and in the personnel of that court there is no man who represents labor from a professional standpoint, or employing capital from a professional standpoint -- they all three represent government, with its pledge of impartial justice.[1]

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1. Henry J. Allen, "Increased Production as a Remedy for Inflation: The Kansas Industrial Relations Court Plan," Proceedings of the Academy of Political Science, IX (June, 1920), p. 71.

As far as this study is concerned it makes no difference which of the terms is applied to the Kansas act. Both it and the other acts mentioned above had one thing in common, they were attempts to prevent industrial warfare by governmental interference. So, before going into the history of the Kansas Court of Industrial Relations, we shall briefly describe how these other governments attempted to solve the problem of preventing industrial disturbances. A comprehensive history of the acts will not be given, merely the main characteristics of each act. Keeping in mind, then, the main points of these laws the reader will be able later on to see how the problem was approached differently by the Kansas act, yet will see that there were many points of similarity.

Previous Attempts at Compulsory Arbitration

A look at these early attempts at compulsory arbitration will show that Kansas was not the first governmental unit to step in and use its power to prevent labor and capital from carrying on industrial warfare. All of these laws are similar in principle and aim, that of finding some way to do away with industrial warfare. Their main differences are in scope and method. One thing will be noticed throughout, and that is that every one of these attempts at compelling both labor and capital to come together in an attempt to iron out their difficulties grew out of a serious strike, one that threatened the nation with widespread suffering and possible economic ruin. These crises seemed to point out to these peoples that unless government stepped in and required at least an attempt at peaceful settlement of these disputes the country would totter on the brink of eventual civil war. Then, we

find that during times of relatively peaceful industrial relations, there is little or no agitation from the erection of such a system which in some ways compels the industrial antagonists to peacefully settle their controversies.

One of the early outstanding examples of compulsory arbitration was the Industrial Conciliation and Arbitration Act of New Zealand passed in 1894. In 1890 New Zealand had had a terrible maritime strike which devastated the whole of Australasia. It soon spread from the shipping world, where it began, into a great circle of related industries. "Merchants and their clerks drove drays and loaded and unloaded merchandise; shipowners and their sons and friends took the place of sailors and stokers; the country want to the edge of civil war."[2] The maritime strike was eventually over, but other labor disputes were looming over the horizon. It was at this time that Mr. W. P. Reeves, the Minister of Labor for the Colony, set himself to find a remedy to prevent the recurrence of such terrible struggles as the maritime strike had been. Eventually Mr. Reeves hit upon the idea of compulsory arbitration. He was treading on new ground here as there had been no previous attempt at this in New Zealand. However, he had come upon this solution and decided to try it, because in looking over the experiences of the other countries of the world whose experience had been confined to voluntary arbitration and conciliation, he saw

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2. Henry D. Lloyd, A Country Without Strikes (New York, Doubleday, Page and Company, 1900), p. 5.

only a record of failure. Success had been achieved mostly when there was very little at stake, never when a great strike had either been threatened or called.

The following are the main points of the Industrial Conciliation and Arbitration Act as finally amended in 1898.[3]

(1) It was recognized that it would be difficult to apply the principle of compulsory arbitration to individual and irresponsible workingmen, so the law first of all provided for the organization of industrial workers into associations or unions, and then provided that the principle of compulsory arbitration could be invoked by such organization. Workingmen who failed to organize themselves in such unions could in no way invoke the benefits of the law. It also made it easy for employees to organize into recognized unions, any five persons or more, by conforming to a few provisions could organize and be recognized as a union.

(2) In the second place, the New Zealand law did not prevent private conciliation or arbitration. Industrial agreements could be made between industrial unions and employers . . . and they would be enforced the same way as if they were awards of the court of arbitration.

(3) Now as regards the conciliation and arbitration features of the law. The law provides for two bodies, conciliation boards and a court of arbitration. The arbitration court was to be used only as a last resort, every facility being offered the disputants to settle their controversy peacefully before arbitration was compelled.
   (a) New Zealand was divided up into as many "industrial districts" as the Governor thought proper, and for each of these districts there was to be established a board of conciliation. It was to have jurisdiction to settle industrial disputes in that district. Members of these boards (either 4 or 6) were elected by the employees and the employers, each electing an equal number.
   (b) Industrial disputes could be brought to this board either by the workers (unions) or the employers.

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3. W. F. Willoughby, "Foreign Labor Laws," Bulletin of the Department of Labor, No. 33 (March, 1901), Washington: Government Printing Office, 1901, pp. 207-234.

However, after the board once had jurisdiction, the employers could not use the lockout, and the workers couldn't strike. Things were to go on as usual until the board had made its decision. If the decision wasn't satisfactory to either of the parties, it had to be taken to the court of arbitration.

(c) The court of arbitration consisted of a single body for the whole Colony. The three-man court was appointed by the Governor; one member on recommendation of the unions, one of employer's associations, and the third member, who acted as president of the court, had to be a judge of the Supreme Court. The court acted in most respected as an ordinary court of law, except that the procedure was simplified, and the decision was not to be written up in technical language.

(4) The awards of the court of arbitration were to be enforced through the regular law courts, but could not be enforced for longer than a two-year period.

(5) There was no provision for imprisonment for violating the All penalties were money payments.

This was the essence of the law then. Strikes were outlawed, in fact were crimes against society. Workers who didn't organize into unions did not come within jurisdiction of the act, however, and employers who prevented their workers from organizing could disobey the act. Mr. Reeves had it in mind that these boards would do most of the work in handling disputes, and that the arbitration court was to be used only as a last resort. However, out of 109 cases dealt with by the boards up to June 30, 1900, 73 went on to the arbitration courts.[4] This would seem to show that the conciliation boards merely prolonged the settlement of disputes and served no useful purpose in the compulsory system.

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4. Bulletin of the Department of Labor, No. 40 (May, 1902), Washington: Government Printing Office, 1902, pp. 552-553.

Mr. Henry Lloyd very succinctly stated the underlying philosophy of this act when he made the following statement.

> We cannot understand . . . why compulsion cannot be used to prevent economic crime, as well as any other crime, or to repel economic invasion of one class by another, which is just the same thing, for all intents and purposes, as the invasion of one country by another.5

If any one part of any society, then, takes it upon itself to invade the rights of the others, the State can step in to protect itself, because the State is composed of all the component parts of society. This should be kept in mind because it will be seen later that those who created the Kansas Industrial Court used exactly the same argument as part of their supporting statements for the act.

At about the same time that New Zealand was starting her experiment in compulsory arbitration, beginnings were being made in Australia too. In 1894 the Colony of South Australia passed an act entitled, "An Act to Facilitate the Settlement of Industrial Disputes," and it followed in many respects the system as created in New Zealand. However, it was more of a conciliation plan than it was compulsory arbitration. Neither party could compel the other to take the dispute to a conciliation board, there was no general system of compulsion, and six years after the law was enacted not a single case had been tried under it.[6]

Most of the other colonies in Australia passed, in the late 19th. and early 20th. century, acts intended to suppress strikes and to cause

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5. Lloyd, op. cit., p. 125.

6. Bulletin of the Department of Labor, No. 33 (March, 1901), Washington: Government Printing Office, 1901, pp. 252-253.

labor disputes to be adjusted, if possible, by agreement under public sanction, and in the last resort by the awards of special legal tribunals. The fundamental provision of most of these statutes was that a strike or lock-out was illegal when other means were provided for settling disputes.

The Commonwealth itself enacted an act in 1904 entitled, "Commonwealth Conciliation and Arbitration Act." It made provision for a Commonwealth Arbitration Court. One of the most important provisions of the act was that which forbade strikes or lockouts under penalty of 1000 pounds. Thus, the right to strike was denied the Australian worker, but he was encouraged, as in New Zealand, to organize into unions so that he could bring his disputes as a unit of workers and try and get them settled peacefully.[7]

Next should be mentioned the attempt made in Canada at some sort of compulsory arbitration system. An act was passed in 1907 called, "The Industrial Disputes Investigation Act." It, as will be clearly seen, was not pure compulsory arbitration as the system set up in New Zealand was. The act applied to coal mines and metal mines, public utilities, including municipal service corporations, transportation of all kinds, including occupations subsidiary thereto, and to all agencies of communication. Whenever a dispute arose between an employer and any of his employees, and the parties thereto were unable to adjust it, either of the parties to the dispute could make appli-

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7. Mary Chamberlain, "Settling Labor Disputes in Australia, " The Survey, XXXII (August 1, 1914), p. 455.

cation to the Minister of Labor for the appointment of a Board of Conciliation and Investigation, to which Board the dispute was to be referred. Like the Arbitration court in New Zealand, every board was to consist of three members, one appointed on recommendation of the employees, one on recommendation of the employer, and the third chosen by the above two.[8] The main purpose of this act was to prevent and not prohibit strikes apparently, and did not aim directly at compulsory arbitration like the New Zealand act.

The act made it unlawful for employers in these industries and occupations to lock out their workmen or for employees to strike until this board had investigated the dispute and had made a report of its findings. After the report of the board had been issued the parties could refuse to accept its findings and start a strike or a lockout, whichever the case might be.[9] Therefore, if this attempt at conciliation was a failure, either side could then resort to industrial warfare. The law merely forbade strikes and lockouts while the dispute was being investigated by this board appointed by the Minister of Labor. It can be seen that the actual compulsion didn't extend as far as it did in the New Zealand act.

The last example to be mentioned before getting into the actual history of the Kansas law will be the experiment made in the state of Colorado in 1915. It was patterned somewhat after the Canadian Trades Disputes Act.

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8. Charles W. Eliot, "The Canadian Act," McClure's Magazine, XXX (November, 1907), p. 149.

9. United States Bureau of Labor Statistics, Monthly Review, III, No. 4, (October, 1916), Washington: Government Printing Office, 1916, pp. 16-19.

The Colorado law created an industrial commission, and conferred upon it certain powers as to the adjustment of industrial disputes. The act made it unlawful for employers to declare or cause a lockout, or for employees to go on a strike prior to or during an investigation or arbitration of a dispute by this industrial commission. The law required 30 days' notice before a strike or lockout was actually engaged in. Conciliation efforts were to be carried on during this period to try and reach a peaceful solution. If this failed, informal conferences could be held to afford a means at arriving at an understanding. If all this failed, then a strike or lockout could be called.[10]

These, then, were some of the previous attempts at some form of compulsory arbitration of labor disputes. To what extent was the Kansas law copied from these? Did they serve as a model for the industrial court established in Kansas in 1920? Governor Henry J. Allen, who was largely responsible for the enactment of the Kansas law, very definitely stated that they did not serve as models for his court. In the first place he criticized these laws because of the makeup of the boards of conciliation and arbitration. He didn't believe at all in having either a representative of labor or a representative of capital of them.

> When you, representing employing capital, select your member of the board of arbitration, and I, representing labor, select my representative and the two choose the umpire, that umpire may do one of three things. He may join your side and secure a partisan decision; he may join my side and secure a partisan decision; or he may dicker back and forth and secure a compromise. But into the consideration

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10. United States Department of Labor Statistics, Monthly Labor Review, X (March, 1920), Washington: Government Printing Office, pp. 216-217.

> of that board of arbitration, there never comes any concern for the other party in the triangle, the party which in every essential industry is chiefly concerned, the public.[11]

Thus Governor Allen developed his theory that the greatest sufferer in industrial warfare was the public, and that the only way that the public could do something about it was to form a court whereby industrial disputes were tried and settled in a court like any ordinary civil suit or crime. But, it was not to be an arbitration board made up of representatives of labor and capital, as the result was too often compromise, not justice for all.

Here, then, is where the proponents of the Kansas law made a differentiation between compulsory arbitration and adjudication. Governor Allen had no faith in arbitration boards at all. Only with impartial judges adjudicating industrial disputes could any form of justice be had at all.

> The chief fault of industrial arbitration, fundamentally, is not that of commission, but of omission. It is only a rudimentary and defective form of adjudication not suited to the handling of sweeping industrial issues. It omits what is most necessary in adjudication -- namely, inherent and fairly constructed authority, and the application of police-power principles.[12]

Governor Allen admitted that arbitration had worked well in boundary disputes and other similar private cases. But he said that in these cases the paramount interest of the public scarcely ever entered as a factor.

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11. Allen, op. cit., p. 74.

12. Henry J. Allen, The Party of the Third Part, (New York: Harper and Brothers, 1921), p. 234.

Neither was there any class interest involved. In those cases the arbiters were fairly open-minded because there was no historic or deep-seated prejudice to be overcome. Then there was another and more important factor which most champions of arbitration overlooked. That was that if civil arbitration failed, the contending parties knew they must resort to a court of law; hence they were constrained always to accept what their consciences told them to be reasonably fair by the knowledge that there always lurked in the background the resort to the process of law, which might not be overridden.[13] In other words, it was the law standing in the background that made civil arbitration successful. But if industrial arbitration failed there was no resort to law but to strikes, lockouts, and boycotts in the majority of cases.

In his book Governor Allen also noticed that throughout the history of industrial arbitration there had occurred the phenomenon of swinging from compulsory to voluntary and back again. Neither had proven satisfactory. He felt that the ideal spirit of arbitration was inherently that of voluntary agreement, and that it could not be bent to the form of compulsion. To him an arbitration board did not present an atmosphere of calm, detached impartiality, but one of prejudiced and clashing viewpoints, of pulling and hauling and jockeying for position.[14]

Out of these ideas and theories of Governor Allen, and of

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13. Ibid., p. 223.

14. Ibid., p. 227.

others who played an important part in drawing up the Kansas law of 1920, a statute was enacted with the idea in mind of correcting these failings and evils inherent in conciliation and arbitration. The result, as was mentioned in the beginning, was a law distinctly different from any passed before or since its time. The things it was aiming for were largely the same, industrial warfare must be done away with, and the people as a whole must be protected by outlawing this warfare. But the Kansas law went one step farther. It took into account that if the laborer was to be denied the right to strike to get redress of his grievances, and the employer the lockout, something else had to be provided to give both an equal chance to secure their rights and insure justice. This was the Kansas Court of Industrial Relations.

As the Kansas Court of Industrial Relations was also conceived out of an emergency period, a brief review will be given of this crisis as a fitting background for the actual establishment of the industrial court.

CHAPTER II

CONDITIONS LEADING TO THE FORMATION OF THE INDUSTRIAL COURT

The General Coal Strike of 1919

It was mentioned earlier that all of these attempts at compulsory arbitration of labor disputes arose out of great national emergencies. Mainly, these emergencies were in the form of serious strikes affecting the country as a whole. The Kansas Court of Industrial Relations grew out of the same sort of circumstances. In this instance it was the nation-wide strike of the bituminous coal miners which precipitated the experiment in Kansas. In order to give the proper background for the formation of the Court, a brief picture will be given of the national strike and its spread to the coal fields in Kansas.

The coal strike of 1919 was merely another manifestation of the industrial unrest prevalent in the United States during the years following the end of World War I. During the war years the workers in many industries had refrained from striking, and in some cases had accepted wage scales proposed by governmental agencies, in order to further the war effort. With the end of the war, workers in many industries began to demand a change, demanded higher wages and new contracts with their employers.

The orders to strike in 1919 were issued directly as the result of the adoption of the recommendations of the scale committee by the miners' delegates at the Twenty-seventh Consecutive and Fourth Annual

Convention of the United Mine Workers of America, held in Cleveland in September, 1919.[1] The Central Competitive Field, made up of Illinois, Indiana, Ohio, and Pennsylvania, had entered into a contract with the operators at the beginning of the war, and which was to last for the duration of the war. It was not, however, to extend later than March 31, 1920. The convention took the position that the war in effect was over, even though the United States had not signed a peace treaty officially ending it, and that it was only fair for a new contract to be negotiated. Because they hadn't had a wage increase for more than two years, and in view of the fact that the cost of living had gone up greatly during that period, they thought it only right that a rise in the wage scale be granted immediately.

The order calling all union (U.M.W.) bituminous coal miners of the country to "close production of coal at midnight on Friday, October 31, 1919" was issued from the international headquarters of the union on October 15, 1919. The order was signed by John L. Lewis, acting President, and William Green, secretary-treasurer of the miners.[2] Lewis blamed the operators, saying that the union had made a sincere effort to negotiate a new wage agreement, but that the operators had persisted in an arbitrary attitude which resulted in a final adjournment of the joint wage conference held in Philadelphia, October 11, 1919. As the strike order was to include all bituminous coal miners in the United

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1. C. E. Stoddard, "Bituminous Coal Strike", U. S. Bureau of Labor Statistics, Monthly Labor Review, IX (December, 1919), p. 61.

2. Topeka Daily Capital, October 16, 1919.

States, it was thought to affect around 500,000 miners.

The miners were making a very drastic demand as far as a wage increase was concerned. They wanted a 60% increase immediately.[3] In addition to this they wanted a six-hour day, a five-day week, and a few other minor demands. The demand for a five-day week was misunderstood by many at the start of the strike. They wondered why the miners should only have to work 30 hours per week. The fact of the matter was that the miners were asking for more work rather than for less. According to Mr. George O. Smith, director of the United States Geological Survey, "in the twelve weeks of February, March, and April the average working time of bituminous coal miners were only a fraction over 24 hours,"[4] or six hours less than the miners wanted to work. Because of the seasonal character of coal-mining the mines closed for many days during the year. The miners, therefore, were asking for a guaranteed time of work. It was almost impossible for them to seek employment during slack periods because they couldn't know when the mines would reopen. There were even charges that operators kept mines closed for long periods in order to keep coal prices up.

After the strike call had been issued the government at Washington stepped in and took measures to prevent it from taking place. President Wilson called on the miners and operators to continue negotiations,

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3. "The Coal Miners' Strike," Current History, XI (December, 1919), p. 420.

4. "Down to Facts in the Coal Fight," Literary Digest, LXIII (December 13, 1919), p. 16.

and if they failed to agree, to submit the controversy to a board of arbitration. The operators accepted the proposal but the miners turned it down. President Wilson then branded the strike as unjustifiable and unlawful and said that the laws would be enforced. He called attention to the probable effects on the country of a nation-wide coal strike, but the miners went ahead with their plans.

Attorney-General Palmer then intervened and said that the strike was a distinct challenge to the law, that the mines would be protected by the government, and that the Justice Department was preparing to take vigorous steps against all who conspired to restrict the supply or distribution of the nation's fuel supply. "All the resources of the Government would be used," said Attorney-General Palmer, "to prevent the national disaster involved in the threatened strike."[5]

The Senate and House voted to assure President Wilson the support of Congress in maintaining order during the threatened industrial emergency. The two houses resolved:

> That we hereby give the national administration and all others in authority the assurance of our constant, continuous, and unqualified support in the use of such constitutional and lawful means as may be necessary to meet the present industrial emergency, and in vindicating the majesty and power of the Government in enforcing obedience to and respect for the Constitution and the laws, and in fully protecting every citizen in the maintenance and exercise of his lawful rights and the observance of his lawful obligations.[6]

On October 31, Judge Albert Anderson of the Federal District Court at

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5. "The Coal Miners' Strike", op. cit., p. 422.

6. Congressional Record, 66 Cong., 1 sess., p. 7761.

Indianapolis showed what he understood by such "constitutional and lawful" means.[7] He issued a temporary injunction restraining John L. Lewis and other officials of the U.M.W. from taking any further steps in directing the coal strike called for the following day. Naturally the issuance of this injunction was bitterly resented by the miners.

At midnight on the last day of October a large proportion of the bituminous coal miners quit work, despite the fact that their leaders had been silenced and prohibited from further activity in promoting the strike. Meanwhile, the government took steps to insure the workers' protection, and troops began to move into the various coal fields.

Measures were immediately taken by the government to prevent profiteering in coal and the Railway Administration took steps and perfected plans for the transportation of the coal supplies already on hand.

In the meantime, the miners had decided to fight the temporary injunction order. They said the government had no right to interfere in the dispute.[8] On November 8, however, Judge Anderson ruled that the bituminous coal strike was a defiance of the Fuel Control Act (the Lever Act), was almost equivalent to rebellion, and refused to listen to the miners' representatives who sought to demonstrate the miners' right to strike. He then issued an order to the United Mine Workers union to recall the strike order before November 11, 1919.[9] Judge Anderson, in handing down this order, said, "I consider this rebellion. That is what

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7. Topeka Daily Capital, November 1, 1919.

8. "The Coal Miners' Strike," op. cit., p. 425.

9. Kansas City Star, November 8, 1919.

it is." He went on to say that, "The government is supreme even to the labor unions."[10] He was merely echoing the prevailing opinion among many people in all walks of life during this trying period of our history that there was a real danger from radical labor unionism, and that they should be curbed by all the powers at the control of the Government.

After Judge Anderson's order to call the strike off by November 11 was received, a meeting of the district presidents and other officials of the U.M.W. was called for Indianapolis. They met there, and after an all-night session and much debate for and against compliance with the order, the union issued an order calling off the strike. "Gentlemen, we will comply with the mandate. We do it under protest. We are Americans. We cannot fight our Government. That is all."[11] This terse statement signified the capitulation of the union to the "majesty and power of the Government."

The way was open now for negotiation between the miners and the operators to look for some way of settling the dispute. Another question that arose at this time was whether or not the miners would obey the order rescinding the strike and go back to work. In many areas, especially in the Kansas coal fields, very few, if any, miners reported for work when the whistles blew at the mines the next day. In some fields the miners said the order they received abrogating the strike

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10. Loc. cit.

11. Kansas City Star, November 11, 1919.

was signed by typewritten signatures and they wouldn't obey such an order. They thought it might be a ruse of Lewis' to get around the injunction order issued by Judge Anderson.

On November 14, 1919, the joint conference of the miners and the operators began in Washington to try and find some basis for permanent settlement. For several days there was little or no progress made and Dr. Garfield, Fuel Administrator, appeared before the meeting and told both the miners and the operators that coal would have to be mined on a large scale, and produced at a reasonable price. This seemed to be threat of added governmental intervention and spurred the two parties to buckle down and really try to reach an agreement. Neither side wanted the government to intervene more than it already had. The operators feared government operation of the mines and the miners were fearing added coercion in the form of injunctions.

Secretary of Labor Wilson interceded at this stage and proposed a straight 31% increase in wages. The miners said they would accept this on the basis of a 7-hour day.[12] The operators refused to accept this however and Dr. Garfield tried another proposal. He proposed a wage increase of 14% with the understanding that the price of coal to the public would not be increased and that the Government would continue provisionally in control of prices. He also urged the formation of an advisory body, to be permanent, with equal representation of miners and operators to get information regarding the industry which would govern future disputes.[13]

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12. "Settlement of the Coal Strike," Current History, XI (January, 1920), p. 25.

13. Ibid., p. 26.

The operators accepted this proposal, but Lewis turned it down. He announced that he was standing squarely behind Secretary Wilson's offer of a 31% wage increase. He took the stand that the Government was pledged to this increase on the basis of Secretary Wilson's position, saying that if they didn't stick with it they would be breaking their word. With this the negotiations reached an impasse.

It was at this juncture that President Wilson intervened in a personal attempt to settle the controversy. He submitted a proposal of his own to both parties and it was immediately rumored that it would be acceptable by them both.[14] The actual proposal, however, was kept secret from the public for several days.

Then, on December 10, 1919, the strike of nearly 500,000 hard coal miners came to an end when the general committee of the United Mine Workers of America agreed to accept the plan offered by President Wilson. The plan, as agreed to, provided for immediate return to work at a 14% increase in wages over the wartime scale. Operations in the mines were to be resumed, except as to wages, on the same basis which obtained prior to the strike. Immediately following the return of the miners to work the President was to appoint a commission of three men, including one practical miner and one operator or mine owner in active business. This commission was to consider further questions of wages and working conditions. It was also to consider profits of operators and the proper coal prices. The duties of the commission were to include the

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14. Kansas City Star, December 8, 1919.

readjustment of both wages and coal prices. Its report was to be made within 60 days and would be accepted as the basis of a new wage agreement.[15]

At last the coal strike was brought to an end, and one of the greatest industrial battles in the history of union labor in the United States up to that time reached its climax in a Presidential intervention. This strike, as do all general strikes in an important industry, had reached far beyond the confines of the coal mining industry. It had paralyzed business, manufacturing, and transportation, and caused acute suffering in many localities. Here, then, lies the beginning of the Kansas Court of Industrial Relations. To get closer to the actual inception, however, it will be necessary briefly to review the strike as it occurred in Kansas.

The Coal Strike in Kansas

When the strike of bituminous coal miners was called by John L. Lewis in October, 1919, it affected the southeastern corner of Kansas also. Here were found the Kansas coal mines and District 14 of the United Mine Workers of America. They went out on strike with the rest of the miners thoughout the United States. The state was brought face to face with a difficult situation and had to almost strike out blindly in an attempt to find some way out of the dilemma. Here was born the Kansas Industrial Court. Governor Henry J. Allen, who was largely responsible for the legislation resulting in the formation of the court, has stated

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15. Kansas City Star, December 10, 1919.

graphically the situation faced by Kansas in that winter of 1919, at least as seen by the chief executive of that state.

> Whether government is supreme; whether the nation and the state were sovereign in their powers and superior to an organized minority of capital or of labor or both; whether a helpless people were to be protected against industrial strife, in the making of which they had no part; whether the forces that regard neither the name nor the fundamental principle of democratic government, using its freedom as an opportunity to destroy the spirit of democratic institutions, should overawe and set at naught the welfare of the majority; these are the questions that were at stake when Kansas and the nation faced a fuel famine, the result of a country-wide coal strike at the beginning of last winter.[16]

This statement of Governor Allen will show the manner in which he was judging the crisis, its cause, and its ramifications. He was to be of the group fearing radical unionism with the resultant decay of our democratic institutions, and he was to vigorously assert the power of government as being supreme in any matter affecting the welfare of the people at large. The coal strike and the suffering it brought to many people proved to him that something, drastic perhaps, had to be done and done right away. He attacked the situation in Kansas in a vigorous manner, created a vigorous instrument to prevent future occurrences, and was this instrument's most vigorous defender throughout its short life.

What struck Governor Allen with the most force was the widespread inconvenience and suffering which were brought home to many people in the state, and the seeming inability of anyone to do any-

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16. Henry J. Allen, "Let the People Freeze," Independent, CI (March 13, 1920), p. 385.

thing about it. To him the main question was not that of continuing industrial production, but of the more basic one of keeping warm and preparing food. The situation was serious in Kansas because there was hardly a reserve supply of coal at all, the winter weather was very severe, and people were going around actually begging for a small supply of coal. Schools and churches had to be closed and all industry shut down.

After two weeks of this situation had brought no relief, and in fact had merely intensified the suffering, Governor Allen took precipitate action to do something about it. An application was filed with the supreme court of the state for a receivership for the mining corporations on the grounds that these corporations were derelict in their corporate duties. On November 18, 1919, every coal mine in the Crawford-Cherokee Kansas fields was put in the hands of the receivers.[17] The Court order provided that the receivers

> Are instructed to take immediate possession of all of said property and to operate said mines and produce and distribute, and sell within the State of Kansas, all coal possible at once. And for said purpose said receivers are empowered and directed to employ all labor or necessary agents and make all construction necessary. Said receivers shall execute their bonds in the sum of $25,000 before entering upon their duties.[18]

It was one thing to put the mines in the hands of receivers, but it was another thing to get three men to accept the receivership. Two of the first two appointed flatly refused to serve. Both the miners and the -

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17. Topeka Daily Capital, November 18, 1919.

18. Ibid.

operators refused to suggest men to represent them on the board of receivers. Finally, three men were found who accepted the responsibility.

The next problem, of course, was to get the coal then in possession of the state out of the ground and into empty bins. Governor Allen, himself, went direct to the coal camps, called meetings, arguing and pleading with the miners to return to their jobs and work for the state. Realizing that the miners would not and could not return to work for the operators, Governor Allen appealed to their sense of duty, to their fealty of citizenship, to the fact that now the State was running the mines and needed their help to relieve the suffering. He promised them that they would be paid at the old wage scale until a new scale was fixed, and then that that scale would be retroactive to the date they returned to work. It was further proposed that if no national agreement should be reached by January 1, 1920, the State would enter into a separate agreement with the Kansas miners. However, all this came to naught and he was not able to persuade the miners to return to the mines. The union officials would not permit the miners to work for the state. The typical attitude was expressed by August Dorchy, vice-president of District 14, United Mine Workers, when he said "The public is sympathetic with itself because of a temporary inconvenience, but indifferent to the fact that hundreds of thousands of miners are forced to work hard at a hazardous occupation and earn so little that they and their families live in . . . squalor."[19] He went on to say

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19. Topeka Daily Capital, November 22, 1919.

that Governor Allen's proposal for the miners to return to work under state receivership offered the miners nothing that the operators did not concede before the strike began, that is, that if they went to work any wage increase granted would be retroactive. Nothing the governor could say would get the miners back on the job. He was received, in the main, courteously, and was listened to respectfully wherever he went, but that was all.

As the Governor then saw the situation, there was only one thing left to do, and that was to call for volunteers to mine the coal. This aspect of the strike in Kansas received much publicity and fanfare, and was typical of the actions taken by Governor Allen all throughout the trying period. At least it can't be said of him that he sat back waiting for something to happen to relieve the situation. He grasped the bull by the horns and waded right into the wallow.

On November 27 Governor Allen issued a formal call for volunteer workers to dig coal in the Kansas mines. His attempt to get the miners to work for the State had failed utterly and this was his answer to their negative decision. He inserted the following notice in the paper:

> WANTED -- 1,000 MEN
>
> Wanted -- one thousand able-bodied young men to dig coal to "keep the home fires burning" in Kansas. Experience unnecessary. Hardy young men able to take care of themselves and to wield a pick and shovel preferred. Travel expenses and at least $5 a day guaranteed by the State of Kansas. Also forty-five engineers to run steam shovels in the Kansas strip mines, with an equal number of

> firemen. Can use also a limited number of men accustomed to use of dynamite. Apply in person, by telegraph, telephone or by mail, to Governor Henry J. Allen, State House, Topeka, Kansas.[20]

What, just exactly, was the position taken by the state in this matter, and what were the explicit reasons for taking it? Governor Allen explained the State's attitude in this manner:

> It is the duty of government, and it has the inherent power, to protect the people whose welfare is dependent upon it. Facing a desperate situation, through a stoppage of coal production at the beginning of winter, government in Kansas is brought to the pass of using all its powers to protect the people whose suffering will be unspeakable unless relief is afforded. If government is to mean anything, then its obligation is to prevent innocent people from becoming the victims of a fuel famine which, in the course of events, is both unnatural and unnecessary.[21]

In other words, the police power of the state can and must be used to protect the health, the peace, and the welfare of all the people. This is important because it is one of the main principles upon which was built the Kansas Industrial Court.

Governor Allen went on to say that the situation in Kansas, and in the nation as a whole for that matter, was distinctly a challenge to government. President Wilson and Attorney-General Palmer had taken exactly the same attitude towards the situation. According to Governor Allen, the government of Kansas was going to accept the challenge, and for that reason had called for volunteer workers for the coal mines. He

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20. Topeka Daily Capital, November 27, 1919.

21. Topeka Daily Capital, November 28, 1919.

wanted it understood, however, that it wasn't a strike-breaking enterprise at all, and that it was not intended to affect the adjustment of the issues between the miners and the operators. "But once and for all it must be understood that the powers of the state now summoned into action for the protection of its people are above and beyond those of any association or organization, whether of capital or of individuals. . . ."[22]

The response to the call for volunteer workers exceeded the fondest expectations of the governor. There are no reliable figures, apparently, on just how many men volunteered, but the estimate is generally put at around 10,000. They came from all walks of life, from the colleges, from the stores, from the banks, from the fields and farms. Many were returned soldiers and sailors. The 1000 who had been selected were escorted to the coal fields by the National Guard, but there was little or no violence on the part of miners attempting to prevent them from mining the coal. Their attitude was only of disbelief that anything of real benefit could be accomplished by these volunteer workers. Their attitude was not belligerent, it was skeptical.

Governor Allen started the volunteers out at $5 per day, but later raised the pay by 14%. The men had to work under incredible hardships. They only took coal out of the strip mines, the law prohibiting them from going underground. The strip mines had to be pumped out, as they were full of snow and icy water. The machinery was in need of

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22. Loc. cit.

repair. Added to this was the bitter weather which existed all through the time the volunteers were digging the coal. But they all seemed to be willing to put up with the inconvenience to get the coal dug. Friendly rivalry developed between delegations from rival colleges to see who could get the most coal out. A great quantity of coal was not mined, but enough was produced by the novice miners to aid localities in which the need was particularly acute.

While the volunteer workers were still in the pits word came out that Governor Allen was proposing the calling of a special session of the state legislature to appropriate money to pay the expense of the receivership and maintaining order, and also to discuss statutes which would eliminate strikes altogether.

On December 12, after the national coal strike had been settled on the basis of President Wilson's proposals, Alexander Howat, president of District 14, United Mine Workers of America, ordered the miners back to work. The job of the volunteer miners was done.

On December 17 the coal mines of southeastern Kansas were returned to the owners. At the same time Governor Allen announced that the legislators at the special session of the state legislature which was to meet in January, 1920, would have a pleasant surprise waiting for them. He said they would not be asked to pay the expenses incurred during the state's operation of the coal mines. He announced that every item of expense incurred by the state in effecting the receivership, in hiring and transporting the volunteer workers to the mines, and in paying their expenses and wages could be met out of the proceeds of the receiver-

ship.[23]

Just what had these volunteer miners accomplished during their brief stay in the Kansas mines? It was reported that 600 Federal troops and 1,200 Kansas National Guardsmen were in the Kansas fields at one time or another. Also approximately 1200 volunteer workers engaged in operating the strip pits. There were approximately 145 cars of coal mined in the Pittsburg district alone, which was enough to furnish temporary relief to 23,200 families, 500 lbs. of coal being available to each family.[24]

Thus came to an end the national bituminous coal strike during the winter of 1919. In its wake it brought the creation of the first, and only, truly industrial court, one that vigorously took hold of the problem and held out a solution it sincerely believed would be the death of industrial warfare. The story of that court's creation, its successes and failures, and its demise will be the theme of the remainder of this paper.

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23. Topeka Daily Capital, December 18, 1919.

24. Topeka Daily Capital, December 14, 1919.

CHAPTER III

CREATION OF THE COURT

It has already been seen that Governor Allen felt very strongly about the coal strike in Kansas, the refusal of the miners to even work for the state, and the suffering brought to many homes because of the cessation of work. During the weeks of the crisis he was beginning to formulate his plan which he felt would put an end to such warfare between the forces of labor and those of capital. We find in him a preoccupation with the whole industrial situation over the nation. He was beginning to feel that the labor leaders were largely responsible for the wave of unrest sweeping the country. This was during the fundamentalist revival following the World War and it wasn't hard to associate labor leadership and strikes with radicals, Reds, and un-Americans. However, the result which arose out of the Kansas creation was not merely a repressive measure directed against these men. While Governor Allen believed that the only way to do away with industrial warfare was to outlaw it, he still realized that something in its place had to be provided so that both labor and capital could somehow find redress for their grievances.

As early as December 8, 1919, word was announced that "new laws looking toward the establishment of industrial courts" might result from the proposed special session of the legislature which was to meet in January, 1920.[1] It was also announced that arbitration might be

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1. Topeka Daily Capital, December 8, 1919.

compulsory if the kind of legislation expected was put through. Then on December 9, 1919, it was announced by Governor Allen that "the first industrial court the world has ever known will be established in Kansas,"[2] that is, if the legislature called into extraordinary session for January 5, would take action in accordance with suggestions upon which he would urge immediate action.

Before going into the recommendations made to the legislature by the governor, something should first be said as to the origin of these recommendations. Where did Governor Allen find his industrial court? It was not completely original with him at all. Mr. William L. Huggins of Topeka was mostly responsible for the original idea, and for the actual drawing up of the bill as presented to the legislature. Mr. Huggins, a Topeka lawyer, happened to be thinking along the same lines as Governor Allen about the industrial situation, and when Allen became familiar with Huggin's beliefs he prevailed upon him to translate them into definite form. On October 30, 1919, Mr. Huggins had delivered an address before the Topeka Rotary Club, at which time he developed his thinking along the lines later made part of the industrial court. It was after reading this speech that Governor Allen got together with Mr. Huggins, out of which meeting the legislation was born.

What were these ideas held by Mr. Huggins which so impressed the governor and others attempting to find a solution of industrial warfare? In the first place he saw the industrial strife then raging over many

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2. Topeka Daily Capital, December 9, 1919.

parts of the United States as a distinct threat to our democracy. It was a momentous problem which had to be solved by peaceful means. Having in mind the threatened coal strike of November, Mr. Huggins said:

> When the responsible head of an almost all-powerful industrial trust peremptorily and contemptuously refuses to meet and confer with representatives of employees on matters relating to wages and working conditions or other matters of interest to such employees, when he refuses to arbitrate matters in dispute, when he denies the right of the workingman to bargain dollectively, he commits acts of tyranny which should not be, cannot be, and will not be tolerated any longer by a free people.[3]

Then Mr. Huggins had something to say about the other side of the problem too.

> On the other hand, when the duly elected representatives of a great labor trust presents to employers demands, justifiable or injustifiable, and couples these demands with a threat that if his requirements are not promptly complied with he will call out on strike a half million workingmen and thereby paralyze industry and cause incomparable nation wide suffering among his fellow citizens, he also commits an act of tyranny which is without parallel in the history of free governments, and one which, in the new industrial code which we must have, should be denominated "treason" and penalized accordingly.[4]

This was strong language indeed, but to many far-thinking individuals, that was just the kind of language, coupled with action, that was needed to find some way out of the maze. It can be seen, then, that this new industrial code that Mr. Huggins mentioned would have as a vital part of in the outlawing of the strike, the boycott, and the lockout. However, and we have mentioned this previously, the solution had to go far deeper

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3. William L. Huggins, Labor and Democracy, (New York: The Macmillan Company, 1922), p. 130.

4. Ibid., p. 131.

than that.

In his Rotary speech Mr. Huggins went on to point out that in justice and fairness the right of the worker to strike could not be taken away from him unless he was given something better as a means of defense. He realized that then the worker had no other means of defense and that he had to be provided with something. That something turned out to be an impartial industrial court meant to give just adjudication to labor disputes, the same way that ordinary courts did to civil and criminal suits.

Mr. Huggins also mentioned something else in his speech which later became one of the main foundations of the Kansas Court of Industrial Relations. That was the principle of "public interest". This principle had long been applied to public utilities and the railroads, and the essence of this principle is that the public has interests which transcend the private interests of those engaged in providing the necessities and comforts of life to the public. The statute enacted by the Kansas legislature extended this principle to include many more industries than the two mentioned as generally having been considered as being affected with a public interest. Along this line Mr. Huggins said that the new industrial code which should be developed should provide that all lines of industry whose business affected the production or distribution or cost of the necessaries of life be impressed with a public interest, because they affected the entire public, and that in case of any dispute which might affect the operation of such industry, the matter should be taken into court, investigated and ad-

judicated.[5] This was later incorporated into the Kansas statute.

After having mentioned the taking of industrial disputes into court, Mr. Huggins brought up the question as to what kind of court was needed, and whether or not the present court system might not suffice for this purpose. If it would not he was in favor of creating one that would. It seemed to him that there should be lawful means to adjudicate industrial conflicts the same way in which civil and criminal disputes were taken care of. He made it clear that he was advocating a court, not a commission or a committee, and he wanted adjudication, not arbitration.

The last thing mentioned by Mr. Huggins in his Rotary speech which was eventually made part of the new "industrial code" in Kansas, was the theory that the businesses affected with a public interest should be required to operate continuously unless a court of competent jurisdiction should find justifiable causes for discontinuance. He had in mind the rumored practice of many industrialists who curtailed production in certain seasons in order to raise the price or keep it at a high level.

These, then, were to be the main underlying and guiding principles to be included in the legislation asked of the special session by Governor Allen in January, 1920. On January 5, 1920, Governor Allen was invited before the joint session of the legislature to deliver his message

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5. Ibid., p. 137.

in person. Before explaining the proposed legislation he delivered a brief preliminary statement concerning past labor troubles in Kansas, and also warned the legislators against the efforts of the organized lobby to defeat the purposes of the special session.[6] He produced statistics to show that from April, 1916, to December, 1918, there had been 364 separate strikes at the individual mines in the State of Kansas. He pointed out how small had been the victory of the miners in these strikes by saying that the record of the operators proved that the amount of dollars and cents gained to the strikers was $784.84. The total loss to miners in wages, as figured at the scale rate per day per man, on account of these strikes was $1,006,454.41. According to the governor there had been on the average 11 strikes per month in the coal fields of Kansas, and that most of them had been called on trivial grounds.

He mentioned that most of the miners would favor the new legislation if they were left to their own initiative, because it would protect them in their desire to work and would prevent the needless closing of the mines, either on account of strikes called by their officials or for any unjust shutdowns by the operators. Then he accused the labor leaders of urging the miners to fight the legislation, labor leaders who made their living off labor controversies. He specifically accused the Four Railway Brotherhoods of leading the fight against the proposed legislation.

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6. Preliminary statement appears in pamphlet, The Court of Industrial Relations, Topeka, 1920, pp. 3-4.

After delivering the preliminary statement Governor Allen went right into his regular message outlining the proposed legislation. In the beginning he reviewed the coal strike in Kansas, how the people had suffered from lack of coal, the heartlessness of both operators and miners union officials in not even providing coal for hospitals, and how the state was finally forced to take over receivership of the mines and operate them to alleviate widespread suffering and possible death.

After reviewing the growing quarrel between capital and labor, Governor Allen said he had come to the conclusion that no progress had been made toward the provision of a just and orderly basis of solution. Then too, the largest party at interest, the public, scarcely ever received a hearing.

> I believe the time has come, in the increasing industrial life of the country, when a tribunal should be established which shall have the power to take under its jurisdiction the offenses committed against society in the name of industrial warfare, a tribunal which shall have the authority to meet industrial discontent, before it crystallizes, by a careful oversight and regulation of the conditions of labor before any injustices are allowed to fester and breed class hatred and bitter antagonisms.[7]

According to Governor Allen there was no reasons why government should not have the same power to protect society against the ruthless offenses of industrial strife as it had always had to protect it against recognized crime. The industrial court, which he hoped to create, was to provide a substitute for strikes and lockouts and protection for the public from abuses arising out of industrial controversies.

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7. House Journal, State of Kansas, Special Session, 1920., p. 8.

Governor Allen also touched upon the growing radical labor movement, saying that it was attempting to set up a system of intimidation which set government at naught. He went on to say that he knew labor had bettered itself by organization and threats of strikes against capital for advantages they should have been given willingly. But, he said, the trend now was toward a situation which made it clear that the final appeal in labor controversies should not rest on the issue of industrial warfare.

> In my judgment the legislation enacted should not deny to labor the right to collective bargaining, but it should establish something saner and juster, when an effort at collective bargaining has failed, than recourse to strike. Arbitration has never provided a guarantee of justice because at best it leads only to a compromise, and into the deliberations of a board of arbitration there seldom comes a representative of the public, which, in the controversies affecting essential industries, is chiefly concerned.[8]

It is seen that the governor was very much impressed by the fact that the public, through the state, should have an effective voice in the settlement of labor controversies. The suffering of various communities during the coal strike had touched him deeply, and made him antagonistic to those agencies he held responsible. This doctrine that these so-called "essential" industries were so important that they were subject to state regulation was not a new one. The United States, and many of the individual states, had had laws providing for the regulation of railroads and public utilities for several years.

Saying that legislation was imperatively needed, Governor Allen

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8. Ibid., p. 9.

wanted a law:

1. Declaring the operation of the great industries affecting food, clothing, fuel and transportation to be impressed with a public interest and subject to a reasonable regulation by the state.
2. Creating a strong, dignified tribunal, vested with power, authority and jurisdiction to hear and determine all controversies which may arise and which threaten to hinder, delay or suspend the operation of such industries.
3. Declaring it to be the duty of all persons, firms, corporations and associations of persons engaged in such industries to operate the same with reasonable continuity, in order that the people of this state may be supplied at all times with the necessaries of life.
4. Providing that in case of controversy arising between employers and employees or between different groups or crafts of workers which may threaten the continuity or efficiency of such industries and thus the production or transportation of the necessaries of life, or which may produce an industrial strife or endanger the peaceful operation of such industries, it shall be the duty of said tribunal, on its own initiative or on the complaint of either party, or on the complaint of the attorney-general, or on complaint of citizens, to investigate and determine the controversy and to make an order prescribing rules and regulations, hours of labor, working conditions, and a reasonable minimum wage, which shall thereafter be observed in the conduct of said industry until such time as the parties may agree.
5. Providing for the incorporation of unions or associations of workers, recognizing the right of collective bargaining and giving full faith and credit to any and all contracts made in pursuance of said right.
6. Providing for a speedy determination of the validity of any such order made by said tribunal in the supreme court of this state without the delay which so often hampers the administration of justice in ordinary cases.
7. Declaring it unlawful for any person, firm, corporation or association of persons to delay or suspend the production or transportation of the necessaries of life, except upon application to and order of said tribunal.
8. Declaring it unlawful for any person, firm, or corporation to discharge or discriminate against any employee because of participation of such employee in any proceedings before said tribunal.
9. Making it unlawful for any person, firm or corporation engaged in said lines of industry to cease operations for the purpose of limiting production, to affect prices or to avoid any of the provisions of this act, but also providing a means by which proper rules and regulations may be formulated by said

tribunal providing for the operation of such industries as may be affected by changes in season, market conditions, or other reasons or causes inherent in the nature of the business.

10. Declaring it unlawful for any person, firm or corporation, or for any association of persons, to violate any of the provisions of this act, or to conspire or confederate with others to violate any provisions of this act, or to intimidate any person, firm or corporation engaged in such industries with the intent to hinder, delay or suspend the operation of such industries and thus to hinder, delay or suspend the production or transportation of the necessaries of life.
11. Providing penalties by fine or imprisonment, or both, for persons, firms, or corporations or associations of persons wilfully violating the provisions of this act.
12. Making provisions whereby any increase of wages granted to labor by said tribunal shall take effect as of the date of the beginning of the investigation.[9]

This was a large order and was a far-reaching program, which, if passed, would project the state right into the middle of the industrial life of Kansas. It was taking the state into radically new fields. Strikes, boycotts, and lockouts were absolutely prohibited. The operator of one of the essential industries couldn't suspend his operations whenever he wanted to, the court had the last word on that. Minimum wages, hours of labor, and working conditions were all to come under the purview of the industrial court. It can readily be seen that many issues would inevitably arise out of the application of this act, there were many points at which the act could be attacked as violating freedom of contract, due process of law, and other rights coming under the protection of the Fourteenth Amendment to the Constitution. Naturally, a statute as all-embracing as this one was, and one that had no precedents, was bound

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9. Ibid., pp. 10-11.

to be challenged by those directly affected by its operation. The story of those challenges and their results is reserved for a later section of this paper.

These things which Governor Allen desired to incorporate into the legislation he was asking for is a brief outline of the final provisions of the Industrial Court Law. Just what did the state think it could accomplish by passing such a law? For one thing they felt that strikes, lockouts, boycotts and blacklists unnecessary and impossible by giving labor as well as capital an able and just tribunal in which to litigate all controversies. They thought they could insure the people a steady and continuous supply of the so-called "necessaries of life". This was to prevent a recurrence of the situation during the coal strike. It was held that by stabilizing production of these goods, the price to the producer and consumer would be stabilized as well. They were going to insure labor steadier employment by keeping the industries running continuously, and insure a better wage by setting a minimum wage scale. The result of all this being, of course, the prevention of the colossal economic waste which is always a part of industrial warfare.

So this was to be Kansas' answer to the growing industrial struggle permeating every part of the United States. Radical labor and selfish capital were to be constrained and held to the level of the public interest in their relations with one another. There was no doubt but what something was needed. Even the International Executive Board of the United Mine Workers of America, pointing to the situation in Kansas, had agreed that the situation had become intolerable. They issued a special

report[10] in which they recognized that District 14 (comprising the Kansas fields) had been in one continuous turmoil. The report stated that it had been the practice to allow all the outlying districts of the union to enter into "district agreements", which provided for tribunals to which grievances were submitted for adjustment when disputes arose between employers and employees. It went on to say that for some time past the procedure adopted by the Kansas mine workers by which their grievances were adjusted had become such a howling farce that the people of Kansas went to the other extreme and enacted the industrial court, believing that the Mine Workers had become an organization of contract-breakers and composed of an irresponsible membership. This very concisely stated the prevailing belief of many persons in Kansas, including Governor Allen.

At any rate, the gauntlet was down and the struggle was on. The struggle was to come after the enactment of the law, however. Apparently the same feeling toward the situation had pretty well affected the people of Kansas as was held by the architects of the industrial law. There was to be little difficulty in pushing the bill through the special session of the legislature. Labor, capital, and representatives of the public were all given a hearing at the session, but it was fairly well understood by most that it was nothing more than display. The temper of the times insured a quick and easy passage.

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10. Official Statement by the International Executive Board, United Mine Workers of America, in regard to the Kansas Controversy, International Headquarters, Indianapolis, Indiana, p. 4.

Even though their arguments had no affect on the ultimate passage of the act, we should look briefly at what these various factions thought of the proposed industrial court. Speaking for labor, and presenting their attitude, was Mr. Frank P. Walsh, a lawyer representing the Four Railway Brotherhoods. He had represented labor in the courts for years.

> Government has neither the constitutional nor moral right to take away the right to strike. Labor is not a commodity, to be bought and sold, nor can the workingman be constitutionally held, nor can he be morally expected, to observe a contract for his labor if under new conditions that contract does not seem to him reasonable.[11]

His main attack against the bill was based on what he called the fundamental and inherent right of labor to work for whom it chooses, when it chooses, and on what terms it was able to wrest. He called the statute state socialism in that it gave to a bureau the right to regulate, control, and in emergency, to operate, industries, including transportation. Later on in his same speech he expressed the hope that the Federal Government would continue to operate the railroads, and transport all products at cost.[12]

Mr. Walsh spent much time, he spoke most of one whole day, in attacking capital, corporate interests, profiteers, and big business generally. He mentioned their huge profits during the World War. After his tirade against business, Mr. Walsh got right down to the Court itself. "As for us (labor), we oppose every line and every clause of this bill --

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11. Topeka Daily Capital, January 9, 1920.

12. Loc. cit.

except the object sought."[13] He thought it would completely strike down the labor movement in Kansas. He took the line that there could be no final settlement of the labor struggle, that it was bound to continue as long as mankind advanced. He thrust aside the fears of many that it all would lead to Bolshevism or Communism by saying that he had every confidence in his country, that such ideologies just couldn't possibly find a place in our scheme of things.

Walsh attacked the bill as infringing the 13th. Amendment to the Constitution, which forbids slavery or involuntary servitude except as a punishment for crime. In closing, Mr. Walsh said that the law gave to a board created by human minds, "powers that were an attribute of the Almighty."

Mr. J. I. Sheppard, representing the State Federation of Labor, also made a speech before the legislature on behalf of labor.[14] He made more of a hit with the legislators than did Walsh. He first declared himself in thorough accord with Governor Allen's handling of the coal strike in Kansas. He said that Alexander Howat, president of District 14, had been wrong in his action during the strike. He defended Howat, who was to prove a mighty thorn in the side of the industrial court throughout its entire existence, however, at the same time making a plea for labor and its troubles. He pictured Howat as a big-hearted and patriotic man who did wrong because his viewpoint was wrong. He pointed out that Howat

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13. Loc. cit.

14. Topeka Daily Capital, January 10, 1920.

had been fighting for the miners for years and all he had ever gotten for them had been by tooth and claw. "It is the only way labor has obtained what rights it has now, and while I deplore his stand, I do not condemn his motives."

Mr. Sheppard approved of the industrial court measure, except for the penalty clause.

> I know the old tooth and claw business has got to stop . . . But your jail and penitentiary law puts the claws deeper into the matter. The strike penalty is a bad thing. You are depriving us of the right to use force, but you use force against us. Don't write the law of force into this statute. Write the Golden Rule into it. Provide for your court, make its findings public, but don't make labor a criminal for fighting for its rights.[15]

In other words, take all the teeth out of the law, and create a mere arbitration court with no power whatever to enforce its decisions. Mr. Sheppard apparently overlooked the fact that when it came to fighting for bread and shelter, money and profits, the Golden Rule was most often lost in the shuffle someplace. Sheppard suggested that the law be written so that in case the employer and employee finally couldn't agree, the state would step in, as it did in the coal strike, and take charge of the property. The paper reported that no member of the legislature was unkind enough to remind Sheppard, when the time for questions came, that that was just what happened in the coal strike, and the miners refused to work when the state did take charge, with the result that the governor had to call for volunteers to dig coal, and for the National Guard to insure protection for them.

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15. Loc. Cit.

Mr. John S. Dean, of Topeka, and representing the employers, also made a speech opposing passage of the bill.[16] Mr. Dean, apparently, presented the most logical legal arguments against the measure that had been heard during the three days of discussion. Dean took the view, and stuck closely to it without any excursions into other fields, that the measure was unconstitutional, as it undertook to confiscate property and provided for involuntary servitude. There was one striking difference between the arguments of Dean and those presented by Sheppard the day before, but their attitudes toward the bill were much alike in one respect. They wanted the penalty clause changed. Sheppard had wanted the penalty against the workingman stricken out, but the provisions bringing industries under regulation by the proposed court he thought were all right. Dean, on the other hand, wanted the industries left more or less alone, but wanted the penalty clause against strikes inserted in the measure, but purely under the police powers of the state.

This, after all, was natural on both their parts. Labor had always, and does today, vigorously oppose any restriction on their right to strike. Capital, on the other hand, shies away from state regulation of any kind. Dean went on to urge that the measure should be amended to eliminate the sections giving the court the "confiscatory" powers referred to, and the right to regulate private industries. He said that if these provisions were left in the bill, the courts would declare it unconstitutional. How right he was later proved to be!

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16. Ibid., January 11, 1920.

Next, it was the turn of Mr. William L. Huggins, the man who did most of the drafting of the measure, to answer these opponents of the bill. Mr. Huggins was representing the public in his speech before the legislature.[17] In the beginning Mr. Huggins took issue with Mr. Walsh concerning the definition of the word "democracy", a very elusive term at best. As he remembered the speech made by Mr. Walsh before the legislature, he recalled that that gentleman had said he approved of the methods used by the Four Railway Brotherhoods at the time of the passage of the Adamson Act, that is, pass the law or suffer a nation-wide tieup of the railroads. Then he recalled Mr. Walsh's statement favoring democracy. To Mr. Huggins that wasn't government by the people, of all the people, nor was it for all the people. That was coercion to favor one group, merely one unit of that "all the people."

Mr. Huggins also scored Mr. Walsh's statement saying he approved of the methods used by the Kansas miners during the coal strike. He was referring to such things as their refusing coal to hospitals, schools, and other needy institutions. Mr. Huggins also thought that Mr. Alexander Howat was a very able man, but that he was misguided from having viewed the abuses perpetrated on the miners for so many years.

One of the fairest portions of the bill as far as labor was concerned, said the drafter of the original bill, was the fact that the poorest working man could come into the court with his case, without posting bond, the court would collect his evidence, and handle his case for him without

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17. Speech Delivered Before the Kansas Legislature by W. L. Huggins, January 9, 1920, State Printing Plant, Topeka, Kansas, 1920, pp. 1-18.

one cent of cost to himself. If the worker didn't think he had received justice from the industrial court, he could have his case taken for him to the state supreme court. Mr. Huggins couldn't see how anybody could be against this section of the bill, having in mind the statment of Mr. Walsh that labor was against every line of the proposed law.

He scoffed at the argument that the bill was anti-union, saying that surely taking away the right to strike was not a death-blow to labor unionism. Wasn't there something more in unionization that just the right to strike down their opponents by force? Besides, the worker had a right to quit his job any time he wished, but couldn't conspire with others to do the same. The worker would do so, however, with the understanding that after he quit his job someone else was perfectly right in getting his job.

The spectre of Bolshevism also entered into Mr. Huggins's arguments supporting his bill. To him, any laboring man who put his union first, above the welfare of his state or country, was a bolshevist. In other words, this could easily lead into the so-called "dictatorship of the proletariat." To him, the only thing wrong with the American labor movement was just that. The radical leaders, and the ideas they had imported from Russia, had gotten into the movement and got a voice in it. The loyal element, meanwhile, remained inarticulate. "That is what is the matter with it - - nothing else."[18]

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18. Ibid., p. 13.

To me, this seems to be one of the basic fears lying behind the Kansas experiment of 1920. Too many times this fear of radicalism is mentioned by the men responsible for the drawing up of the measure to think that only a sincere feeling that something should be done to compose the struggle between capital and labor was the guilding motive of those creating the law. Certainly this was part of it, but it stemmed from the belief, and fear, that if this composing wasn't done soon there would develop a dangerous threat to our government and way of life. I would like to quote part of the conclusion of Mr. Huggin's speech before the legislature, because I feel it summarizes this basic drive of those bringing up the measure.

> I think this is the most serious time in the history of this republic outside of the first three years of the civil war. I bar no other period. The statement by Mr. Walsh that there is no danger from bolshevism goes contrary to the known facts. The government of the United States is hunting down, arresting, putting in jail, and deporting thousands of these agitators, and I don't believe they ever will get near all of them, because some of them are too smart to get caught. We are challenged by a soviet government, we are confronted by a condition where a considerable portion of the people in this country say that their first duty is not to the government of the United States, but some other government, a government within a government; a government that is more powerful than the government of the United States, a government that demands their first loyalty. There are too many who believe that. They never deport enough of them. Any man who says: "My first duty is to my union, or to my church, even, or to my lodge - - I owe no allegiance to the government of the United States nor to the State of Kansas that I will not freely set aside if my union . . . tells me to" - - no man who believes in that is a good citizen. No man who acts in this manner should be granted the protection of the law which he despises, and no penalty that you can impose upon that kind of a man is too severe.[19]

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19. Ibid., p. 18.

This also served as a final reply to those who said they favored the law, but were opposed to the penalty provisions of it.

These, then, were the main arguments for and against the industrial court bill as presented before the special session of the Kansas legislature in January, 1920. Mr. William Allen White was also invited to speak on behalf of the public before the legislature and did so on January 12, 1920.[20] His arguments supporting the measure were largely taken up with the belief that eventually both capital and labor would look upon the Kansas act as that which finally emancipated them from their own strangle hold on each other, and that which established an equitable and living relation between them.

Passage of the Law

Immediately after the introduction of the industrial court measure, labor leaped into the fray with all its fury to try and defeat it. Mr. Alexander Howat, president of District 14, United Mine Workers of America led the struggle against the law. He foresaw absolute slavery for the coal miners, and all other classes of labor in Kansas, if the bill was passed. He called it the most drastic and vicious bill against labor that was ever heard of; it would put the workers at the absolute mercy of the employers; they would be brutalized and oppressed more than ever before; and it would completely destroy the usefulness and effectiveness of the

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20. Kansas City Star, January 12, 1920.

labor movement.[21] He urged every member of the union to use his utmost effort in defeating the proposed legislation.

It wasn't long, however, before labor realized that the cards were stacked against them and that they would be unable to defeat the law. The labor lobby in Topeka then turned its fight to strike out the penalty clause of the bill. This was the clause that provided for the enforcement of the measure, and to remove it, would have been to simply create a court of investigation without the power to have a court of competent jurisdiction enforce its orders. This was just what labor wanted as it would have still left the strike as the final solution of all labor controversies with capital.

Those favoring the bill, however, said there would be absolutely no compromise with the penalty clause.[22] They said that if the people of Kansas wanted the law they should prevail upon their representatives to keep the penalty clause. To them a law without the penalty clause would be nothing. They saw that exactly the same sort of situation which brought on demand for the bill, meaning the 1919 coal strike, could take place in Kansas again the next winter and the people would be powerless to prevent it. No, if there was going to be an industrial court law, one worthy of the name, it would have the power to enforce its orders and decisions.

The Kansas Industrial Court Act was not a partisan measure, supported by one party and opposed by another. It was created by the Republicans, but was just as vigorously supported by the Democrats of the state. On

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21. Ibid., January 10, 1920.

22. Loc. cit.

January 13 the Democratic members of the legislature held a caucus and voted to support the industrial court bill. They announced, however, that they would attempt to amend the bill so as to make the members of the court elective after the first term.[23] The law made provision for their appointment by the governor. Whether this amendment passed or not, they announced they would support the bill.

The Kansas Industrial Court Act had been introduced into both houses of the legislature as companion bills on January 5, 1920. In the senate the bill went to the judiciary committee. This committee in the senate wrote an important amendment into the act. This amendment prohibited the "check-off" system at the Kansas coal mines.[24] Under the check-off system, the coal operators were compelled to collect union dues and fines from their union employees and turn the money over to the union officials. The money was held out of the miners' pay envelope and the result of the system was that the mine operators were made the real support of the union. No miner could work without paying his dues and he had no way of resisting the imposition of any fine the union might impose. The system left the mine laborer at the absolute mercy of the union, the amendment was finally dropped.

The bill passed the senate by a vote of 33 to 5. The senate, upon convening, voted as a committee of the whole to recommend the measure. Little oratory or time was wasted in the quick passage of the act. The bill was voted on section by section, and the senate voted down the

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23. Ibid., January 13, 1920.

24. Ibid., January 14, 1920.

Democratic amendment to make the judges elective. It was passed as it had come from the judiciary committee.[25]

As mentioned above, the original bill was introduced into both houses as companion measures. Both houses proceeded to pass their own measure. The result was that there were a few differences outstanding between them. The two bills differed only in three essential points, all three being amendments adopted by the house. They broadened the powers outlined in the original draft. They (1) allowed the industrial court to regulate profits, prices and wages of all industries engaged in the sale or barter of food or food products, (2) required labor contracts with unions to be approved by the industrial court before they became binding, and (3) prohibited any "closed shop" contract with labor organization.[26]

The senate voted not to accept the house amendments, so a conference was needed between representatives of both houses to iron out the differences. Two conferees were appointed from each house to accomplish this. Points 2 and 3 seemed to be those most outstanding between the two houses. The senate was apparently disposed to grant the house contention that there should be some tribunal in which retail prices might be considered and regulated, but that it should be worked out in a separate bill and not tied in with a measure intended to deal only with industrial controversies and thus endanger the constitionality of the entire measure. The result was an agreement which didn't materially affect the

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25. Ibid., January 16, 1920.

26. Ibid., January 17, 1920.

original senate measure.[27] The amendment in regard to retail price-fixing was written into a separate bill, and the open shop amendment and the one requiring labor contracts to be approved by the new court were dropped entirely. Both houses approved of the conference report.[28]

As was mentioned the measure passed both houses on January 16, 1920, subject to the later agreement on the conference report. It might be well to glance just a moment at the vote as it occurred in both houses on the bill. It has been seen that the vote in the senate was: Yeas 33, Nays 5, absent or not voting, 1.[29] Three Republicans and two Democrats voted against the bill. A Republican abstained. These men who voted against the measure were from Leona, Fort Scott, Girard, Wichita, and Galena. Most of these towns were in the coal-mining district. The abstainer was from Kansas City. James Malone, who voted aye on the measure explained his vote in the following manner, which showed that he was apparently thinking more level-headed than were some of his colleagues.

> In my judgment we are acting with too much haste in enacting this legislation at this time. At this moment of unrest and discontentment, immediately following the great World War, and also following the great industrial disorder, when men's passions are aroused and the accumulated vengeance of the public is directed upon labor and labor unions, there

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27. Ibid., January 22, 1920.

28. State of Kansas, Senate Journal, Special Session, 1920, p. 98.

29. Ibid., p. 44.

> is serious danger of doing a grave injustice to the laboring class.[30]

He thought the legislation should have been held over until the next regular session, and that the court should have been made elective. However, since the people were asking for legislation of this kind, he voted aye, believing that in the future the act would be amended to make it elective.

In the house the Industrial Court Act passed with the following vote: Yeas 104, Nays 7, absent or not voting, 13.[31] Of the seven voting no, four were Republicans and three were Democrats. They were fairly widely spaced which showed that apparently their independent judgment, not pressure from coal-mining communities, influenced their vote. They were from Topeka, Augusta, Parsons, Ashland, Weir, Hays, and Galena. Some of these can be seen to have come from the coal fields however. Of those not voting, 12 were Republicans and one a Democrat. They were from widely spaced parts of the state. Representative Mulroy of Hays explained his no vote in this fashion:

> Believing a law placing in the hands of the governor the authority to appoint three men whose duty it will be to regulate everything and everybody to be fundamentally, if not constitutionally, wrong, and as a protest against the steam-roller tactics employed in the last hour, I vote no.[32]

Another representative explained his vote in much the same way, saying

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30. Ibid., p. 45.

31. State of Kansas, House Journal, Special Session, 1920, p. 77.

32. Ibid., p. 78.

he didn't approve of having measures like this shoved down his throat.

The Kansas Industrial Court Act had successfully cleared the legislative hurdle, and the great experiment was ready to get under way. It will be necessary now to see just what the new law provided for, as a means of doing away with industrial controversy and warfare.

The Kansas Industrial Court Law[33]

The Court of Industrial Relations was to be composed of three judges, to be appointed by the governor, by and with the advice and consent of the senate. The three judges originally appointed were appointed for one, two, and three year terms to begin simultaneously. Each succeeding judge was to be appointed for a three-year term. The salary of the judges was $5,000 per year.

The act conferred upon the industrial court the jurisdiction formerly held by the Public Utilities Commission, but these powers were to be taken away after a short while.

In order to preserve the public peace, promote the public welfare, protect the public health, prevent industrial strife, and to secure the regular and orderly conduct of the businesses directly affecting the living conditions of the people, the following businesses were declared to be affected with a public interest and subject to state supervision: (1) the manufacture of food products, (2) the manufacture of clothing and wearing apparel, (3) the mining or production of fuel, (4) the

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33. Laws of Kansas, Special Session, 1920, Chapter 29, pp. 35-48.

transportation of food products, and (5) public utilities and common carriers.

Because it was recognized that the continuous operation of these industries was necessary to the peace and security of the people, and so that they could be supplied with the necessaries of life, the law provided that no person, firm, corporation, or association of persons should in any manner wilfully hinder or suspend the continuous operation of an industry for the purpose of evading the purpose and intent of the act, nor could they refuse to perform any duty forbidden by the act with the intent to hinder or suspend the continuous operation of any of these industries.

Cases could be brought before the court by either party to a controversy, or the court could initiate a case on its own if they thought the situation warranted it. Then, too, any ten citizens in an area threatened by an industrial dispute could bring suit before the court to prohibit a strike from resulting, and the Attorney-General was given the right to institute cases before the court.

The industrial court was given the power to make changes in the industries affected with a public interest in regards to working and living conditions, hours of labor, and could set a minimum scale of wages to be paid by the employer. Such changes were to continue for such reasonable time as fixed by the court, or until changed by agreement of the two parties with the approval of the court.

If either party refused to obey an order of the industrial court, that court had the authority to bring proceedings in the supreme court

of Kansas to compel obedience to such orders. Also, either part could bring suit in the state supreme court if they weren't satisfied with the ruling of the industrial court. Such cases were to be given preference over other civil cases before the supreme court. Such suit had to be brought within 30 days of the service of the order made by the industrial court.

The act also recognized the right of collective bargaining, and any agreements made collectively by labor and capital were to remain in force as long as both parties were satisfied with them. Then, if they couldn't agree on another contract, the industrial court assumed jurisdiction in order to prevent the disagreement from ending in a strike, boycott, or lockout.

It was made unlawful by the act for any corporation engaged in the industries covered by the act to fire an employee because he testified before the industrial court, or because he was in any way responsible for the bringing of a suit before said court. It was unlawful for any of the industries affected with a public interest to cease or limit operations with the idea in mind of raising prices, or for avoiding any provision of the act. These industries could apply to the industrial court for permission to cease or limit operations, however, and if the application was found to have been made in good faith authority to take the action would be given.

The Kansas Industrial Court was given the power to make rules, regulations and practices to govern the operations of industries whose operation might ordinarily be affected by changes in season, market

conditions, or other causes inherent in their line of business, so that the best service would be rendered to the public at all times.

The law outlawed the right to strike. Individual workers were free to quit their employment at any time they pleased, but they could not conspire with others to quit their employment for the purpose of hindering or interfering with the operation of any of the industries mentioned in the law. Picketing was declared to be unlawful also.

Section 18 was the penalty clause of the act and made it a misdemeanor to wilfully violate any provision of the act, or any valid order of the industrial court. Upon being found guilty of such violation by any state court of competent jurisdiction, punishment was by a fine not to exceed $1,000, or by imprisonment in the county jail for a period not to exceed one year, or by both such fine and imprisonment.

Section 19 provided that any officer of the industries mentioned, or any officer of a labor union, who wilfully used his power or authority coincident to his official position to intentionally influence or compel any other person to violate any provisions of this act, or any valid order of the court, was to be deemed guilty of a felony, and upon conviction, should be punished by a fine of not to exceed $5,000, or by imprisonment in the state penitentiary at hard labor for a term not to exceed two years, or by both such fine and imprisonment.

The court was given authority by the act to take over and operate any industry mentioned in the act, in case the operation of that industry was being suspended or limited contrary to the provisions of the act, if it appeared to the court that such suspension or limitation of operations might injure the public welfare, public peace, or public health. During

the period of state operation a fair return was to be paid the owners of such industry, and a fair wage to the workers.

The court could institute investigations into various subjects, and could hire competent help to carry them on. Any order made by the court as to a minimum wage was to be deemed prima facie reasonable and just, and if this wage scale was higher than the wages currently being paid by the industry, the new scale was to be paid from the date of the service of summons or publication of notice institution said investigation into that industry.

The last section of the act, Section 28, made the following provision:

> If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court.

This section is very important because it was later used as a basis for saving parts of the act not declared unconstitutional by the Supreme Court of the United States.

We have said that the Kansas Court of Industrial Relations was a new creation entirely, that it had no precedent, nor has it had any successor. But an act that goes into such far fields as does this measure certainly is created on the basis of something that has gone before. In other words, the men who drafted the Kansas act of 1920 first found some basis of authority upon which to found their new court. There wouldn't be much use in writing the law if it was so new and different that it could not be sustained by something more definite than urgent need. In the case

of the Kansas statute, citations of authority were gathered by Mr. Huggins and others mainly responsible, which seemed to show them that what they were doing would be held constitutional by any court in the land. Not only did they believe in the main principles of their act, they believed also in its legality. Where, then, did they find justification and a legal basis for the Kansas act?

In the main they turned to the Supreme Court of the United States and studied cases which seemed to them similar in point of law. In several of these cases they found support for their doctrines of "public interest", and the right of a state to use its police power to protect the public welfare, health and comfort of its citizens. One case in particular which was studied was Munn v. Illinois,[34] which, to them, was sufficient authority for their declaration that certain industries were affected with a public interest and were therefore subject to regulation by the state. The United States Supreme Court said that:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.[35]

There is a very important sentence in this excerpt, that which says that he has to submit to public control to the extent of the interest

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34. 94 U.S. 113, 1877; 24 Law. Ed. 77.

35. Ibid., p. 84.

he has thus created. Well, then, is the business of the food producer, and the clothing producer affected with a public interest to an extent subjecting it to public regulation? It isn't a question of principle, but of extent, and that was to be one of the pitfalls of the Kansas act.

Another case studied by the creators of the Kansas industrial court was German Alliance Insurance Company v. Lewis.[36] This case concerned a Kansas law of 1909 which gave the state superintendent of insurance ultimate control over the rates that could be charged by insurance companies in the state. The company claimed, that since they were a private business, there was no constitutional power to allow a state to fix the rates and charges for services rendered by it. Here again the Supreme Court brought out the principle of public interest when it said, "The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation."[37] The Supreme Court then declared that the insurance business fell within this category.

The case, Budd v. State of New York,[38] was another citation apparently confirming the stand taken by the Kansas industrial court law. This concerned a New York statute which regulated the fees and charges "for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in

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36. 233 U.S. 389; 58 Law Ed. 1011.

37. Ibid., p. 411.

38. 143 U.S. 518, 1892; 36 Law. Ed. 247.

the state." The claim was made that floating elevators in the port of New York were private, were not affected with any public interest, and, therefore, were not subject to regulation of rates. In upholding the law the Supreme Court relied heavily upon its decision in the Munn case. "We must regard the principle maintained in Munn v. Illinois as firmly established. . . ."[39] This main principle, which was seemingly used in these cases in arriving at when a state could use its police power in regulating businesses affected with a public interest, was stated by Mr. Justice Bradley in speaking of the Munn case.

> The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, -- it is subject to regulation by the legislative power.[40]

Now, here is the critical point in the whole business. When a business is such that it creates a virtual monopoly, then it is subject, under the police power of the state, to legislative regulation. Well, is the manufacture of food and clothing a monopoly? It is interesting to note that in all these cases being mentioned, that which is declared to be affected with a true public interest is fenerally a virtual public utility or means of transportation, some sort of enterprise that is generally recognized as being monopolistic. Nothing yet has been mentioned of the ordinary pursuits of manufacturing food products

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39. Ibid., p. 255.

40. Ibid., p. 253.

and clothing for general consumption. Again, it seems that on principle the Kansas court was on solid ground, but on the extent to which the principle was extended, on dubious ground.

The case, Bacon v. Walker[41] was used to justify the exercise of the police power in Kansas to enforce the industrial court act, that is, in the state's claim that in enforcing the act it was in reality protecting the public welfare. This case involved an Idaho statute putting certain restrictions on the grazing of sheep on the public domain. The Supreme Court upheld the statute as a valid exercise of the police power. They claimed that indiscriminate grazing of sheep was harmful to the public domain, and therefore, in restricting it the state was merely protecting public property. The police power, said the Supreme Court, "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."[42] The State of Kansas, then, was doing the same by prohibiting industrial warfare and requiring labor and capital to compose their differences according to public regulation.

It also seemed to the supporters of the Kansas law that Muller v. Oregon[43] gave supporting sanction to the fixing of working conditions by the industrial court, as a valid exercise of the police power. In this

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41. 204 U.S. 311, 1911.

42. Ibid., p. 317.

43. 208 U. S. 412, 1908.

case the Supreme Court upheld the validity of an Oregon statute which made it unlawful to employ women more than 10 hours in any one day. The law was challenged as being an abridgment of freedom of contract. The Court held that there were limits on the freedom of contract. Because of the possible effect on the race of overworking women in industry, laws limiting the number of hours they could be employed a day were valid. Women were in a different position than men. " . . . her physical structure and a proper discharge of her maternal functions - - having in view not merely her own health, but the well-being of the race - - justify legislation to protect her from the greed . . . of man."[44]

Another case, Holden v. Hardy[45] added more justification to the state's regulation of working conditions and terms of employment, without being in violation of the freedom of contract. This case arose out of a Utah statute regulating the hours of labor for underground miners, a limit of 8 hours per day having been set. The question was whether or not this was a violation of freedom of contract, or was it a valid exercise of the police power of the state? The Supreme Court thought the latter.

> We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, hold it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly

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44. Ibid., p. 422.

45. 169 U.S. 366, 1898.

> or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.[46]

Because of conditions in underground mines, therefore, the state was empowered to regulate the time of working in them, as unlimited exploitation of underground miners would have a detrimental effect on the public. This seemed, to the creators of the Kansas act, as complete justification for the court of industrial relations to fix wages, hours of labor, and working conditions in state industries to promote public welfare and protect public health and morals.

Another very important case studied by those responsible for the industrial court in Kansas was Re Debs.[47] Mr. W. L. Huggins had this to say about the case:

> In Re Debs . . . Justice Brewer delivered the opinion and with his usual clarity of thought and felicity of expression, stated the principles of law which very largely influenced and guided in the framing of the Kansas Industrial Act.[48]

Eugene Debs had violated an injunction forbidding him to obstruct interstate commerce on the railroads during the Pullman Strike of 1894. The Supreme Court held that the United States Government could, through its

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46. Ibid., p. 392.

47. 158 U. S. 564, 1895.

48. W. L. Huggins, Labor and Democracy, (New York: Macmillan Company, 1922), p. 75.

official agents, use physical force to carry out the powers and functions that belonged to it. This included the power to command obedience to its laws, and hence the power to keep the peace to that extent. Supporters of the Kansas statute made an analogy between the right of the Federal Government to use police power to prevent hindrances to interstate commerce and the right of the state to use its police power in cases which might arise under the Kansas Industrial Act. Then, to support the power of the industrial court to apply to courts of competent jurisdiction for orders to enforce its decisions, the founders relied upon this statement of Justice Brewer:

> Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other. . . . [49]

The Court went on to say that, while it was not the province of the government to interfere in the mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of were such as affected the public at large, then the mere fact that the government has no pecuniary interest in the controversy was not sufficient to exclude it from the courts.

The last principal case used as a citation of authority for the act was Wilson v. New.[50]

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49. 158 U.S. 564, p. 578-9.

50. 243 U.S. 332, 1917.

> It is claimed that in everthing, except possibly its penal sections, the Kansas Industrial Act is strictly within the principles of law laid down by Chief Justice White in the prevailing opinion in Wilson v. New.[51]

This case upheld the constitutionality of the Adamson Act, which established wages and hours on railroads in interstate commerce. It was to avert a threatened nation-wide strike on the railroads that the law was passed. In this case the following was relied upon by Mr. Huggins, apparently, as encompassing the main principles contained in the Kansas law and justifying them.

> . . . what benefits would flow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employee and of the employees among themselves, and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident, and giving efficient remedies for that purpose, if there was no power to remedy a situation created by a dispute between employers and employees as to rate of wages, which, if not remedied, would leave the public helpless, the whole people ruined, and all the homes of the land submitted to a danger of the most serious character? . . . We are of opinion that the reasons stated conclusively establish that . . . the act before us was clearly within the legislative power of Congress to adopt, and that in substance and effect, it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing . . . a legislative standard of wages, operative and binding as a matter of law, upon the parties. . . .[52]

Translate this to the state level and you have, as it looked to Mr. Huggins and the other founders of the Kansas experiment, ample justification to regulate wages, hours of labor, and working conditions in industrial disputes, if the public welfare was in any danger, by the state indus-

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51. Huggins, op. cit., p. 77.

52. 243 U.S. 332, p. 351.

trial court.

Upon these cases was principally based the authority to establish the Kansas Court of Industrial Relations. The founders were confident that they had not only found a way to eradicate industrial warfare altogether, but that they had also found a constitutional way to do it. It was to be up to the Supreme Court of the United States to eventually decide whether or not the Kansas law could be supported by these other decisions. We have said that the Kansas law was not entirely new, and that it was in part based on previous principles enunciated by the highest court in the land. Mr. F. Dumont Smith, a Hutchinson lawyer, and one of the framers of the industrial law, said that the industrial court was not new or novel, but was simply the application of the police power, the old attribute of sovereignty, in this respect to a modern condition that had become intolerable.[53] To him, the police power had little or no limitations, and was the broadest and the most undefined of all governmental powers. It was, in fact, the final end and aim of civilized government, and that which all other governmental powers had to respect. It could even override the sacredness of contract. At least, it has been seen that it was relied upon heavily in the creation of the industrial court.

Opinion For and Against the Court

It might be well to just pause at this point to briefly summa-

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53. Topeka Daily Capital, July 20, 1920.

rize some of the arguments, pro and con, concerning the Kansas law. There were literally hundreds of articles, books, editorials, and newspaper articles written about the court. It seems as if the writer was either very much in favor of the law or very much against it. There didn't seem to be too much written in a purely objective light on the merits and demerits of the new statute. Of course those of labor were bitterly opposed to the law, and even many representing capital; while those who had had a part in the passage of the law were passionately supporting it. Some writers, in most part college professors, economists, and political scientists who had no direct interest in the law, impartially weighed the law, looking more at its possible reception in the courts, certain fallacies in its principles, and mentioning the parts of the measure worthy of praise, and whether or not such a measure was really the answer to industrial warfare.

One such writer was Mr. W. E. Atkins of the University of Chicago.[54] It seemed to him that the Act was colored with the impatient thought of the post-war period, and that under more tranquil conditions its would have been difficult to conceive of such legislation being passed, at least for some time to come. He emphasized the tense atmosphere of the Kansas legislature, and the fact that they apparently wanted to settle the matter (of possible recurring strikes in the coal fields) once and for all. He was under the impression that three things should have been

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54. W. E. Atkins, "The Kansas Court of Industrial Relations," Journal of Political Economy, XXVIII (April, 1920), pp. 339-352.

clear to the legislators when they passed the law. First, that there were limits to the implications some people found in the doctrine of public interest -- when difficulty arose between employer and employee, especially when the doctrine of public interest was spread as it was in the Kansas act, that the interest of the public was distant and indefinite compared to that of the worker who was fighting for what he termed his very existence. Secondly, Mr. Atkins thought that since labor had had difficulty with the courts for many years, the act might provoke rather than curb difficulties. For his third point, he found a danger in the provision that the appointment of the judges lay with the governor; he was not bound, moreover, to choose a purely representative group of judges.[55] It should be brought out here that it wasn't the idea of the governor, nor of those who framed the bill, to have a representative group chosen for the court. This would have made it more of an arbitration court, with haggling between the judges, and a compromise solution probably being the result in the majority of cases. The industrial court was to be exactly like any of the other legally constituted state courts, made up of impartial judges who would adjudicate the industrial disputes purely in the light of known facts, tempered with justice for both parties.

Mr. Atkins did think the court had possibilities and might gather some success because of the fact that Kansas was largely agricultural, not predominantly an industrial state. He did think the doctrine of

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55. Atkins, op. cit., p. 347.

public interest had been spread much too far, especially in the inclusion of the production of wearing apparel.

Mr. William Allen White was one of the virgorous supporters of the Kansas industrial law. Besides speaking before the special session of the legislature in support of the bill, he wrote several magazine articles in which he upheld the content and purpose of the law. He emphasized the advantages held by the industrial court over former arbitration and conciliation plans. Arbitration and conciliation had sought peace, on the best terms possible, but it was only a temporary peace. Now the Kansas court would seek justice in labor controversies, this justice naturally being followed by that peace in our industrial life that everyone wanted.[56]

Numerous magazine articles were written by Governor Allen in support of his court. In all these writings his arguments followed the same line of thought. Why did Kansas create the industrial court?

> The state reasoned that government has put a stop to every other quarrel which threatens the welfare and good order of society. The industrial quarrel is the only one which government anywhere allows to proceed on its own destructive will. And so reasoning that the state by the broad exercise of its police powers has the right to protect the public against the danger and the waste of the industrial controversy, it adopted a law which declares that neither labor nor capital shall conspire to close down an institution which is engaged in the production of an essential commodity such as food, fuel, clothing, or transportation.[57]

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56. William Allen White, "Industrial Justice -- Not Peace," The Nation's Business, X (May, 1922), pp. 14-16.

57. Henry J. Allen, "What About the Public?" The Rotarian, XXI (September, 1922), pp. 117-119.

He always reiterated his fear that a small group of radicals were in the process of getting control of the workingman, and was encourageing him to look for justice through their own force, not through justice as rendered in the courts of the land. Government should come out right now and prove that it was able to protect the many against any encroachments by the few. Governor Allen was by far the staunchest supporter of the Kansas law, not only while he was in office, but after he had retired to private life.

Labor, largely through the voice of the American Federation of Labor, was always a bitter critic and opponent of the measure. They called it involuntary servitude, said that it was meant to protect the financial interests of the employer, and that it had been passed largely due to a wave of hysteria created by Governor Allen during the period of the coal strike and after.[58]

Samuel Gompers, President of the American Federation of Labor, was especially bitter in his opposition to the act. He once engaged Governor Allen in public debate over the issue.[59] The main thing he had against the Kansas Court was its prevention of strikes. He thought the whole act was undemocratic and wouldn't work. "The right to quit work must be maintained inviolate if freedom is to be preserved."[60] He scoffed

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58. "Kansas Court of Industrial Relations," American Federationist, XXVII (July, 1920), pp. 627-629.

59. See, Debate Between Samuel Gompers and Henry J. Allen at Carnegie Hall, New York: E. P. Dutton & Co., 1920.

60. Samuel Gompers, "The Case For Organized Labor," The Rotarian, XXI (October, 1922), p. 174.

at the contention of Governor Allen that there was a distinct "third-party" which had a very vital interest in all industrial disputes. He said there was no such thing as a detached general public; that the whole population was divided as employers and employees. His solution to the industrial problem was to hang on to voluntary arbitration.

The framers of the Kansas statute always disputed with the opponents of the court the question concerning this right to quit work. The court made a differentiation between striking and the mere quitting of work.[61] To labor they were one and the same thing. In reply to the charge of Mr. Gompers that the court had taken away the divine right of the worker to quit work whenever he so desired, Mr. Allen said, "We have merely helped to take away Mr. Gomper's divine right to order a man to quit work. That is all."[62]

Mr. John S. Dean, a leading Kansas lawyer and one-time United States District Attorney for Kansas, was another who felt that the Kansas law was fundamentally wrong. He feared for private enterprise under the system as established by the Kansas law. He made much of the fact that manufacture and production were fundamentally and unchangeably private business. It was one of the inalienable rights of the American people, that of engaging one's property and services in business activities, to control and manage the same as he wished, to

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61. Section 17.

62. Henry J. Allen, Address to Kansas Bankers' Association, A Modern Weapon, Topeka, State Printer, 1921, p. 11.

hire and discharge whom he desired, and to be left perfectly free in contracting for his labor.[63]

Mr. Dean thought the main features of the law contravened the most elementary principles of individual liberty and private property. He could not see how economic change and modern progress had suddenly impressed such private industries as the production of food and clothing to such an extent as to subject them to state regulation.

> To select these particular industries and deprive the owners and the workmen employed by them of the freedom of contract, untrammeled control of their own property and their individual liberty, while leaving the balance of their fellow-citizens in the full possession of these invaluable rights; to burden the owners and workers in these particular industries with the supervision, control and management of a state commission, is a flagrant denial of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.[64]

These have been some of the principal arguments used by those for and against the Kansas industrial law. One screamed justice, the other tyranny. A middle ground was hard to find. Mr. F. Dumont Smith refuted the arguments that the law made men work against their will, that it made an industry continue operation at a loss, etc., which were principal arguments used by the opposition. He said the law didn't even pretend to do these things. "It merely attempts to prevent a breach of the peace by settling a strike before it reaches that point, and merely

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63. John S. Dean, The Fundamental Unsoundness of the Kansas Industrial Court Law," American Bar Association Journal, VII (July, 1921), p. 333.

64. Ibid., p. 63.

asserts the power to compel continued production when a stoppage of production would endanger the public health."[65]

In a speech before the International Convention of Rotary Clubs in Atlantic City, New Jersey, on June 22, 1920, Mr. Huggins very adequately summarized the main purpose of the Kansas statute, and what it would do for both capital and labor. He said that:

> The prime purpose of the industrial law is the protection of the public against the inconvenience, the hardships and the suffering so often caused by industrial warfare. It protects every citizen in his God-given right to work, to support his family like a free man without molestation and without fear. It confirms the right of every man to quit, to change his employment, like a free man; but it forbids him either by violence or by intimidation to prevent others from working. It assures capital invested in the essential industries freedom from the great economic waste incident to industrial warfare. It offers a fair return upon such investments. It guarantees to workers engaged in these essential industries a fair wage, steady employment, and healthful and moral surroundings. It gives to employers, to employees and to the general public alike an impartial tribunal to which may be submitted all controversies vitally affecting the three. It declares anew the democratic principles that the will of the majority legally expressed shall be the law of the land. It prohibits and penalizes the rule of the minority by means of intimidation. It prohibits trial of industrial disputes by gauge of battle, and it offers in place thereof, a safe, sane and civilized remedy for industrial wrongs.[66]

The success, or failure, which attended the efforts of the Kansas industrial court to fill in this picture with effective action will be left for the next section of this paper. In it will be described the intimate workings of the court, including sample cases and investigations, plus a short summary of the court's struggle with organized labor.

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65. Topeka Daily Capital, July 20, 1920.

66. The Kansas Court of Industrial Relations, A Modern Weapon, (Topeka: State Printer, 1921), p. 6.

CHAPTER IV

THE COURT IN OPERATION

This chapter will be mainly concerned with the activities of the court in connection with industrial disputes. However, a word about the supplementry activities of the court. When the Court of Industrial Relations was organized, February 2, 1920, the powers and duties formerly belonging to the Public Utilities Commission were given to it. The court only had this jurisdiction for nine months, at which time the Public Utilities Commission was created again. During its first year of operation the court was mainly occupied with the utility side of its duties. During the first nine months, 1104 cases concerning public utilities, their rates, stock and bond issues, approval of building plans, and sales were decided by the Utilities Division of the court.[1]

Aside from the public utility functions of the court, 28 cases were filed on the industrial side during the first 10 months, which is roughly the period covered by the First Annual Report. Of these, 25 were filed by labor and 1 by capital, while 2 investigations were initiated by the court. Of the 25 cases filed by labor, 20 received formal attention and decision. In 13 of these cases a wage increase was granted; in 3, wages were found to be fair so that no increase was allowed; in 2, only working conditions were involved; while in 1 the

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1. Court of Industrial Relations, First Annual Report, State of Kansas, (Topeka: State Printing Plant, 1921), p. 4.

employers took action satisfactory to the employees, the court simply approving the settlement. The remaining case was merely a referee action on a collective agreement.[2]

During the times between cases the work of the court went on. In order to correctly adjudicate labor controversies, the members* found that they needed information concerning such things as the cost of living, the working conditions in the various industrial plants throughout the state, hours of labor, sanitary and health conditions, safety appliances, and a variety of other matters. The court employed two lawyers to act as investigators or inspectors, and whenever a complaint was made, they went to the plant or industry affected and tried to ascertain the facts involved. At times questionaires were sent out by the court to gather information concerning prices and costs, in order to gauge the rise or fall in the cost of living. This was an important matter in the adjudication of disputes where a wage increase was asked for.

At the time that the powers and duties of the Public Utilities Commission were removed from the jurisdiction of the industrial court, other duties were conferred upon it by the legislature. The legislature placed the activities of the labor department, free employment service and Industrial Welfare Commission under the jurisdiction of the indus-

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2. U.S. Department of Labor, Bureau of Labor Statistics, Kansas Court of Industrial Relations, Bulletin No. 322, (Washington: Government Printing Office, April, 1923), p. 37.

* The first three judges of the industrial court were: W. L. Huggins, presiding judge; James A. McDermott and John H. Crawford, judges. In 1923 Henderson S. Martin replaced Mr. McDermott on the court, and in 1924 judge Crawford was succeeded by Joseph Taggart.

trial court.[3] This is how the functions and duties of the court were then lined up. The court was composed of five main divisions.

I. Industrial division
   1. Adjudication of disputes between employer and employees in the essential industries named in the statute
   2. Adjudication of disputes in any industry submitted by agreement of the parties
   3. Original investigations in essential industries
   4. Procuring continuous and efficient operations of essential industries sufficient for the protection of the public

II. Labor division
   1. Mine inspection department
      a. Accident prevention, ventilation and sanitation
      b. Mine-rescue work. Maintenance and superintendence of mine-rescue stations at Pittsburg, Arma, and Scammon
      c. Making statistical reports on mines, surveys, tonnage production, workmen employed, etc.
   2. Factory inspection department
      a. Safety and sanitation
         Fire prevention
         Safety of buildings
         Elevator inspection
         Machinery inspection as to safety appliances, etc.
         Lighting
         Ventilation and sanitation
         Orders for betterment
      b. Statistical inspections and reports
         Number and classification of employees
         Wages paid
         Minors employed
   3. Administration of all labor laws
      a. Eight-hour day on public work
      b. Reports of industrial accidents (fatal and nonfatal)
      c. Other miscellaneous provisions.

III. Women's division (and child labor)
   1. Investigation as to women in industry
   2. Promulgating of orders relating to:
      a. Hours of labor
      b. Minimum wages
      c. Safety, sanitation and welfare
      d. Child employment
      e. Recording and supervising issuance of child-labor permits
      f. Enforcement of child-labor penal laws

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3. Court of Industrial Relations, Second Annual Report, State of Kansas, Topeka, State Printing Plant, 1922, pp. 5-6.

IV. Free employment service
  1. Maintenance and supervision of public free employment offices.
    a. Topeka, Wichita, Kansas City, Salina, Hutchinson and Parsons
    b. Cooperating with federal employment service
  2. Regulation and supervision of private employment agencies
  3. Investigation of nonemployment, and reports to state and federal authorities
  4. Harvest labor

V. Miscellaneous activities
  1. Reports and investigations of settlements in industrial accident cases
  2. Advisory-workmen's compensation claims

One of the new duties thus imposed on the industrial court was that of factory inspection. This had formerly been done by the labor commissioner in the Department of Labor and Industry. Along with this was the duty of seeing that the labor laws were enforced. In doing this a systematic and regular inspection of all places of employment was required. The labor department had been carrying this out for years, now it merely being under the direction of the new court. Since most of the activities newly-conferred on the court were mere routine, they will not be gone into in any detail in this paper.

An example of the workings of one of these other minor divisions is a project carried out by the Women's division in 1921. It made a Cost of Living Survey, which was later used as a basis for hearings held to aid the industrial court in investigating conditions preliminary to revising mercantile, laundry, factory and public housekeeping orders of various Kansas cities.[4] As a result of these hearings modifications of

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4. Court of Industrial Relations, Third Annual Report, State of Kansas, Topeka, State Printing Plant, 1923, p. 115.

orders affecting women workers were made by the industrial court. Changes were made in minimum wages, hours, overtime, and prohibition of night work. The Women's Division also made an investigation of the child labor conditions in Kansas and published a report in 1922 mainly concerning child-labor in the sugar-beet fields.[5]

As we have seen, the Kansas Court of Industrial Relations was organized primarily to deal with industrial problems and controversies. For this reason the remainder of the discussion concerning the activities of the court will be in connection with this function. One thing will be noticed in this respect, and that is, that each year the number of cases of the industrial side of the court declined in number, until in 1925 the court was nearly inoperative as far as adjudicating industrial controversies was concerned. There seem to have been several reasons for this. In the first place, there was a gradual lessening of industrial tension by 1923 throughout the country, and especially in Kansas. Then there was the fact that Kansas wasn't a great industrial state to begin with, as a result of which there would never be many industrial conflicts to be settled. In 1923 Mr. Jonathan Davis was elected governor of Kansas. He was a Democrat and had been elected on a platform of abolishing the industrial court. This apparently showed that the people in Kansas were losing interest in their industrial court. In his first message to the Kansas legislature, Governor Davis advocated the repeal of the industrial court law.[6] He said the greatest progress toward the peaceful settlement

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5. Results of this investigation published on pages 123-124 of the Third Annual Report.

6. State of Kansas, House Journal, January 10, 1923, pp. 9-24.

of differences between employer and employee had been made in mutual understanding and by the state's aid in conciliation. To him the law was a failure because it had failed to engage the mutual confidence and support of either employer or employee. He, too, saw in the law a threat of spreading socialism. "Followed to the ultimate conclusion, the principles involved in the attempt to regulate wages and conditions and activities through this so-called court, would involve the state in the regulation of all business and produce state socialism. . . ."[7] He attacked the legality of the court also, saying that the so-called court could not enforce its decrees save through the civil courts, nor could it be properly clothed with power to do so. It was not even a court, and the legislature could not create a court in this manner.

Governor Davis had an alternative plan in mind to resolve differences between labor and capital. He thought a law should be enacted creating the office of industrial commissioner, consisting of one commissioner to be appointed by the governor with the consent of the senate. This commissioner would aid in arbitration and conciliation of labor disputes. In case of a dispute, he was to ask the governor to appoint a representative of labor and one of capital to meet with him and form a board to try and draw up a settlement. It could make investigations, subpoena witnesses, and publish its findings, but could not force either party to agree to any settlement it might decide upon.[8]

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7. Ibid., p. 17.

8. Ibid., p. 18.

He wasn't able to abolish the industrial court law, however, because the legislature was Republican and they were committed to support of the court. He was successful in weakening the court though. He appointed Mr. Henderson Martin, who had opposed him in the gubernatorial primary on an anti-court pledge, to a vacancy on the court. To another seat he named Mr. Leo Goodrich, repeatedly and publicly pledged against the court and all its works. Also, the appropriation made for the industrial court for the next two years was $77,900, barely enough to keep it alive.[9] The staff of experts, engineers and accountants was also drastically reduced. It looked as if the only reason the Republicans in the legislature had retained the court was because the Democratic governor wanted it abolished.

Another reason for the growing weakness of the court was an adverse decision rendered in the United States Supreme Court on its constitutionality.[10] The decision outlawed the provision allowing the court to fix minimum wages in the flour-milling industry. This case will be taken up and discussed in the next and final chapter.

The 28 cases filed in the industrial side of the court during the first year was the greatest number for any one year. During 1921 there were only 13 cases filed on the industrial side.[11] one of these, the Charles Wolff Packing Company case was later carried to the United

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9. Charles B. Driscoll, "The Kansas Industrial Court -- Gassed," The Nation, CXVI (April 25, 1923), p. 489.

10. Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 1923.

11. Second Annual Report, pp. 14-15.

States Supreme Court and was responsible for the series of cases resulting in the virtual nullification of the more important features of the Kansas law. There were 10 industrial cases filed during 1922.[12] The number of cases had dropped to 2 by 1923,[13] and in 1924 only one new case was brought before the court.[14]

Illustrative Cases Before the Court

Examples will be given of certain of the more important cases which appeared before the court for settlement, plus an original investigation entered into by the industrial court, to show the methods used by the court in reaching decisions and adjudicating the disputes. The first case appearing in the court for settlement was the Topeka Edison Case.[15]

The complaint in this case was brought by the attorney-general of Kansas on behalf of the electrical workers, members of Local Union No. 841, International Brotherhood of Electrical Workers, and the respondent was the Topeka Edison Company, a corporation engaged in generating and selling electricity for lighting and power purposes in Topeka, Kansas.

A dispute had arisen between the local union and the company in the matter of hours of labor and wages. The complaint charged that all

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12. Third Annual Report, p. 23.

13. Fourth Annual Report, pp. 12 and 14.

14. Fifth Annual Report, p. 7.

15. Miscellaneous Pamphlets, Volume II. The State of Kansas vs. The Topeka Edison Company, Docket No. 3254-I-2, pp. 3-10; The Court of Industrial Relations, Selected Opinions and Orders, Topeka, October 12, 1922, pp. 10-15.

efforts to reach an agreement with the company had failed. In their reply, the company admitted that there was a controversy, but that they had offered the workers an increase of 2½¢ per hour, which they had turned down. They were insisting on an increase of 10¢ per hour and a standard 8-hour day.

The workers, in particular, who were complaining were the linemen, the men who put up and maintained the lines transmitting the electric power from the company to the city. It was mentioned that their work was very hazardous, that they were all employees of long standing with the company, and were skilled workers in every sense of the word. Upon this,mainly, they were justifying their demand for a wage increase, and the standard 8-hour day. The matter of the 8-hour day was settled between the two parties with the concurrence of the court, and so wasn't any longer part of the dispute to be settled by the court.

The wage of the workers (the linemen) had increased from a daily wage of $2.75 in 1916 to 60¢ per hour for a basic 8-hour day in 1919, with time and one half for overtime and double time for work on Sunday. In the hearing it was brought out that prior to the year 1919 the workers were able to live and support their families reasonably upon the wage which they then received. Some, apparently, were able to save a little money. The 60¢ per hour wage for the 8-hour day, of course, raised the daily wage to $4.80, but the men were complaining, that with the tremendous rise in the cost of living, they were not able to support their families as well on this as they formerly had on the $2.75 wage scale. The court

remarked that it was evident the cost of living had indeed gone up, and that the cost of food had increased 100% by November, 1919, over November, 1913, and that clothing and furnishings had risen even more. The worker's rent, and the price of coal, had also gone up as much as 50%, the court reported.

These statements of fact naturally brought up the most important point of the whole case, and that was what the industrial court considered a fair wage. How did the court arrive at a so-called fair wage? The court made a difference between a living wage and a fair wage. A living wage was defined as a wage which enabled the worker to supply himself and those absolutely dependent upon him with sufficient food to maintain life and health; with a shelter from the inclemencies of the weather; with sufficient clothing to preserve the body from the cold, and to enable persons to mingle among their fellows in such ways as may be necessary in the preservation of life.[16] As to a "fair wage", which the court said that all industrial workers were entitled to, several important circumstances were taken into consideration, namely:

1. the scale of wages paid for similar kinds of work in other industries.
2. the relation between wages and the cost of living.
3. hazards of the employment.
4. the training and skill required.
5. the degree of responsibility inherent in the job.
6. character and regularity of the employment.
7. skill, industry, and fidelity of the individual employee.[17]

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16. Ibid., p. 5.

17. Ibid., p. 7.

The court went on to say that a skilled worker should have a higher wage than an unskilled worker. Such skilled workers were entitled to a wage which would enable them to procure for themselves and their families all the necessaries and a reasonable share of the comforts of life. They were entitled to a wage which would enable them, by industry and economy, not only to supply themselves with opportunities for intellectual advancement and reasonable recreation, but also to enable the parents working together to furnish to the children ample opportunities for intellectual and moral advancement, for education, and for an equal opportunity in the race of life. A fair wage would also allow the frugal man to provide reasonably for sickness and old age.

However, the industrial statute empowered the court to fix only a minimum wage. The minimum could be fixed by the court, but the maximum must depend upon the skill, fidelity and industry of the employee, the fair and equitable disposition of the employer, the prosperity of the business, and other economic circumstances.

The court found that the wage paid to the workers mentioned was unreasonably low and was not a fair wage to be paid them and other workers similarly situated and employed by the Topeka Edison Company. The main reason given for the fact that the wage was unduly low was the rise that had occurred in the cost of living during the years following the World War. A minimum wage of 67½¢ per hour on the basis of an 8-hour day, time and a half for overtime and double time for Sundays, was established by the court in this case. The wage order was to be

continued for a period of six months, unless changed beforehand by agreement of the two parties, with the approval of the court.

This case shows the points taken into consideration by the industrial court in its attempts to arrive at fair minimum wages, a difficult job in any situation by any board or commission. The same criteria were used in the other cases brought before the court in which attempts were made to find a new wage scale. There was no contention in the Topeka Edison Case concerning the ability of the company to pay the increased wage rate. In the following case this point did come up, and it is interesting to note the philosophy developed by the judges concerning the relationship between the need for a higher wage scale and the financial inability of a company to pay it.

The case to be mentioned now was the Joplin and Pittsburg Railway Company case.[18] The officers and members of local union No. 497 of the Amalgamated Association of Street and Electric Railway Employees of America brought this action before the industrial court. The company concerned operated an electric railway in Crawford and Cherokee counties in Kansas, and to Joplin, Missouri. The union members represented all the various occupations connected with the railway company.

The union claimed that the wage paid them was unfair, was unreasonably low, and was not sufficient to provide reasonably living conditions for them and their families; and they mentioned that the

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18. The Court of Industrial Relations, State of Kansas, Selected Opinions and Orders, Topeka, issued by W. F. Wilkerson, Clerk, October 12, 1922, pp. 25-30.

controversy would endanger the continuous operation and efficient service of the company. It was, of course, only under this condition that the industrial court could take jurisdiction. The union claimed that efforts had been made to work out an agreement respecting wages with the company, but that the company had refused to come to any agreement. The union claimed that, since the controversy would affect the public, would endanger the public health, and the general welfare of many people in Kansas, the industrial court should take jurisdiction, make an investigation, and establish a reasonable minimum wage for them.

The railway company claimed that the industrial court had no jurisdiction, as they were in interstate transportation business and could only be regulated by the federal government. The court ruled, however, that they did have jurisdiction over the matter. The company also denied that the controversy would in any way endanger the public health or welfare, and claimed that, with its present earnings, it would be unable to pay a higher rate of wages than they were then paying.[19]

Two entire days were taken up in hearing the evidence upon the issues brought up. The evidence was very voluminous and covered a wide range of facts. Among other points, the evidence showed that within recent years a strike of 80 days had occurred, totally paralyzing business, with a result of more than $68,000 loss to the company. Later, a thirty-six day strike occurred with a corresponding loss to the company.

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19. Ibid., p. 26.

Also, it was found that some voluntary increases in wages had been made since August 1, 1914. Then, in May, 1918, a wage controversy was submitted to the Hon. William Howard Taft, and Frank P. Walsh, joint chairmen of the War Labor Board, and on July 31, 1918, a decision was rendered by this board fixing a certain wage scale for the employees of the company. This award was to continue for the duration of the war, except that either party might reopen the case before the arbitrators at periods of six months' intervals, beginning February 1, 1919, for such adjustments as changed conditions might render necessary.At the time of this case, 1921, the workers claimed the right to reopen the case before the Court of Industrial Relations as the War Labor Board had ceased to function. The court upheld them in this contention.

The problem was made difficult by the fact that both skilled and unskilled labor was involved, and there was a wide divergence between the various crafts and classes of labor as to the responsibility imposed. This made it difficult to fairly adjust the difference in the wage rates to the various classes. The court said that it was evident that there had recently occurred a rise in the cost of living, and thought that the 42¢ per hour minimum fixed by the War Labor Board for both skilled and unskilled workmen was unfair. The court mentioned again the criteria used to determine a fair wage. These were mentioned in connection with the Topeka Edison Case.

During the case the question arose as to whether or not the railway company was financially able to pay a higher wage rate to its employees. The company hadn't been financially prosperous for years and didn't pay a

reasonable return on the physical value of its property. There had been, however, increases in freight and passenger rates granted by the industrial court. The growing competition of bus lines and trucking service was mentioned as having had effects on electric railways the country over.

Then the court brought out a bit of philosophy which was adhered to by it throughout all its existence. It said:

> This court is very desirous to do nothing in this case which will unduly burden the respondent (railway company). However, it must be admitted that wages to labor should be considered before dividends to the investor, and that a business which is unable to pay a fair rate of wages to its employees will eventually have to liquidate.[20]

This was justification for the power conferred upon the industrial court to fix a minimum wage and have it obeyed by the corporations. Then, too, the court in this case brought out the point that the people of southeastern Kansas would vitally need the services of the electric railway for years to come, which merely meant that, even with the financial straits enveloping the company, it must remain in operation. This wasn't outright ordered because the company didn't ask to cease operations, but if the company had, it is quite probable that the court would have denied the permission. In that case the state would have been in position to assume operation of the company if necessary to maintain its continuous and efficient service to the people in that sector of Kansas.

The industrial court found that the wage then being paid by the company was unreasonably low and was not a fair scale to be paid to the employees. The court then set another scale which was to be paid by the

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20. Ibid., p. 28.

company. This new scale raised the minimum wage to be paid the employees as much as 10¢ per hour for some types of work. It was a general raise for all classes of employment. This new wage rate, however, was only to apply to such employees who were bona fide residents of Kansas, and likewise was to run for a period of six months, unless changed by the parties during that time.

But not every case before the court resulted in the granting of a wage increase. It might be well now to glance at a case in which a request for a wage increase was denied, and at the reasons why it was denied. This was a second case involving the Joplin and Pittsburg Railway Company.[21] It involved train despatchers on the line. They brought suit in the court to get a wage increase shortly after many other employees of the company had been granted an increase, referring to the case just mentioned.

In this case the industrial court took the following attitude. The wage then being paid train despatchers by the railway company was $160 per month. The court found from the evidence that the work was done by telephone, and was work of the sort that it required by a short space of time for an apt student to learn. The work was not heavy and was not comparable with train despatching on the steam railroads, either in the matter of skill required, or of the responsibility imposed. From this evidence, the court ruled that the wage rate was not unfair. It believed that the $160 per month that was being paid for such work was a fair wage.

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21. Court of Industrial Relations, First Annual Report, State of Kansas, Topeka, State Printing Plant, 1921, p. 44.

The request for an increase was therefore denied by the court.

Here is another case, one in which a decision was made by the industrial court on things other than wages. It is the Fort Scott Sorghum-Syrup Company Case.[22] This company manufactured syrup from sorghum cane, and furnished for the most part only seasonal employment. The grinding of the cane and the first preparation required something more than 100 men from 50 to 90 days in the fall of the year, running the plant 24 hours per day. During this time from 5 to 7 steam boilers and engines were in use. After that the process of mixing and refining the syrup and preparing it for table use and for shipment, called for but a few men and only one steam boiler.

On July 15, 1920, the company made an agreement with the International Brotherhood of Firemen and Oilers in the nature of a closed shop contract, There was no controversy except as to the number of men employed after the heavy fall campaign, the period of the year when the plant operated at full capacity, was over. During previous years two engineers and two firemen had been required to run the necessary boiler and engine, but in the autumn of 1920 the company found itself doing only about 4 or 5 percent of its average business. The company, therefore, sought to reduce expenses by discharging the two firemen, two engineers working alternate shifts and firing their own boilers. The two engineers were willing to fire their own boilers in view of the small amount of work required, saying that to fire the engine would

22. Selected Orders and Opinions, pp. 35-38.

not require to exceed two hours of time per day. The Engineer's union refused to permit this, as it would violate the "one man, one job" policy of their union.

The company felt that some concession should be made, otherwise they would be required to pay $12 per day for men to perform two hours' work. Admitting that the sum was relatively small, the company said that nevertheless it would simply increase the deficit the company had been operating under. A general representative of the union, who was present at the trial, thought that the concession ought to be arranged, and expressed his belief that local officers had made a mistake in insisting on the "one man, one job" idea. The court wished to waive decision until the unions could make their own arrangements, but both parties stated that they had agreed to abide by the order of the court and insisted upon an immediate and authoritative decision.

In its decision the court recognized the closed shop in the particular case because it had been instituted by mutual agreement, but it did think it was unfair to require the employment of two men to do the work of one. In this connection the court ordered that the contract should be so modified as to permit one man to work at two or more jobs not requiring excessive periods of time, in which case his union membership might be transferred without cost to any party so long as the necessity for this work should continue.

The last representative case to be mentioned also concerns the Joplin and Pittsburg Railway Company. In this case the same employees who had been granted a raise in wages by the industrial court in 1920,

the first Joplin and Pittsburg Railway Case reviewed in this paper, went into the court for another increase.[23] Also included in their request was the adjustment of a collective agreement relative to train crews, hours of labor, and days per week.

The industrial court declined the wage increase on the ground that there was a general tendency toward a decrease in living costs, and while it had not yet materially affected the ultimate consumer, there had at least been no advance. The other point decided by the court in this case was similar in some respects with the Fort Scott Sorghum case, that is, the company complained too many men were being demanded by the union for performing certain functions, merely increasing the operating costs of the company.

The men wished the contract to require three men on their trains that handled three or more cars at the same time. The court's view of this was, that considering the nature of the work done upon the freight trains usually handled by the company, the third man would add an unjust burden to the costs of operation without public benefit, a result which would ultimately be reflected in lower wages to the men or poorer service to the public.

In this case the court again brought out the principle that wages to labor should come before all else in the business operations of the concerns affected by the Industrial Court Law. That is, the company should see that fair wages were being paid to the workers, then dividends

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23. Selected Opinions and Orders, pp. 30-34; U. S. Bureau of Labor Statistics, Monthly Labor Review, XII (April, 1921), p. 123.

and profits would fall into second place. Another point in this case related to the establishment of an 8-hour day. A method of working an 18-hour shift on an 8-hour basis was worked out by the chief accountant of the court, but it was computed that this would add $25,000 to the annual operating cost, an amount the company could not pay without subtracting from its depreciation fund or failing to pay interest due. The court maintained its view that wages must come before dividends, and that a business which couldn't pay a fair wage, and at the same time earn a reasonable return, must eventually go out of business. However, as the problem was eventually worked out, this 8-hour system was not instituted. Instead, it was decided that, taking into consideration the nature of the work performed, a 9-hour day would not unduly deprive the worker of a reasonable time for rest, recreation, self-improvement, social diversion, and the family circle.

These random cases will tend to illustrate the workings of the court in its decisions regarding industrial disputes. A standard had been set up to measure a fair wage, certain ideals regarding the operation of businesses affected by the industrial law were enunciated, and the long rocky road to industrial peace was being warily trod by the new court. Another important activity of the court that should be mentioned at this time is that of making original investigations into certain industries. Out of these investigations the court gathered much valuable information relating to such things as the continuous operation of certain industries, could they be operated more regularly than they were, or were there cogent reasons for partial elapsing of operations?

We have mentioned the surveys carried out by certain minor divisions of the industrial court and their importance. Investigations were made into the coal industry at various times in order to furnish the court with needed information in correctly adjudicating disputes occurring therein.[24] One such investigation, which will suffice in pointing out this part of the court's activities, was the original investigation carried out by the court concerning the continuity of production in the flour-milling industry at Topeka and other points in the state of Kansas.[25]

The occasion of this investigation was the information, which came to the court in an informal way, that the flouring mills located in Topeka, Kansas, were reducing production. A preliminary investigation was held and testimony was taken from the seven milling companies and from many others located throughout the state. The one outstanding fact which emerged from this investigation was that the mills had not stopped operation in any general sense, but that owing to conditions, the mills of Kansas generally were running at about 60% capacity. The court was to decide whether or not there was any hint that the millers were in any way hindering production merely to bring the price of flour up. In summing up the results of the investigation, Judge William L. Huggins, the presiding judge of the industrial court, went back over certain parts of the industrial law to make the situation clear. He mentioned section 6 which said that it was necessary for the public

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24. First Annual Report,

25. Selected Opinions and Orders, p. 39; First Annual Report pp. 68-71.

good that the industries encompassed by the act be operated with reasonable continuity and efficiency. The law then provided, however, that because of seasonal changes, market conditions, or other factors influencing a certain industry, an application could be made to the court to fix certain rules and regulations which should govern the operation of the industry so as to give the best possible and efficient service to the people. Then, if the suspension or limitation of production in any industry would threaten the public welfare, the court was authorized to take control and operate it throughout the emergency period. It was to be real emergency, like the 1919 coal strike, though, before this final step would be taken.

After the investigation the court decided that the flour mills had not been guilty of deliberately slacking production in order to affect the market price. It found that the world conditions made the situation so that they could only operate at about 60% capacity. There was a surplus of Canadian wheat, being marketed in the United States free; an immense wheat crop was being harvested in Australia, and in the Argentine; then, the European peoples were so destitute that they were poor customers for American wheat. Because of these circumstances, it was found that there was excuse enough for the curtailed operation of the flour mills in Kansas. "Unquestionably the testimony shows that the millers of Kansas are confronted with market conditions which are beyond their control and beyond control of this court."[26]

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26. Ibid., p. 70.

The court also found from the evidence that the milling industry was one of the essential industries in the sense of the Kansas statute, and was therefore subject to such regulation as was necessary to protect the public. The court further found that the industry was affected by market conditions, that such influences were inherent in the nature of the business, and that reasonable rules, regulations and practices should be prescribed by the court to be observed in the operation of the industry for the purpose of keeping the court informed as to continuity and efficiency of production, and of securing the best service to the public consistent with the rights of employers and employees engaged in its operation as provided by the Kansas industrial law. In view of this fact, the following rules and regulations were drawn up to apply to the flour-milling industry throughout the state.

1. Each company to make reports to the industrial court at such times as they might be called for. Forms would be prescribed by the court.
2. In case any company was forced to reduce its production below 75% for period of 15 days or longer, to make application to the court, listing reasons for reduction.
3. Every company operating a flour mill in the state should familiarize itself with the demand for flour in the state at all times, and should cooperate with, and use all possible means, to assist the industrial court in preserving the flour supply and preventing shortages.
4. In so far as it was reasonably possible, head millers, chief engineers and all other skilled workmen in mills located in the state should either be paid on a monthly basis or be given other employment during the period of reduced or suspended production, so that efficient production could be promptly resumed when conditions permitted.
5. All employees of Kansas flour mills were to be given reasonable notice, when possible, before any cessation or limitation of production takes place, in order that they may provide themselves with other employment.[30]

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30. Ibid., p. 71.

These last rules and regulations promulgated by the industrial court show the extent to which the state was inserting itself into the conduct of private business in the name of the public welfare. It is no wonder that intensive opposition grew up in the state opposing this sort of activity. These sample cases and investigations are illustrative of the industrial functions carried on by the Kansas court. It can be seen that all aspects of business and industrial relationships came under purview of the court.Not only were industries instructed as to how to actually carry on their business in some respects, but such things as minimum wage scales, hours that workmen could be worked, and the number of men to be required by the unions in various tasks were taken under consideration by the court.

There is another interesting sidelight to the workings of the industrial court, and that is concerned with its success in preventing strikes in the industries affected by the industrial law. That was one of the main reasons for the passage of the act, it was to be one of its main purposes, and was to be an important excuse for its very existence. It was not successful, however, in preventing industrial strife in Kansas. Aside from numerous small and minor stoppages, there were four major strikes called in violation of the Kansas Industrial Court Law. A brief review of these strikes, and the stand taken by the industrial court in their regard will now be taken up as illustrative of this side of the court's functions. It will certainly bring out the fact that a large group of people cannot be kept from taking certain actions merely by the passage of a penalty law. This is especially true of a group representing, not only a certain occupation or trade, but a distinct class of

the population. You can't jail several thousand people for violating such a penalty law, at least its never been tried. Somthing deeper and more basic is apparently needed in all controversies if they are to result in peace, understanding and agreement. You have to erase the fundamental causes bringing on the disputes, instead of providing for punishment for those taking part in them.

Strikes and the Kansas Industrial Court

The most bitter and persistent enemies of the new Kansas court were the coal miners of southeast Kansas, and especially their leaders. The principal leader in this fight on the court was Mr. Alexander Howat, president of District 14, United Mine Workers of America. He was the cause of a series of cases taken to the Kansas supreme court, and later to the United States Supreme Court concerning the validity of the new law. When Governor Allen spoke of radical labor leaders, men who lived off of industrial strife and miners' dues, he had Alexander Howat especially in mind. They were at it "hot and heavy" during the years the industrial court was in existence. This was the man often mentioned during the debate previous to the passage of the law in January, 1920. To supporters of the measure he was a tyrant who had refused coal to hospitals and children during the 1919 coal strike. To labor leaders he was the apostle of the awakened working class; to others a misguided man, sincere in his efforts to improve the lot of the coal miner, but wrong in his methods of seeking this improvement. He was castigated by his enemies as creating class hatred, and of fomenting industrial strife

to merely flout the law and the state. He was certainly to be an especially prickly thorn in the august side of the industrial court.

On the Monday following the passage of the Industrial Court Law, 400 miners went out on strike in protest against the bill. According to Governor Allen[31] the Attorney-General was immediately sent to the field to begin prosecutions under the criminal section of the new law. Before he had time to make any arrests, the striking miners all went back to work. Governor Allen said the union leaders asked them to "forget the matter". It does seem,however, as if the governor was twisting the situation just a little.

In the first place Howat disclaimed any responsibility for calling the strike, said he wouldn't order the men back to work, and that the miners of Kansas would quit work whenever they wanted to.[32] Attorney-General Hopkins reported from the fields that there apparently was no organized strike, and that there was absolutely nothing upon which to base a prosecution under the Kansas industrial law.[33] Howat also assured Hopkins that the miners were not out on strike to violate the new law. The attorney-general then reported that apparently the men had just not gone to work that day because it was "blue Monday", and that they had voluntarily returned to the mines the following day anyway. So apparently Governor Allen was attempting to present the view that fear of the new

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31. Henry J. Allen, "How Kansas Broke a Strike and Would Solve the Labor Problem," Current Opinion, LXVIII (April, 1920), pp. 472-8.

32. Topeka Daily Capital, January 27, 1920.

33. Ibid., January 28, 1920.

court had driven the men back into the mines, and that the attorney-general had been on the verge of arresting many for the strike.

During the summer of 1920, however, there developed a strike which was more serious than this initial walkout. It developed out of the so-called "Saturday-holiday movement." Late in June, 1920, and early in July, and throughout the month, there was a serious shortage of railroad cars in Kansas to move the coal from the coal mines. The industrial court sent a man to investigate this shortage. The coal operators had complained that the railroads were furnishing only 38% of the cars ordered by the operators.[34] According to the report of Mr. G. H. Engh, who made the investigation for the court, it wasn't entirely the shortage of coal cars that held down coal shipments from the Pittsburg fields during the summer, What was wrong was the fact that the cars were unloaded slowly and therefore didn't return to the mines rapidly. Then, too, there were long waits on sidings and the cars moved so slowly in transit.[35] Along with these delays there was also an admitted shortage of railroad cars. This condition resulted in intermittent operation at the mines, as it was no use mining the coal until there were cars enough gathered to take it away. As a result, numerous local unions voted to discontinue work on Saturdays. It was hoped that enough cars would be accumulated at the mines then by the first of the week to furnish fairly steady employment until the next week-end.

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34. Ibid., July 24, 1920.

35. Loc. cit.

The contract of the miners with the operators, however, provided for fines of from $1 to $2 per day for failure to work Saturdays. Therefore, when about half the miners of the Pittsburg district quit work on Saturdays, the operators deducted accordingly from their pay.[36] Alexander Howat declared the levying of fines -- even though authorized by the contract -- an outrage, and asserted on July 25 that the miners would start a clean-up of the mines the next day, preparatory to a walkout.[37] The actual number of miners who struck in protest against the fines is not known for sure. Alexander Howat claimed there were 7,000 miners out, but the operators' association officials set the number at 1800.[38]

Apparently this part of the contract had never been enforced before, so when the operators invoked it in this case, they let themselves in for the charge that they were conspiring to run the price of coal up. It was thought by some that they were goading the miners into a strike, which would result in a shortage of coal, and then the price would go up. There probably was little truth in the allegation.

Because of the shortage of coal cars up to the week of the strike, the production and shipping of coal from the district had not been seriously affected by the efforts of the miners to shorten their working time to five days a week. However, after the strike occurred, Governor Allen announced that the production of coal was seriously

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36. Domenico Gagliardo, The Kansas Industrial Court, University of Kansas Publications, Lawrence, 1941, p. 134.

37. Topeka Daily Capital, July 25, 1920.

38. Ibid., July 28, 1920.

impaired, that 20 out of 127 miners were idle with the chance that more soon would be, and that the point would probably be reached where the normal production of the district would be reduced about one-third.[39]

After the above announcement by the governor, the court began an investigation immediately, and the granting of a permanent injunction against Howat and other union officials was considered. It was even rumored that drastic state action, meaning state operation of the mines, might result, but only if the production of coal reached the point where the public welfare was affected. The governor hoped that this wouldn't be necessary.

As the whole matter ended, the industrial court was not obliged to take any action whatever. A quarrel developed between John L. Lewis, president of the United Mine Workers of America, and Alex Howat, president of the Kansas district. Lewis, after studying the situation, decided that the miners were in clear violation of their contract and that they should be ordered back to work. Lewis sent a telegram to Howat denouncing him for fostering the strike trouble.[40] In this message Lewis declared the president of the Kansas miners had made no attempt to settle the strike as provided in the contract with the operators, and he warned Howat that he must comply with the laws of the union.

> A continuation of the mad course you are pursuing in Kansas will bring further condemnation to your organization and stamp you as a man devoid of principle and destitute of honor . . .. The miners of Kansas, through the incessant and continuous strikes which you have directly ordered or

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39. Ibid., July 31, 1920.

40. Ibid., August 5, 1920.

> sanctioned, are gradually being reduced to a state of poverty and woe. . . . The office is in receipt of appeals from many members of the organization in Kansas pleading for the intervention of the international union to save them from your ruinous government.[41]

Lewis was insisting that all local unions abide by the contracts they had with the operators. He went on to inform Howat the wails which would no doubt emanate from him upon receipt of the message would not change the situation at all. "The miners of Kansas shall not be permitted to be sacrificed to the whims and caprices of a demagoge."[42]

This action of Lewis' undoubtedly came as a shock and a surprise to Howat, who had apparently thought Lewis would stand clear and let him fight it out with Governor Allen and the court by himself. At any rate, it was a critical spot for Howat. Lewis had ordered Howat to send the miners back to work, and upon Howat's refusal to do so, had himself sent telegrams to 33 local unions in Kansas ordering them to return to work and end the strike.[43] This was too much for Howat, and he sent a return telegram to Lewis denouncing him for taking the action he had. He denied having called the strike in the first place, and said that if Lewis had stood as firmly in defense of the mine workers of the country during the 1919 coal strike as he was now standing in defense of the operators, a lot of labor quarrels could have been avoided now. He challenged Lewis "to do his worst."[44]

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41. Loc. cit.

42. Loc. cit.

43. Kansas City Star, August 5, 1920.

44. Topeka Daily Capital, August 6, 1920.

Little by little the miners went back to work and all were again at work by August 24. This was the first major clash in the struggle between Howat and Lewis which was to result in the final defeat of Howat. The operators, in the meantime, refunded the fines that they had collected.[45] As it turned out the industrial court took no definite action of any kind. Governor Allen pointed out that under the law no jurisdiction was conferred upon the Court of Industrial Relations except in cases where a controversy of this kind threatened the public.[46] He then said that since it appeared the whole thing would be settled by the national union there was no occasion for any further action on the part of the court. Was this sidestepping the issue? When does, or will, a controversy threaten the public welfare? It seems as if the court was left a lot of leeway as to what action to take, if any, in industrial disputes, and that it would be easy under certain circumstances to not intrude too far into the question.

The next important strike taking place after the formation of the industrial court was the so-called Howat strike of 1921. It developed out of a minor affair known as the Mishmash strike. This had occurred some six months after the strike over the Saturday-holiday movement. Mishmash had worked in a mine on a boys' pay until reaching the age of 19, at which time he was paid a mans' wage. He later sued for back wages as he claimed he had reached 19 years of age before the date he originally

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45. Gagliardo, op. cit., p. 136.

46. Henry J. Allen, "Is the Industrial Court Making Good?" System, XXXIX (January, 1921), p. 100.

claimed. The dispute dragged on for several years, the union making no attempt to collect the back pay. The result was that Howat apparently used the trivial affair as an excuse to call a strike, with the probable intention of testing the industrial court law. The strike was called on February 3, 1921.[47] The industrial court held a hearing and ordered the George Mackie Fuel Company, where Mishmash had formerly worked, to pay the boy more than $200.[48] The court also notified the miners not to refrain from returning to work because of the strike order issued February 4. Needless to say, the operators were much put out with the award to Mishmash, some even threatening to join Howat in his fight against the industrial court. After the money was awarded to Mishmash the miners all went back to work.

On September 30, 1921, Howat went to jail on a six months' sentence for violating the Kansas Industrial Court Law in calling the Mishmash strike. This occasioned the "Howat strike" of 1921. When Howat went to jail the miners went out of the mines in protest against his imprisonment. There was no actual strike call issued, but a majority of the workers went out on strike.

By October 4 all Kansas miners were out on strike. As yet the industrial court had held no conference on the situation, apparently not being in agreement as to what action should be taken. Here was a clear-

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47. Kansas City Star, February 3, 1921.

48. Ibid., February 18, 1921.

cut violation of the industrial law and a chance presented to the court to prove that the measure actually had teeth. Judge Huggins said he personally was in favor of giving Lewis a chance to straighten out the situation before the industrial court took any action.[49] Immediately, however the judge changed his mind and advocated that the court take vigorous action in handling the situation. He formulated a five-point "program for resuming coal production in Kansas."[50] Here were the main points of his program:

I. The industrial court should at once ask the governor . . . to organize through the adjutant-general, a military police force of sufficient strength and of selected men from the various National Guard units . . . . Said military police force should be used if needed in the mining district to protect miners who are willing to work, so long as such protection may be needed.
II. If production was not resumed by October 12, the court should ascertain the cause why it hadn't. If the cause was defiance of the industrial act as reported, then the court was to find out whether, with police protection, the operators would be willing to resume operations with the miners then in the district. If not, and the operators were willing to resume, the court should aid in getting labor from elsewhere to operate the mines.
III. Advocated abolition of the "check-off" system.
IV. If the operators were unable or unwilling to proceed at once in producting coal, then the court should proceed under Section 20 of the industrial law to take over and operate the mines.
V. If the court did take over, the program should be same as outlined above.

This plan was not adopted because the other two members of the court did not concur in it. This hesitation on the part of some can probably be ex-

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49. Topeka Daily Capital, October 4, 1921.

50. Herbert Feis,"Kansas Miners and the Kansas Court," Survey, XLVII, (February 25, 1921), p. 825.

plained in the following manner. There was apparently no serious coal shortage as yet, the judges couldn't agree on just what action should be taken, and there was always the hope that Lewis would step in again and settle the matter once and for all.

Meanwhile, on October 7, Governor Allen announced that the industrial court had formulated a definite program of action in the event of a prolonged coal strike. He said merely that the details would be revealed from time to time as developments warranted. "The public may be assured that after the efforts of a year and a half to devise a tribunal to insure industrial peace, it will not fail to act when the proper time comes."[51] But when is the proper time? That, of course, was to be decided also by the court.

The strike deadlock was broken on October 13 when John L. Lewis suspended the Kansas district of the United Mine Workers, District No. 14. Alexander Howat and all other district officers were removed, and provisional officers appointed.[52] All loyal miners were ordered back to work. This involved about 12,000 dues-paying miners in the district. Legal proceedings were initiated to force the outgoing officers to surrender records, books, and offices. They had refused to do so. Howat's reaction to this action by Lewis was consistent with his previous attitudes. "To hell with John Lewis and Governor Allen. Our plans are unchanged. We will continue the fight."[53]

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51. Kansas City Star, October 7, 1921.

52. Ibid., October 13, 1921.

53. Loc. cit.

The cause of the action in suspending district 14 was based on the refusal of Howat and his district board to put back at work miners called out on strike during the Mishmash affair. The International Convention of the union had voted for Howat to put the men back to work, and he had refused to do so. In other words, the laws of the union were being flagrantly violated by the Kansas district.

When the provisional government in district 14 ordered the miners back to work, they refused to accede, with the result that the charters of the local unions were revoked and all miners refusing to return to work were automatically expelled from the union. New unions were organized by the international organization, and such miners as were willing to return to work and who were acceptable as members of the new organization were received and admitted into the union. By this process a large number of miners gradually returned to work, thus permitting resumption of operations, until within 60 days practically normal resumption of mining was accomplished and the very radical element in the miners' unions was eliminated.[54]

No sooner had production been resumed in the mines than disturbances broke out in the coal field, necessitating the calling out of the National Guard. Bands of women attempted to halt the work being resumed at the mines and intimidated many of the men attempting to work. The industrial court took no formal action whatever during the entire controversy,held no hearings, took no testimony, and issued no orders.[55]

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54. Second Annual Report, p. 10.

55. Gagliardo, op. cit., p. 143.

In other words, the court took no effective action to break the strike, but the state did.

On January 4, 1922, attorney-general Hopkins met the peace officers and city officials of the two counties, Cherokee and Crawford, affected by the strike, and demanded that every town in the district pass the following ordinance:

> Any person engaged in any unlawful calling whatever, or who shall be found loitering without visible means of support, or who being without visible means of support, shall refuse to work when work at fair wages is to be procured in the community, or who shall threaten violence or personal injury to fellow workmen or to employers of labor shall be deemed a vagrant, and, upon conviction thereof, shall be imprisoned in the city jail for a period of not less than ten days nor more than 30 days for each offense, and shall be compelled to work at hard labor until sentence is fully complied with.[56]

As can be plainly seen, this was aimed directly at striking miners present in the mining section, to make them go to work or leave the state. It was also aimed at preventing any more disturbances in the coal fields. The state was still looking upon all miners who went out on strike as being radicals, and thought this one good way to run them out of the state. Attorney-general Hopkins said that no man could be compelled to mine coal, and that a man could quit work when he pleased, but could not quit honest employment and be a loafer depending on charity if there was work to be had in the community. Hopkins was referring here to strike benefits being given the miners by unions in Kansas and Illinois.

Most of the towns passed these ordinances, apparently arousing no opposition as being distinctly un-American except from the miners them-

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56. "Forced Labor in Kansas," New Republic, XXIX (January 25, 1922), p. 240.

selves. These ordinances were drafted without reference to the industrial court, and the court wasn't responsible for their issuance. It is reported that Governor Allen consented to them against his better judgment [57] in the hope that they would drive the troublemakers out of the coal fields. Judge Huggins is reported to have been opposed to the ordinances and emphasized the fact that the court had had nothing to do with their passage.

On January 12, 1922 Howat issued a lengthy document from his jail cell ordering his supporters to return to work.[58] He said that the purpose of the strike had been accomplished, in that it had shown that the Kansas Industrial Court Law had failed in its purpose of doing away with strikes and industrial turbulence. He accused Lewis, Governor Allen, and the operators of working in opposition to the aims of the Kansas miners' organization, but asserted that the 4-months strike had been successful nevertheless. Attorney-general Hopkins said Howat had called off the strike to save his face, and that the vagrancy ordinances had thrown fear into the miners,making them realize that if they continued to loaf, i.e. strike, they would be picked up and sent to jail.[59] It is hard to judge just what effect these ordinances did have on many of the men returning to the mines. The attorney-general also made the statement that many of the returning miners would find their places filled by men supporting Lewis, and that these men certainly wouldn't be discharged

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57. Feis, op. cit., note bottom of p. 825.

58. Topeka Daily Capital, January 13, 1922.

59. Loc. cit.

to make way for the returning strikers. These returning men would have to take what jobs were left, and the rest go on the waiting list.

The final chapter in this dispute came on January 15, 1922, when Circuit Judge Samuel A. Dew refused to grant Alexander Howat, the deposed Kansas mine leader, an injunction against international officers of the United Mine Workers, to keep them from continuing the provisional organization.[60] John L. Lewis hailed this as a vindication of the long-established policy of the union of observing contracts with employers. The deposition of Alexander Howat was not permanent, however, as he was reinstated in the union and re-elected to the presidency of district 14 in 1929.[61]

Now why didn't the industrial court take more vigorous action, and why did they mostly stand on the sidelines during this struggle? The court made an explanation of its attitude. It based its non-activity mainly on the fact that there wasn't an emergency requiring the court's intervention. According to the court, during the progress of the strike, there were only two weeks of complete shut-down, and succeeding the first two weeks, mining operations were gradually resumed.[62] In this period there was no abnormal demand for coal, the available supply from within and without the state being more than sufficient to meet the demands of

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60. Ibid., January 15, 1922.

61. Gagliardo, op. cit., p. 143.

62. Second Annual Report, p. 10.

the public. Then, the court said that they had originally agreed to stand aside and let the national union settle the question, which it eventually was instrumental in doing. If they could settle the question before a serious fuel shortage developed they were to be left free to do so. The court also took the view that there had been no actual controversy between employer and employee, the only sort of controversy the court had the power to settle according to the industrial law. Whatever the merits of the arguments, it did add further proof of the inability of the court to actually prevent industrial disputes from deteriorating into work stoppages and strikes.

The next important strike occurring after passage of the industrial court law was the Packing Strike of December, 1921. This strike involved the Big Five Packers, which included the Cudahy, Wilson, Morris, Swift, and Armour companies. During the World War the employees of these concerns were working under an award as to wages and working conditions made by Federal Judge Alschuler, acting as federal administrator under the Bureau of Conciliation of the United States Department of Labor. This agreement expired September 15, 1921, and the packing concerns thereupon installed what was termed a plant assembly representation plan, whereby the employees of the various plants elected their representatives as members of the plant assembly, the employer also designating members of such assembly on its behalf, and these plant assemblies would then negotiate and determine the terms of the contract of employment.[63] These assemblies negotiated a

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63. Ibid., p. 11.

wage contract which was a very substantial reduction over those wages received under the Alschuler administration. A strike vote in the Big Five plants was taken by members of the Amalgamated Meat Cutters and Butcher Workmen of North America, authorizing the executive board of that organization to call a strike in case the packers failed to meet their demands, and on December 1, 1921, a strike call was issued from Chicago by the butchers union.[64] It was to take affect December 5, and was to affect all plants of the Big Five packers in the United States.

Mr. Dennis Love, secretary of the packers union, said the strike had been called because the plant assemblies, which had voted for a 6% wage decrease, did not represent the workmen and expressed opposition to the action taken by these assemblies.[65] Following the announcement of the strike, attorney-general Hopkins filed a petition asking the industrial court to investigate into the proposed strike. He charged in his petition that the parties to the dispute were conspiring, contrary to the industrial court law, to bring about the cessation of an essential industry.[66] The public interest was affected because 10,000 workers were affected by the strike order, and the cessation of the packing industry would shut off a large part of the meat supply of the state.

Following this, subpoenas were issued for certain officers of the local unions, as well as superintendents of the packing plants, to appear

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64. Loc. cit., Kansas City Star, December 1, 1921.

65. Topeka Daily Capital, December 2, 1921.

66. Ibid., December 3, 1921.

before the industrial court in Kansas City. The union early showed a determination to both strike and defy the industrial court. The union workmen were ordered to take all their tools home. Pickets from the packing union challenged the authority of the court by walking the street in front of the city hall in Kansas City, exhorting witnesses subpoenaed by the court not to acknowledge the summonses. Only one union official appeared at the hearing; all packer's representatives came.[67] The court also informed the strikers that if they ceased work on Monday morning, when the strike was to take place, they were no longer employees of the packing industry and could not regain their old positions without the consent of their employer, and that the court's concern after December 5 would be wholly with the employer and those who took the places of those going out on strike, and to further see that the industry operated continuously and efficiently.[68]

Attorney-general Hopkins, after the union officials had refused to appear before the industrial court, applied to the district court to order the 16 union officials to appear and testify. Before going into the district court, the members of the industrial court issued an order taking jurisdiction and forbidding either the packers or the employees to make any move until after a further hearing of the court.[69]

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67. Kansas City Star, December 3, 1921.

68. Second Annual Report, p. 12.

69. Kansas City Star, December 4, 1921.

That order amounted to a temporary injunction in its effect and scope. The same day the industrial court applied for aid from the district court, the international headquarters of the union informed the local officials to ignore any pleas to halt the strike action scheduled for the fifth, unless word was received from headquarters. They blamed the industrial court for not preventing the wage reduction voted by the plant assemblies in November, 1921.

The district court subpoenas were obeyed by all but one of the 16 union officials to whom they were issued. Five of them were sworn in to give testimony.[70] The same day the three industrial court judges warned the mayor of Kansas City that unless the crowds of strike sympathizers about the packing plants were dispersed by noon of the following day, they would recommend to the governor that the militia be called out. The court, in effect, was prohibiting all picketing, even peaceful, which was one of the powers given to the court by the industrial law. Picketing in this instance even referred to the strikers loitering on the streets in the vicinity of the packing plants, whether or not they were doing anything in the way of active picketing.

The union remained defiant through all of this activity. Mr. E. W. Jimmerson, St. Louis, who was in Kansas City directing the packing strike, defied the industrial court in a speech before 2500 striking packing

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70. Ibid., December 5, 1921.

house workers. "If the industrial court would call on me to end this strike before you win your fight, I would go to jail before I'd obey their order."[71] He constantly referred to the industrial court as "Allen's pet dog", and endeavored to outline the conditions on which the striking employees would go back to work. The crux of his terms was the re-establishment of the federal arbitration court with a presiding judge as fair-minded as was Judge Alschuler, whose term expired with the agreement in September.

Immediately after the strike began, on December 5, 1921, it was apparent that it would never gather much force. By the 6th. and 7th. it was already losing strength. The packers estimated on December 6 that meat deliveries were 75% of normal. Men were being hired and some strikers were returning to work. The labor leaders kept up their assertions that from 85 to 98 per cent of the employees affected by the wage cut were still out on strike. On the 7th. the Big Five announced that they were meeting the normal demand in Kansas City.[72] Employees who answered the strike call were going back to work in large numbers, plant officials reported. The packers held that workers were returning to work because they no longer feared possible action from the crowds of the idle. These crowds had been prevented from congregating near the entrances to the packing plants. So it seems as if the non-picketing order and the policy of the plants to remain in operation despite the strike had thrown the tide against the strike element.

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71. Ibid., December 6, 1921.

72. Ibid., December 7, 1921.

The industrial court spent most of its times keeping an eye on the situation, and members made tours of the plants, assuring themselves that the work was going as per usual. Judge J. H. Crawford reported that it appeared as if the plants were operating all departments with skilled hands and that conditions were about normal.[73]

There was one great difference between the packing strike as it was carried on in Kansas City and Wichita, and the methods used in Chicago, the seat of the packing industry. There, blood was shed and there were numerous clashes between police and strike sympathizers. There was none of that in the Kansas section, probably due largely to the assertion of the industrial court that it would enforce the anti-picketing order with the state militia if it came to that. Also the local police cooperated with the court in preventing congregations of strike sympathizers near the plants where outbreaks could very easily have occurred. Even the strike leaders in Kansas City urged the strikers not to use force and to scrupulously obey the anti-picketing order.[74] No doubt they feared martial law and the effect it would have upon their strike, and what they were trying to accomplish. A few radical and passionate leaders now and then counselled the disregarding of the order,[75] but for the most part cooler heads prevailed.

Normal production in the packing plants had so far been resumed by December 21 that attorney-general Hopkins announced that the indus-

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73. Topeka Daily Capital, December 8, 1921.

74. Ibid., December 7, 1921.

75. Ibid., December 9, 1921.

trial court was practically out of the affair.[76] He said that there then existed neither a controversy between employees and employers, nor a cessation of production, the two causes for action on that part of the court. There was no controversy between employees and employer because most of the old workers had been replaced by new ones, who naturally were not part of the dispute; therefore, there was no quarrel between the workers and the plants. Then, too, since normal production had been nearly achieved again, at least enough to supply the demand at that time of year, there was no threat to the public from a meat shortage. The strike had just about ended in a fiasco for the striking workers.

On January 18, 1922, the Federal Government made an offer to mediate the packer's strike. Officials of the Big Five, however, declared that they saw no need of federal mediation.[77] Plant conditions were normal, and as far as they were concerned, there was nothing to mediate -- the strike was over. As time went on more strikers returned to work, and where they didn't, new workers were put on in their stead. Finally, it became clear even to the remaining men out on strike that the whole affair was a complete failure, and that the only thing to do was to return to work. On February 1, 1922, by unanimous vote, 600 packing house strikers ended the strike against the packers in Kansas City.[78] Union headquarters in Chicago had recommended that the strikers vote to end the strike because to continue it would only work hardship on the

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76. Ibid., December 21, 1921.

77. Kansas City Star, January 18, 1922.

78. Ibid., February 1, 1922.

families of the strikers.

Immediately hundreds of the men showed up for their old jobs and found them filled. The packing houses said they had all the men they needed, and did not intend to discharge men hired when the old employees were out on strike. The number of idle men was put at 2000. They received small strike benefits for awhile, but most of them got behind on such things as rent and groceries. They hadn't won their strike, and had only created a civic problem.

Now there was criticism from several points about the part played by the industrial court in the packer's strike.[79] Most of them agreed that the court had acted tardily. Some thought that the court should have stepped in when the plant assemblies voted for the 6% wage reduction to be sure it was fairly entered into,and represented the desires of all parties. Apparently the court was under the impression that the workers had voluntarily accepted the wage reduction. There was criticism also that all the court did was to enforce the anti-picketing provision of the industrial law, preserve order, and prevent bloodshed. Certainly they had no quarrel with this aspect of the court's actions, but they thought that along with it should have been included a vigorous attempt to step in and fix wages and hours in the packing plants in order to prevent the threatened strike.

Judge Huggins, in replying to these critics, defended the court's

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79. Herbert Feis, "The Kansas Court of Industrial Relations, Its Spokesmen, Its Record," Quarterly Journal of Economics, XXXVII (August, 1923), pp. 705-733.

actions during the strike.[80] He said that all the information reaching the court before the strike took place was to the effect that the workers had accepted the 6% wage decrease declared by the plant assemblies. Then he mentioned that only a small percentage of the packing house workers had desired to strike, proven by the way in which they flocked back to the plants following the abolition of picketing by the industrial court. Since this resulted in nearly normal production there was no great emergency, no threat to the public welfare through a meat shortage, and therefore, no especial cause for interference on the part of the court. By keeping order around the plants so they could be operated, said Judge Huggins, the court had fulfilled its main duty of ensuring continuous production. He was very pleased with the work done by the court up to the end of the packing strike and emphasized the fact that it had not failed in any respect.[81]

As to the probable action of the court if there had developed a serious situation, that is if the plants hadn't have been able to maintain production, it is mere speculation. Probably the court would have taken over the operation of the plants if workers could not have been found to run them. The whole thing hinged on the effectiveness of the court in enforcing the anti-picketing provision and in maintaining order, because it was no doubt largely due to this that men flocked back into the plants to resume operations. But the strike had been a

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80. Letter by W. L. Huggins to The Survey, March 18, 1922, p. 968.

81. W. L. Huggins, "A Reply to Samuel Gompers," The Rotarian, XXI (October, 1922), pp. 176-177.

failure from the start and the court had merely assumed that an emergency requiring active intervention had not occurred.

The last strike to be mentioned in connection with the industrial court was the strike of the Railway Shopmen, which occurred in 1922. The strike, called July 1, 1922, was national in scope and included the lines maintaining shops in Kansas. Prior to the calling of the strike, the shop crafts and the employing railroads had submitted their controversy with reference to wages and working conditions to the Federal Labor Board, and had received a decision from that board with which the shop crafts were dissatisfied, and the strike was called as a result.[82]

The industrial court also played a minor part in this strike. As in the packing strike it spent most of its time in seeing that order was maintained and that there was no intimidation by either party. The court explained its stand in the following manner:

> All the principal railroads of Kansas are interstate carriers and do very largely an interstate business, so that the men employed in the shops were to that extent also engaged in interstate business. While the men engaged in the shops within the state of Kansas might in the first instance have submitted their controversy to the Kansas Industrial Court, yet the Federal Labor Board also having jurisdiction of the dispute, and both parties having submitted their controversy to that tribunal, the Kansas Industrial Court was deprived of any jurisdiction so far as the merits of the dispute were concerned; so that upon the calling of the nation-wide strike, under Section 4 of the industrial act, it became the duty of this tribunal to see that all of the provisions of the industrial act were enforced, including the provisions against picketing, intimidation, and conspiracy to interrupt transportation.[83]

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82. Third Annual Report, p. 9.

83. Loc. cit.

Still, there was a strike in Kansas, and such a thing was outlawed by the industrial law. This is merely another example of the fact that something more fundamental is needed in industrial controversies than the mere outlawing of certain actions and practices. Here was a strike, and striking was in stict violation of the industrial court law. The only conclusion, coming on top of the other strikes which have been mentioned, is that the court was utterly unable to actually prevent strikes. True, many controversies were submitted to the court, they were adjudged, and the decision was adhered to by the parties, which otherwise might have resulted in strikes. In that sense it did prevent many strikes. But, in major cases, such as the national packing and railroad shop strikes, the court could do nothing.

The industrial court still might have assumed jurisdiction in the matter, regardless of the interstate character of the employment, and the jurisdiction of the Federal labor board. Something similar to this had happened before and the court had assumed jurisdiction. In March, 1920, members of the International Brotherhood of Stationary Firemen and Oilers, as existing in Kansas, came before the court claiming insufficient pay. The nine roads named as respondents were engaged in both interstate and intrastate commerce. The court assumed jurisdiction, found the wages were insufficient, and made an order applying only to actual Kansas residents of the union.[84]

The carriers had been unwilling to submit the matter to the state

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84. United States Bureau of Labor Statistics, Monthly Labor Review, II (August, 1920), p. 142.

industrial court, and denied the right of that court to assume jurisdiction, as they were engaged in interstate commerce, and that under the Transportation Act of 1920, they were paying wages fixed by the Director-General of the United States Railroad Administration, and that the industrial court had no jurisdiction on account of the provisions of the transportation act of 1920 for settlement of disputes by the railroad labor board.

The industrial court based its right to take jurisdiction on a decision of the United States Supreme Court, [85] setting forth the competence of a state to govern its internal commerce and adopt measures of a reasonable character in the interests of its people, although interstate commerce might incidentally or indirectly be involved. It was decided that any action that the court might take would be presumed to be fair and reasonable, and if so, no injury could come to interstate commerce, and no unnecessary burden be imposed upon it. Neither could it be presumed that the Federal Labor Board would render an award which would be unfair to the public, nor that the court of industrial relations would refuse to approve a reasonable order made by the labor board if such was accepted by the disputants.

In other words, the court was saying that it was possible for the state and federal laws to exist side by side without conflict, leaving each free to act in its field, and providing a ready means of adjustment if anything in the nature should arise.

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85. Simpson v. Shepard, 230 U. S. 298.

The court, as has been hinted, spent most of its time preventing picketing and seeing that no one interfered in any way with transportation on the railroads. In this the court was very effective. Because of this activity the maximum amount of freight was kept rolling on the railroads during the duration of the strike. In December, 1922, the industrial court sent out questionnaires to the railroads operating in Kansas for the purpose of obtaining their statements as to shop employment during the strike period, the amount of freight traffic carried, as well as the amount of extraordinary expenses incident to the strike incurred by them from July 1, 1922 to January 1, 1923. These returns [86] showed how effective the court was in maintaining adequate transportation facilities in Kansas during the strike period. The report of the court, based on these questionnaires, showed that, so far as ton miles of freight hauled were concerned, during the strike period the total for all railroads in Kansas was practically the same as for the same period in 1921. Was the industrial court solely responsible for this? Probably not entirely, but certainly the keeping of order, the prevention of intimidation, and the leaving of the railroads free to operate with the help they had, contributed much to the continued efficiency of railroad transportation in the state. By the time this strike occurred unions had come to accept the fact that one of the main functions of the court, and something it would not hesitate to do, was to prevent picketing and other kinds of coercion common to labor squabbles. The day after the

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86. Third Annual Report. pp. 10-21.

strike began, a union official in Topeka announced that there would be no picketing by the striking shopmen because it was prohibited by the industrial court law.[87] This was certainly a radical departure from the former conduct of strikes in Kansas.

This concludes the discussion involving the industrial court and strikes called after it was formed, the adjudication of industrial disputes brought before the court by various parties, its investigations to find out facts and data concerning different phases of industrial enterprise in the state so that continuous and efficient production in the essential industries would ensure the public adequate necessities, and the subordinate duties attached to the court by acts of the legislature in 1921. It is hoped that a clear picture has been presented as to how the court conducted itself in attempting to fulfill the duties conferred upon it by the special session of the legislature.

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87. Topeka Daily Capital, July 2, 1922.

CHAPTER V

THE INDUSTRIAL COURT LAW BEFORE THE COURTS

The Kansas Court of Industrial Relations law was an intensely litigated piece of legislation. Roughly speaking, two sets of cases appeared in the courts relative to the Kansas act. One group of cases concerned Alexander Howat, the afore-mentioned president of the Kansas miners, and his attempts to get the court declared unconstitutional. The other set of cases grew out of an industrial court ruling involving the Charles Wolff Packing Company. It was here that the court sustained its defeat at the hands of the United States Supreme Court. This final chapter will take up these cases, and will bring out the reasons for the attitudes the various courts took concerning the constitutionality of the law. The industrial court will be followed through the courts to its demise in 1925.

Shortly after the industrial court law became effective, February 22, 1920, reports came from the coal fields in Crawford and Cherokee counties that Alexander Howat, president of the United Mine Workers, district 14, was openly defying the law and threatening to call a strike for the purpose of testing certain provisions.[1] There is no doubt but what Howat was openly defying the court and its principles. In his fourth report to the biennial convention of district 14, United Mine Workers of America, Howat declared the court inimical to organized labor, was an insult to every union man, and was a disgrace to the

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1. Court of Industrial Relations, First Annual Report, State of Kansas, 1920, p. 163.

state of Kansas.[2] He also foresaw the destruction of organized labor, not only in Kansas, but in the United States if such laws were allowed to exist on our statute books. The industrial court received its information concerning the calling of a strike from an unidentified miner. This miner informed the court that Howat and his officials had been doing field work among the miners and miners' locals, endeavoring to arrange for certain delegates to be sent to their convention in Kansas City, "and they are expecting to select delegates to be sent from each local instructed to vote a general strike in Kansas during the session of the convention."[3]

The information was apparently reliable, because the convention did vote backing to Howat at such time he should deem it advisable to call a strike. Then, in an address before the Illinois miners' convention late in the same month, Howat castigated the industrial court law, announced his determination to fight the law "whether or not my bones rot in a prison cell", and said that, "Be the consequences what they may, there is no power on earth, injunction or otherwise, that will make me call off this strike. This strike will be called by me in the very near future."[4] The Illinois' miners pledged their unqualified support to Howat and his 12,000 Kansas miners in whatever action they might decide upon.

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2. Topeka Daily Capital, March 9, 1920.

3. Loc. cit.

4. Ibid., March 21, 1920.

As a result of all this the industrial court had a temporary order issued by Judge A. J. Curran in district court, restraining Howat and 47 other district officials of the U.M.W. from interfering with coal production in Crawford and Cherokee counties.[5] The order was issued after Howat publicly declared his intention to call a general coal strike early in April. Governor Allen justified the restraining order on the grounds that Howat was simply going to call the strike to defy the industrial court, and also on the grounds, that by issuing the order, the court was preventing economic waste, loss of wages to labor, violation of the law, and suffering to the people of Kansas.

The first conflict between Howat and the court, however, broke out over something other than the calling of a strike. It took place during the period when Howat was being restrained by the industrial court from calling a general coal strike. The industrial court began an investigation in the Kansas coal mining industry upon the complaint of certain miners of district 14. About 2000 miners were out on strike at the time. It wasn't an organized strike, called by unions officials, but a walkout in protest against the award which had been made by President Wilson's coal wage commission. Howat wanted it understood that "The men are out on their own initiative."[6] He said there was much discontent throughout the coal field over the commission's award.

The industrial court immediately began its investigation into the

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5. Kansas City Star, March 30, 1920.

6. Topeka Daily Capital, April 6, 1920.

situation. The investigation was directed toward working conditions in the mines with reference to hours of labor, provisions for safety and sanitary conditions; miners' incomes with relation to living costs; plans of mining as to continuity of production; conditions of the mines with reference to future supply, and the cost of production as compared with previous years; school and church privileges and general social surroundings; and complaints of mine workers, or owners, or the public.[7] In carrying on the investigation between 45 and 50 witnesses, including operators and miners were subpoenaed to appear as witnesses before the industrial court. Along with these men, 25 union officials were ordered by attorney-general Hopkins to appear before the court and state why the miners went out on strike and on whose orders. According to the miners the strike was for one day only and that the men would report for work the next morning.[8]

Among the union officials ordered to appear before the industrial court were Howat, August Dorchy, vice-president of district 14, and Thomas Harvey, secretary-treasurer of the local. After these men had been served with an order from Judge Curran of the district court to appear before the court and give their testimony, they were in another room of the building where the industrial court was sitting. They told the sheriff, who went to them because of an inquiry by the presiding judge, that they were having a little meeting of their own and would be through in about 10 minutes. They didn't appear after that, and apparently

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7. State v. Howat, 107 Kan. 423, p. 425.

8. Topeka Daily Capital, April 6, 1920.

showed no disposition to obey the process.[9] Howat then issued another of his diatribes against the court and Governor Allen, saying that the miners didn't recognize the industrial court.[10]

As a result of this action, Howat was taken into court on a contempt charge. When first brought before Judge Curran he again threw down the gauntlet of defiance to the industrial court, then backed up, pleaded guilty, changed his mind again, and finally concluded to stand trial.[11] Howat was committed to jail, but when he had asked for a continuance in order to make his defense, he was released on $500 bond to reappear before the district court. Howat either had to completely give in and appear before the industrial court as a witness, or refuse and go to jail for contempt of the district court.

In the meantime there was growing evidence of dissatisfaction among the miners in the district toward Howat and his actions[12] and many were going back to work. By April 8 all mines were working except one which was not because of certain mechanical difficulties. This dissatisfaction directed toward Howat was something often claimed by the industrial court and the state officials prosecuting Howat, but in the clutches this dissatisfaction seemed to melt away, leaving nothing but fairly firm support. The miners were probably going back to work because they were getting hungry, not to show that they were opposing

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9. 107 Kan. 423, p. 429.

10. Topeka Daily Capital, April 7, 1920.

11. Kansas City Star, April 7, 1920.

12. Ibid., April 8, 1920.

their leader. It will be remembered that the miners had already announced that they would be returning to the mines in a short while, as the "strike" was only a temporary affair directed in protest against the award of President Wilson's coal commission.

When Howat's case came to trial, he and the officers mentioned with him,were sentenced to jail until such time as they would consent to appear before the industrial court as witnesses and answer questions.[13] In response, Howat's counsel filed in the district court an answer consisting of 23 paragraphs. The first 21 alleged that the act undertaking to create the court of industrial relations was void because it was in conflict with various provisions of the state and federal constitutions, and that, therefore, it had no legal existence, and the district court was without jurisdiction to enforce attendance upon it. The 22nd. paragraph denied the violation of any lawful order of the district court, and the 23rd. was a general denial.[14]

While in jail, Howat resumed his attacks upon the court and Governor Allen. Now he included Judge Curran in his remarks. For some reason or other the sheriff gave Howat the run of the jail and allowed him to make a speech from the front porch to an assembly of miner sympathizers. Here he referred to Governor Allen as "that skunk, that tyrant, that would-be destroyer of organized labor, that oppressor of human rights."[15] After his sentence to jail, Howat was once more

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13. Ibid., April 9, 1920.

14. 107 Kan. 423, p. 425.

15. Topeka Daily Capital, April 13, 1920.

assured that he wasn't losing his control of the Kansas miners, as many people were wont to believe.

Many miners quit work throughout the Pittsburg area in protest to the imprisonment of Howat. Miners' meetings were held around the district protesting the jailing of their president. It was at this time that evidence was once more presented measuring the part that anti-alien sentiment throughout the country was playing in influencing many every-day events. We have mentioned that it, in part, lay behind the agitation for an industrial law in Kansas in 1920. The state began to fear that radical labor elements made up of aliens, not familiar with our system of government, would try and take over the fight against Howat's imprisonment. It was even reported that hundreds of socialists were working in railroad shops and were planning to stage a demonstration in favor of Howat.[16] As a result of this ill-founded fear, Howat and the other officials imprisoned with him, were removed from the jail at Girard and were taken elsewhere. Immediately, however, the union officials were released from jail on $2,000 bond pending appeal of their conviction to the supreme court of Kansas.

Immediately before Howat got into trouble with the industrial court, and the district court, for refusing to testify in the investigation of the coal-mining industry, it will be recalled that a restraining order had been issued forbidding Howat to call a strike in the coal fields. Now, after the miners had gone out because of the imprisonment of Howat, Judge Curran issued an order to Howat and the other union

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16. Kansas City Star, April 14, 1920.

officials to order the miners back to work, or show cause for refusing to do so April 27.[17] The motion for this wider and supplementary order charged that the strikers had quit work simultaneously and that the movement was directed against the industrial court law, and for the purpose of violating that law by causing a curtailment in coal production. Howat issued a statement saying that the miners themselves would decide whether or not they would return to work.[18] However, the committee which had been in charge of the demonstration in sympathy for Howat began urging the men back to work.

The hearing on the restraining order was heard before Judge Curran on April 27, and on April 30 he issued a temporary injunction, which had been sought by the state, to prevent the calling of a strike in the Kansas coal mines. He did not make the injunction mandatory, as to making Howat call the miners back to work, as evidence of the state mine inspector, and officials of the operators association, showed that the miners by this time were back at work.[19] He said, however, that if further proceedings showed that the miners were not working, a mandatory order would be issued by the court.

Alexander Howat appealed his contempt conviction, for refusing to appear before the industrial court and testify, to the Kansas supreme court.[20] Counsel for Howat attacked the validity of the industrial court

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17. Ibid., April 17, 1920.

18. Topeka Daily Capital, April 20, 1920.

19. Kansas City Star, April 30, 1920.

20. State v. Howat, 107 Kan 423, 1920.

law before the supreme court. That court said, however, that the only question involved in the proceedings was whether the defendants could be required to attend as witnesses before the Court of Industrial Relations. It said that it involved no more than the right of a witness to refuse obedience to a subpoena. Most of the objections of a constitutional nature raised in the supreme court by counsel for Howat were directed to the provisions of the act creating the court of industrial relations. The supreme court ruled that the validity or invalidity of these objections had no possible bearing on the disposition of the case at hand.

The Kansas court did, however, advance a few arguments justifying the creation of the industrial court, since the defendants had attacked its validity. Saying that the court was partly an administrative body, the supreme court was of the opinion that the legislature surely had the power to pass laws designed to protect the health and safety of miners, and could authorize an administrative body to make rules in that connection having the force of law. The supreme court echoes the attitude of the principal framers of the industrial law in saying that the police power of the state could be used to protect the public welfare, and that the industrial court was merely the instrument of this power.

As Howat and the other officials had refused to testify at a hearing held by the industrial court in conjunction with its investigation into the coal mining industry, the supreme court ruled that their conviction could not be challenged on the grounds that the industrial court didn't have the right to institute such an investigation. No reasons were suggested to the judges why the legislature could not authorize the court of industrial relations to conduct an inquiry into conditions

existing in the mining field, and in furtherance of the inquiry require the attendance of witnesses.

The supreme court also upheld the right of the industrial court to appeal to a district court for an order requiring attendance at its hearings or obedience to its orders, on the grounds that since the industrial court was mostly an administrative body, it had no power to enforce its own process. The conviction of Howat on the contempt charge, then, was upheld by the Kansas supreme court. It was then appealed to the United States Supreme Court. As it was appealed to this court in conjunction with another case arising out of the following circumstances, the disposition of them in that court will be taken up after these circumstances have been looked into.

In Chapter IV a discussion was undertaken of the various strikes which took place in Kansas after the passage of the industrial court law. One of those mentioned was the so-called Howat strike of 1921, growing out of a minor strike called the Mishmash strike. This had been a dispute over back wages allegedly due Mishmash by a coal mining company. It figures in the story again here because, in calling that strike, Howat violated the industrial court law and Judge Curran's injunction. It was, in fact, the first officially-called strike of the coal miners in Kansas after the passage of the industrial court law. Two hundred miners were affected by Howat's order, employees of the George K. Mackie Fuel Company, where Mishmash had formerly been employed.

Governor Allen announced, as soon as the strike had been called, that the only question to be determined by the industrial court was whether or not the closed mines (there were two involved, both belonging

to the above-named company) should be operated under a state receivership as authorized by the industrial law. The prosecution of Howat under the criminal provisions of the law were in the hands of the attorney-general and the criminal courts.[21] Before taking any direct action, however, attorney-general Hopkins wired the Crawford county attorney to make an investigation of the reported strike. The report apparently convinced Hopkins that Howat had actually called the strike because Howat and four other members of the district board were arrested for it. Bond was fixed at $500 and the defendants were all released on their own recognizance.

There was, in fact, no point in Howat denying having called the strike, because before he was brought before the district court, a miners' union official at Scammon, where the strike had been called, had showed the original strike order to Judge Curran. When brought before Judge Curran, Howat readily admitted calling the strike.[22] He said he called the strike solely to get injustice for Mishmash, a poor boy being exploited by a "greedy corporation."

A postponement for the hearing of a week was granted by Judge Curran. In urging a continuance, the defense counsel suggested to the court that only two mines were made idle by the strike order, and stressed the fact that the supply of coal to the public was not menaced as a result. This seemed to indicate that the defense attorneys would offer as a defense that the union officials actions had violated the letter of

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21. Kansas City Star, February 5, 1921.

22. Topeka Daily Capital, February 8, 1921.

the state industrial court act, but not the spirit.[23] Judge Curran reminded counsel, however, that Howat was not being tried for violating the industrial court law, but was accused of violating an order of the district court. He went on to say that the constitutionality of the industrial court law would not figure at all in the case.

The defense attorney made two attempts to halt the hearing when it was taken up again. They filed two demurrers, one claiming that the evidence submitted failed to properly show that the defendants had called a strike, and denying that any of the district board members had had anything to do with the calling of the strike. Judge Curran merely pointed to the admission of Howat at the preliminary hearing that he had called the Mishmash strike.

When asked by an attorney for the industrial court if the district board had considered that the calling of the strike was in violation of the injunction, and that it might end in a jail sentence for the members, Howat replied:

> We considered only one thing, and that was we were out for justice for this boy and his widowed mother, at whatever cost. We did not believe that the injunction granted by Judge Curran meant that these miners had to be chained to their jobs whether they were paid or not. We believed that the injunction was aimed only to prevent a general tieup of all the mines, such as took place last winter.[24]

This explanation didn't impress anyone very much though. In the first place, the union had never pressed the company for the alleged back-pay before the

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23. Ibid., February 9, 1921.

24. Ibid., February 16, 1921.

creation of the industrial court. Therefore it seemed that the real purpose back of the strike call was defiance of the new law. Mishmash, on the other hand, had not worked at the mine for months, and was not pressing the payment very heartily. Howat got more to the point, then, when he added that it had never been the union's policy to go to a court for wage settlements. He said they had always gotten the worst of it, and so hadn't gone into the industrial court to recover payment for Mishmash. Also, he declared, the union considered the industrial court unconstitutional.

Judge Curran found Howat, and five other union officials, guilty of contempt for violating the district court's injunction, and sentenced them to one year in jail and also to pay all court costs.[25] Motion for a new trial was overruled by Judge Curran, and bond was set at $2,000 when defense counsel gave notice of appeal. The case was appealed to the Kansas supreme court.[26]

In the Kansas supreme court, the defendants attacked the validity of the injunction itself, and the constitutionality of the industrial court law. As far as the first point was concerned, the supreme court ruled that the state had a perfect right to use the power of an injunction to protect the public health and welfare. More emphasis, howeveer, was placed upon the attack on the constitutionality of the industrial law made by counsel for Howat and the other union officials.

The main line of attack by Howat's counsel was their attack on the constitutionality of the act creating the court of industrial rela-

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25. Kansas City Star, February 16, 1921.

26. State v. Howat, 109 Kan. 376, 1921.

tions because it contravened the fourteenth amendment to the constitution of the United States, in that it destroyed liberty of contract and permitted involuntary servitude on the part of workingmen. The court went into a long discussion refuting this argument, and it might be well to mention the main points in this opinion.

Much of the argument of the court in sustaining the industrial court law was similar to that used by those originally proposing the establishment of the industrial court. It brought out that the public is usually the greatest sufferer in industrial disputes, that the Kansas legislature realized this and the need for industrial cooperation. But, if the two parties to industrial disputes couldn't, or wouldn't, voluntarily get together and collectively iron out their difficulties "why should they be permitted to start a fight, which quickly brings upon the public a recrudescence of barbarism?"[27] In other words, the state had a right to step in and require them to settle their differences in a peaceful manner.

The supreme court went on to say that in dealing with the constitutionality of the 1920 legislation it would be necessary to bring out a few disagreeable facts concerning the industrial history of the United States. The Pullman Strike of 1894, with all its violence and intimidation, was mentioned by the court as a good example of rampant labor leadership and the inherent evil in industrial warfare directly resulting. The court

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27. Ibid., p. 395.

pointed to the strike history of the United States during the World War as another blot on our industrial record.

> Between April 6, 1917, and November 11, 1918, the period of our participation in the world war, there were more than 6,000 strikes in the United States, some of which imperiled winning the war. When the whole world was shaken by the earthquake of the world war, and the flower of this country went forward as willingly as a bridegroom goes to his bride, to hurl themselves into the raging pit of hell in Western Europe, their fate there depended on patching up strikes at home.[28]

Therefore, the court was implying, the right to strike was not at all unlimited and should be curbed to some degree. This was one of their bases for upholding the legality of the Kansas court. The supreme court went on to outline the general coal strike of 1919 and all the suffering it had brought to the people, including in its discussion the opinion that Alexander Howat's district was ruled in medieval fashion.

The court also based its justification for the establishment of the industrial court to a great extent upon the world conditions in 1920. It said the following, which seems to be its principal justification of the industrial court.

> At the beginning of the year 1920 it had not been demonstrated that the world would escape bankruptcy as a result of the war. The problems of economic and industrial reconstruction were not merely local and national, but were international in character. Early hopes of a speedy and easy transition from war to peace conditions were not realized. Instead of that, the situation, always grave, was complicated and aggravated by continued rise in prices, by profiteering, by social unrest fanned by radicalism, and by other ugly influences. The bitterness of the struggle between those who ought to be partners in industry became acute, the only remedy for the high cost of living -- joining forces in greater production — was rejected and economic readjustment promised little but economic turmoil.[29]

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28. Ibid., p. 398.

29. Ibid., p. 402.

It was under these conditions, then, that Governor Allen called the special session of the legislature to consider what might be done to protect the people from dislocations in Kansas certain to ensue from these conditions, special emphasis, of course, being put on the continued production of those things referred to as the necessaries of life.

The supreme court, taking the view again that the court was in reality more of an administrative board, said it was an impartial body with adequate facilities to promulgate just and reasonable regulations to govern the relationships between capital and labor, and that with a group of this kind to appeal to industrial disputants had no moral right to resort to striking or lockouts. The court even took the view that government could take action to prevent striking because it always affected the public welfare.

In conclusion the supreme court brought out the fact that heretofore industrial relationships had been regarded as existing between only two members -- industrial managers, and industrial workers. Now, however, there was a third member, the public, which was to see to it that business did not come to a standstill because of a controversy between the first two. Defending the act and its principles, the court said that

> The privilege of industrial managers to organize is not disputed. The privilege of industrial workers to organize is expressly recognized. Collective bargaining between the two organizations is not only encouraged, but is in effect placed on the plane of duty. The rights of society as a whole, however, are dominant over industry; and the state is under obligation to intervene to compel settlement of differences whenever failure of manager and laborer to agree endangers the public safety or causes general distress.[30]

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30. Ibid., p. 417.

On the basis of these arguments the Kansas supreme court affirmed the judgment of the district court in convicting Howat for violating the injunction by calling the Mishmash strike.

This case, along with the case[31] upholding the decision of the district court adjudging Howat guilty of contempt in refusing to testify before the industrial court, was appealed to the United States Supreme Court. This court decided both cases at the same time.[32]

In presenting these cases before the Supreme Court, Howat's counsel took the same line of attack as they had in the supreme court of Kansas -- attacking the constitutionality of the Kansas Industrial Court Act. They held that the district court was without jurisdiction to issue the injunction and that, therefore, they couldn't be punished for violating it. They held that the industrial court law was unconstitutional because it violated the liberty of contract; that it was in general violation of the 14th. Amendment; that it abridged the privileges and immunities of citizens, that the void sections were so intermingled with the other sections to cause the whole act to fall; and that the industrial court held legislative, judicial, and administrative functions.

In presenting the case for the state of Kansas, counsel first of all held that the cases presented no federal question. Then they held that the district court had authority, even without statute, to issue the order, that the injunction was authorized by the Kansas statute creating the industrial court, which was constitutional; that it was

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31. State v. Howat, 107 Kan 423, 1920.

32. Howat v. Kansas, 281 U. S. 181, 1921.

competent for a state to declare that strikes should be unlawful generally; that there was no constitutional right to strike; that the injunction could be supported by the power of the state to regulate industries affected with public use; that the strike called by Howat abridged the constitutional rights of the fuel company; and, finally, that if any provisions of the statute other than those making a strike unlawful should be invalid, it would not affect the validity of the strike provision.

Chief Justice Taft delivered the opinion of the Court. Right at the beginning he said that "We are of opinion that in neither case is the Kansas Industrial Relations Act presented in such a way as to permit us to pass upon those features which are attacked . . . as violative of the Constitution of the United States."[33] After going into a discussion of the act, its purposes, powers and its operation, Chief Justice Taft said that the Supreme Court obviously could not pass upon the constitutional validity of an act presenting such critical and important issues unless the case before it required it to do so. He recognized that the industrial court was misnamed court, and that it should have been called a board, because it was really an administrative body. He upheld, however, the right of such a body to compel the attendance of witnesses to give testimony.

The Supreme Court then held that the supreme court of Kansas had disposed of the cases without any consideration of the application of the Federal Constitution to the features of the Kansas statute of which com-

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33. Ibid., p. 556.

plaint was made. Even if those features of the law which had been attacked were void, the Court said that the state court had sustained in contempt convictions on general law, and that, therefore, the Supreme Court could not consider the Federal question.

The Supreme Court, in effect, was saying that the injunction suit in the district court was not the enforcement of the Industrial Relations Act, but was a proceeding wholly independent of that, and didn't depend upon the constitutionality of that act for its jurisdiction in granting the order. The violation was of an order of the district court, not of the industrial law, so constitutional questions didn't enter into it. Even if the industrial law was unconstitutional, it didn't give Howat the right to disregard an order of a legally-constituted state court requiring attendance to it. Nothing can justify the disregarding of a court order, unless the court itself has no legal basis or standing. "As the matter was disposed of in the state court on principles of general law, and not Federal law, we have no choice but to dismiss the writs of error."[34]

On July 1, 1921, Alexander Howat and August Dorchy, president and vice-president respectively of district 14, United Mine Workers of America, were charged with the violation of the criminal provisions of the Kansas industrial court law by calling the strike in February at the mine of the George K. Mackie Fuel Company, the so-called Mishmash strike.[35] Their prior conviction, it will be recalled, was on the violation of the district

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34. Ibid., p. 559

35. Topeka Daily Capital, July 1, 1921.

court's injunction against the calling of a strike. In the trial the presiding judge made it clear that the industrial court law was not being tried. He instructed the jury that the question to decide was whether Howat and Dorchy used their power to call the strike, thus hindering the production of coal.

The two were found guilty of a misdemeanor for violating the criminal sections of the Kansas law. No testimony was offered in behalf of Howat and Dorchy in the short trial. The defense counsel had rested without calling a single witness.[36] This was Howat's first conviction by a jury. It was understood when the verdict was brought in that three jurors voted for conviction on the felony charge on the first ballot. The felony charge, however, was soon disposed of. At one stage of the jury's deliberations, the reports stated, seven were for acquittal. Members of the jury, discussing their work, said that it was the general opinion of the jurors that the Mishmash strike had not been called to curtail production.[37]

Howat and Dorchy were sentenced to serve six months in jail and pay a fine of $500 by Judge Frank Boss of the Cherokee County district court. The judge also ordered Howat and Dorchy to give a bond of $2,000 each not to again violate the Kansas Industrial Court Act. Notice of appeal was given immediately and the two were turned loose pending this appeal. A motion for a new trial was overruled. As part of the motion requesting a new trial, counsel for the convicted union officials introduced an

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36. Kansas City Star, July 1, 1921.

37. Loc. cit.

affidavit drawn up by the jury which had found them guilty. The jurors said in this affidavit that they returned a verdict of guilty only because they had taken an oath that "They would be governed by the law as set forth in the judge's instructions."[38]

As far as the trial itself was concerned, Howat didn't think he had been given a fair one because there had been no miners on the jury. A jury of miners, it seems would have been his conception of a fair jury to judge his case. Howat also continued his vituperation against the court and Governor Allen after his conviction for violating the criminal section of the statute. He made a speech to a mass meeting of miners at Columbus, Kansas, at which time he charged that the industrial court law was drawn to benefit large corporations, and even went so far as to declare that three members of the Kansas supreme court were identified in the drawing up of the law. He flayed Governor Allen as "the man who tried to ride into the White House on the back of organized labor."[39] It was at this time that there was some talk of booming Allen for the presidency, William Allen White being one of the leaders of the movement. After his conviction Howat also made the statement that he would drop the strike as a weapon against the court and concentrate on organizing union labor, farmers and anti-court factions with the idea of getting control of the Republican party by putting anti-court candidates in the field for the Republican nomination for state offices.

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38. Kansas City Star, July 8, 1921.

39. Topeka Daily Capital, July 9, 1921.

Howat applied to J. C. Pollock, United States District Judge for Kansas, for a writ of habeous corpus, raising the question of the constitutionality of the Kansas act. Before the case was decided Howat dismissed the application and went to jail September 30, 1921.[40] There he declared he was willing to remain in jail until the industrial court was taken off the statute books.[41] Appeal was taken to the supreme court of Kansas, and on February 6, 1922, Howat was released from jail pending the final decision of the case. Before being released from jail pending this appeal, Howat and Dorchy had to post a $2000 peace bond not to call any more strikes. In support of his previous statement that he was willing to stay in jail until the industrial court was taken off the statute books, Howat announced that the only reason he was leaving jail now was so he could attend the international convention of the United Mine Workers in Indianapolis, after which he would return to finish his term.[42]

In the Kansas supreme court, then, counsel for Howat and Dorchy brought suit to have their conviction set aside, contending that their arrest, trial, and conviction and sentence were in violation of the rights guaranteed them under the laws and constitution of the United States.[43] On the authority of its decision in State v. Howat, 109 Kan. 376, the supreme court affirmed the district court's conviction of Howat and Dorchy for violating the criminal provisions of the Kansas act.

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40. Gagliardo, op. cit., p. 179

41. Topeka Daily Capital, September 30, 1921.

42. Ibid., February 7, 1922.

43. State v. Dorchy, 112 Kan. 235.

Appeal was then taken to the United States Supreme Court.[44]

Before this appeal was taken to the Supreme Court, however, something happened which altered the situation completely. After the Kansas supreme court had upheld the conviction of Dorchy and Howat, and before appeal was made to the Supreme Court of the United States, that Court had ruled that compulsory arbitration as applied to packing plants violated the Federal Constitution (Wolff Packing Company v. Court of Industrial Relations, 262 U. S. 522). This case will be brought up later in connection with the dispute between the Wolff Packing Company and the industrial court.

In the case now brought before them (Dorchy v. Kansas, 264 U.S. 286), the Supreme Court held, that for the same reasons given in the Wolff case, compulsory arbitration (or wage-fixing by the industrial court) was also unconstitutional as applied to the coal mines in Kansas. However, the Supreme Court said that the question to be decided now was whether or not Section 19 (the penal section under which Howat and Dorchy were convicted) was invalid, and had fallen as a part of the system of compulsory arbitration. If this part of the statute was so closely intermingled with the compulsory arbitration features of the act that it had to fall with the others, why naturally Howat and Dorchy couldn't be convicted under it; for, as the Supreme Court said, "If Section 19 falls as the result of the decision in the Charles Wolff Packing Company case, the effect is the same as if the section had been repealed without any

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44. Dorchy v. Kansas, 264 U. S. 286.

reservation."[45] The Court did make the observation that a statue had in part was not necessarily void in its entirety.

The court held that most of the provisions of the original act were very intimately connected with the system of compulsory arbitration, but whether or not Section 19 was was a question of interpretation and of legislative intent. It went on to say that the task of determining the intention of the state legislature in this case, like the usual function of interpreting a state statute, rested with the state court, and its decision as to the severability of the provision would be conclusive upon the Supreme Court. Therefore, in order that the Kansas supreme court could pass on the question of whether or not Section 19 fell with the system of compulsory arbitration, its judgment -- which had been rendered before the Wolff Packing Company case --was vacated. Judgment was reversed to allow the Kansas court to decide the point.

Section 28 of the industrial act reads as follows:

> If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court.

The Kansas supreme court said that, because of the pioneer character of the legislation, the legislature had so framed the act so that any invalid provision could be eliminated without affecting the others.[46] The Kansas court

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45. Ibid., p. 289.

46. State v. Howat, 116 Kan. 412, 1924.

also took exception to the Supreme Court calling the work of the industrial court compulsory arbitration.

> Justice was to be done between employer and employee, but protection of the public interest was to be paramount, and the public interest is not a subject of arbitration. Besides that, the constitution and functions of the tribunal forbade its classification as an arbitral body.[47]

As for the main question, that of deciding whether or not it was intended that the provision against using official power to call strikes in the industries named in the act should stand, even if the provisions relating to the regulation of wages be held unconstitutional, the Kansas supreme court said it should remain. "To free labor-union members from tyrannical domination by ruthless labor leaders, prevent meddlesome interference with the relation between employer and employee, and so secure continuity in production of coal, Section 19 was inserted in the law."[48] The conclusion drawn then, was that Section 19 was to be regarded as having the legal effect of an independent statute, making it a punishable offense for an officer of a labor union, acting in his official capacity, to call a strike of coal miners. The judgment of the district court in imposing upon Dorchy and Howat the penalties prescribed by the section in question was affirmed. Two justices of the Kansas court dissented, thinking that the act as a whole should fall as a result of the decision of the United States Supreme Court in the Charles Wolff Packing Company case.[49]

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47. Ibid., p. 415.

48. Ibid., p. 416.

49. Ibid., p. 419-420.

As a result of this decision of the Kansas supreme court affirming their earlier opinion in the conviction of the two union officials, the case was taken back to the United States Supreme Court on appeal.[50] In this case counsel for Dorchy and Howat held that compulsory arbitration was unconstitutional and did not apply to coal mines in Kansas, on the basis of the Wolff Company case. Also they challenged the constitutionality of Section 19 of the Kansas act, which had been held still valid by the supreme court of Kansas.

Counsel for the state held that since the supreme court of Kansas had held that Section 19 was independent, there could be no question there of the validity of the provisions of the act concerning the fixing of wages and hours by the industrial court, and that the plaintiffs in error (Howat and Dorchy) could only challenge the constitutionality of those parts of the act affecting them personally, in this case only the penal section. The state also held that the Mishmash strike had been unlawful because it had attacked the constitutional as well as the legal right of the fuel company and its customers.

The Supreme Court largely took the same view of the matter, and ruled that since the Kansas Court had said the penal section could stand alone, it was bound by this decision. "The only question open . . . is whether the statute as so construed and applied is constitutional."[51] Reference here was being made to Section 19 standing alone as an independ-

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50. Dorchy v. Kansas, 272 U. S. 306, 1926.

51. Ibid., p. 308.

ent statute, and whether or not it was constitutional standing alone. The question, in other words, was not whether the legislature had the power to prohibit strikes, but whether or not it had the power to do so constitutionally in the Mishmash case. At least, that is as far as the Supreme Court was willing to commit itself. It side-stepped the question of the general prohibition of striking by the state, and confined itself to judging the individual Mishmash strike.

In discussing this strike the Supreme Court said that there was no trade dispute at the time between the operators and the miners; there had been no controversy between the company and the union over wages, hours or conditions of labor; nor was the strike ordered as a sympathetic one in aid of others engaged in any such controversy; the order was made and the strike was called to compel the company to pay a claim of one Mishmash for $180. There was also no evidence that the claim had been submitted to arbitration, nor of any contract requiring that it should be. The claim was disputed and had been pending nearly two years. The Court said that:

> The right to carry on business-- be it called liberty or property -- has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise.[52]

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52. Ibid., p. 311.

The Court went on to say also that there was no absolute right to strike, neither under the common law, nor the Fourteenth Amendment. So it was determined by the Supreme Court that a strike called to force payment of a contested claim was unconstitutional, leaving the broader subject to the general prohibition of strikes unsettled. In an annotation to this case the Supreme Court listed the purposes for which strikes could lawfully be called. On this basis the decision of the Kansas supreme court is upholding the conviction was affirmed.

This brings to a close the series of cases arising in the courts relative to the Kansas Industrial Court brought by Alexander Howat and the other union officials of district 14 who sought to have it declared unconstitutional. In these cases the law was continually upheld, mainly because the real controversial points of the new law had not been legally brought up for constitutional adjudication. Now it will be necessary to bring out another series of cases, the result of which was to seriously limit the industrial court as originally established. These cases grew out of a conflict between the industrial court and the Charles Wolff Packing Company. These cases have already been briefly alluded to during the discussion of the Howat cases.

This case was conspicuous as being one that was carried to the supreme court of the state, and later to that of the United States, by an employer on the challenge as to the constitutionality of the act as it created a wage-fixing body. A controversy arose over wages and hours of labor, and a meeting was called to take a strike vote. Instead of voting to strike, the employees voted to submit the controversy to the Court of Industrial Relations. A complaint was then filed by the workers

with the industrial court.[53]

The butcher's union, which brought the case in the industrial court, alleged that the contract under which the men had been working had expired, and that without drawing up a new one the company had cut wages, would not guarantee at least 40 hours of work per week, and did away with a bonus provision of the previous contract. In answering the charge the packing company admitted the existence of the contract that had expired, claimed they had carefully complied with it during its duration, said they had offered to discuss a new one, but that the union had presented one already drawn up for signature.[54] The company justified the wage reduction on the grounds that they had lost in excess of $100,000 during 1920, and could not, therefore, continue the former wage scale.

Neither side to the controversy wished to change the "open shop" status of the packing plant. The industrial court thereupon proceeded to take testimony as to the present cost of living as compared with the previous year, the evidence being conflicting. It was finally decided that there had been a slight drop in the cost of living since the previous year, so the court announced a wage scale slightly reduced from that one paid during 1920. Another sorely contested point had to do with the length of the working day, the court finally deciding that an 8-hour day should be basic. However, a 9-hour day could be observed not to exceed 2 days in any one week without penalty. The court presented its conclusions under 20 heads,

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53. Court of Industrial Relations V. Wolff Packing Company, 111 Kan. 501, 1922.

54. United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 322, Washington, Government Printing Office, 1923, pp. 21-23.

including those mentioned dealing with wages and hours.[55]

The Wolff Packing Company refused to obey the order thus drawn up by the industrial court, so the state sought a writ of mandamus from the supreme court to compel their obedience.[56] The Packing Company attacked the proceedings on several grounds, the minor ones need not be gone into at this time. The attack on the constitutionality of the law, however, was important.

In the first place the company contended that the industrial court could not exercise the extraordinary power of regulating wages to be paid by employers except in cases of emergency, and that no emergency existed justifying the present interference on the part of the court. The court dismissed this contention by saying that the petition bringing the mandamus proceedings sufficiently alleged that an emergency existed which justified the industrial court taking jurisdiction. It might be interesting to note this little sidelight at this time however. After the industrial court had applied for the compelling order, the supreme court had appointed a commissioner to consider the record, to take additional evidence, and report his conclusions to the court. The commissioner found that the company had lost $100,000 the previous year, and that there was no sufficient evidence of an emergency or danger to the public from the controversy to justify action by the industrial court.[57] The

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55. 111 Kan. 501, pp. 503-4.

56. Court of Industrial Relations v. Charles Wolff Packing Company, 109 Kan. 629, 1921.

57. 262 U. S. 522, p. 525.

supreme court overruled his report and ruled that the evidence did show a sufficient emergency.

The packing company also contended that the industrial court law and the orders sought to be enforced by it in the mandamus proceedings violated the Fourteenth Amendment of the United States Constitution in that the law and the orders made under it deprived the defendant of its liberty and property without due process of law, and also denied it the equal protection of the laws. To support this contention the defendant argued that employees could not be governed by the orders of the industrial court; that the wages of the defendant's employees were not affected with a public interest so as to subject such wages to regulation by the state; that the law and orders made by the industrial court deprived the defendant and its employees of the freedom of contract concerning wages; and that the classification of the businesses to which the law applied was arbitrary and unjust.

Here the company was principally attacking the provision in the law which prohibited strikes, and that which required a company to continue its operation unless the court gave them permission to cease operation. The supreme court refuted their arguments by saying that both labor could quit work and capital could cease operation, except with the intention in mind of violating the provisions of the act. The industrial court was to be the judge as to whether or not such was the intention in any case arising where a worker had quit or a business had ceased operation. The court justified state regulation of the packing concern by referring to the fact that public utilities had long been regulated by government

because of their public interest, and, therefore, since the legislature had declared the packing business to be affected with the same public interest, it was subject to the same regulation. The charge by the company that the wages of its employees were not affected with a public interest was answered in the same way.

The supreme court based its contention that the industrial court had the right to fix minimum wages and hours of labor on the United States Supreme Court's decision in Wilson v. New (243 U. S. 332), which upheld the Adamson law which fixed the 8-hour day and minimum wages for railroad employees. The commerce clause, that is, the right of congress to regulate interstate commerce was the basis of the decision. To this the Kansas supreme court said that

> If under the commerce clause of the Federal Constitution congress can regulate wages and hours of labor of those working on railroads, the state, under the police power should be able to regulate the wages and hours of labor of those working in a packing plant operating wholly within the state. The powers of congress under the commerce clause are no greater than the authority of the state under the police power.58

Another analogy was made between the circumstances surrounding the two cases. The court recalled that the Adamson law had been passed to avoid a threatened tieup of the nations' railroads, also that the Kansas Industrial Court Law had been passed for the same reasons; that is, to prevent suffering and hardship from falling on the people.

One other important point was brought out in this case, and that was concerning the freedom that does exist under the contract clause of

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58. 109 Kan. 629, p. 644.

the Constitution. In this case the court mentioned the fact that many state laws had been upheld which prescribed minimum wages for women and children, and that any such law naturally restricted the absolute freedom of contract.But, it was held, there is no absolute freedom of contract, based also on the protection due the public by the state from absolute freedom of action by any person or corporation. It might be added here that the United States Supreme Court has also gone on record since the time of the industrial court as saying that absolute freedom of contract does not exist.[59] Here the Court said that freedom of contract was a qualified and not an absolute right, and that there was no freedom to do as one willed or to contract as one chose. Contracts which worked against the interests of the community could not be allowed. Non-living wages worked against the public good and, therefore, were subject to minimun wage laws.

On these grounds, the Kansas supreme court upheld the state's demurrer to these legal objections of the packing company to the mandamus. Only questions of law had been decided at this time. The case went again before the state supreme court [60] and this time questions arising out of the evidence were disposed of. Here the court upheld the higher wage rate which the industrial court had ordered the packing company to pay to its employees. It will be recalled that in certain of the sample cases mentioned in chapter four, the industrial court made the statement

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59. West Coast Hotel Company v. Parrish, 300 U. S. 379, 1937.

60. Court of Industrial Relations v. Charles Wolff Packing Company, 111 Kan. 501, 1922.

that any company that could not pay a living wage to its employees and still make a profit had no business operating. In this case the state supreme court went on record with the same philosophy.

> The operators of a packing plant cannot, by law, be compelled to sell the finished product of their plants at a price that will not allow them a fair return upon the investment, but that does not say that those operating the packing plant cannot be compelled by law to pay a living wage to their employees, notwithstanding the fact that the plant is being operated at a loss. An industry of any kind that cannot be operated except at the sacrifice of its employees ought to quit business.[61]

In other words, the company, in this case, could not put their loss on the employees by making them work for a wage, which in the opinion of the industrial court, was not a living wage. As a result the supreme court ordered the packing company to pay the schedule of wages ordered by the industrial court, and also to establish the hours of labor which it fixed. It was to look elsewhere to recoup its losses.

After the rendering of this unfavorable decision, the Wolff Packing Company appealed their case to the United States Supreme Court.[62] This was probably the most important of the cases affecting the industrial court as it was instrumental in seriously curtailing its operation. In the Supreme Court the packing company attacked the law on practically the same grounds they had in the Kansas supreme court. They held that wages paid by employers to packing house workers were not impressed with a public interest or subject to state regulation. They also contended

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61. Ibid., p. 507.

62. Wolff Packing Company v. Court of Industrial Relations, 262 U.S. 522, 1923.

that the order of the industrial court was void because it increased the operating expenses of the packing company against its will, notwithstanding the income of the company was insufficient to pay the costs of raw material and operating expenses, including wages to their employees affected by the order of the industrial court. In reply the state held that the business of the Wolff Packing Company was affected with a public interest, that an emergency existed, and the order made was constitutional and valid because of the state's right to protect the welfare of the people. In this respect the state contended that the doctrine of freedom of contract could not make the law unconstitutional.

The opinion of the Court was delivered by Chief Justice Taft. He based his first attack on the law under the Fourteenth Amendment, and it concerned the right of capital to cease operation, and the right of labor to quit work. The Chief Justice mentioned that the act permitted an employer to go out of business only if he could show that he could only continue on the terms fixed by the industrial court at such heavy loss that collapse would follow. He also brought out the right of a laborer to quit, but not to combine with others to induce them to quit. These privileges were generally illusory it seemed to the Chief Justice, and the act curtailed the right of the employer, on the one hand, and of the employee, on the other, to contract about their affairs.

The Court's opinion on the freedom of contract was that it wasn't absolute, was subject to various restraints, but that these restraints could not be unreasonable or arbitrary. Freedom was to be the general rule, and restraint the exception. Then came the discussion as to whether or not exceptional circumstances, which could only justify legislative

authority in abridging the freedom of contract, existed in the present controversy. The state held that such an emergency had existed, that since the legislature had declared the preparation of food affected with a public interest, the state had the right to regulate that business by fixing wages and terms of employment so as to insure continuous operations which were necessary to safeguard that interest. The Court then attacked the Kansas laws' extension of the public interest principle to such wide fields as preparation of food, production of fuel, and the manufacture of clothing.

The Court said that businesses to be clothed with a public interest, justifying some sort of state regulation, could be divided into three classes. (1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such were the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. (3) Businesses, which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulations. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants

the public an interest in that use, and subjects himself to public regulation and to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly.[63] After listing numerous cases cited under this third head, the Court said that after examining them it was manifest that the mere declaration by a legislature that a business was affected with a public interest was not conclusive as to whether or not it was subject to regulation on any of the grounds mentioned. "The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry."[64] So it wasn't the principle of the public interest that the Court was attacking at all, because it had long been recognized as valid; but it was the extent to which the Kansas law had applied this principle which was wrong. To the Court "public interest" meant much more than that the public welfare was affected by continuity of operation or by the price at which a commodity was sold or service rendered.

> It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation.[65]

To be affected with a public interest, the Court was saying, the business had to have a peculiar relationship with the public, and the degree to

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63. Ibid., p. 535.

64. Ibid., p. 536.

65. Ibid., p. 537.

which they could be regulated, depended upon the nature of the business itself. Only those businesses indespensable to the public, and which could charge exorbitant rates or charges to which the public would be powerless to oppose, were really affected with a public interest. In other words, those that were monopolistic in character, those that were not governed by competition or affected by competing interests, were businesses actually affected with a public interest and subject to public regulation.

> If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground. . . .[66]

This could not at all be reconciled to the freedom of contract guaranteed by the Fourteenth Amendment.

It will be recalled that in a previous case[67] the Kansas supreme court had said that the police power of the state was just as great as the powers of congress under the commerce clause. It had said the industrial court had the right to fix minimum wages of persons working within the state, under this police power, since the Federal Government had the right to fix minimum wages for railroad workers working in interstate commerce, under the commerce clause. The court was referring to Wilson v. New, in which the Supreme Court had upheld the Adamson act.

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66. Ibid., p. 539.

67. 109 Kan. 629, p. 644.

To this, the Supreme Court now said that

> The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of the plaintiff in error (Wolff Packing Company), whose classification as public is, at the best, doubtful.[68]

The powers of the Federal Government under the commerce clause were greater, it seems, than the police power of any one of the states in regulating their internal businesses.

The opinion of the Court was, then, that in so far as it permitted the fixing of wages in packing plants in Kansas, the industrial law was in conflict with the Fourteenth Amendment and deprived the company of its property and liverty of contract without due process of law.

After this decision by the United States Supreme Court, the state of Kansas brought mandamus proceedings in the Kansas supreme court once more, this time to compel obedience of the packing company to those parts of the order previously made not invalid under the Supreme Court's decision.[69] The packing company moved that the judgment of the Kansas court originally upholding the order be reversed in its entirety, and that the industrial court be assessed all costs incurred by the packing company in taking their case through the courts to its final decision.

The Kansas court rejected this, saying that only those provisions of the original order relating to the fixing of wages were declared

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68. 262 U. S. 522, p. 543.

69. Court of Industrial Relations v. Charles Wolff Packing Company, 114 Kan. 304, 1923.

invalid by the United States Supreme Court decision

> The Supreme Court of the United States has not said that the court of industrial relations act is invalid except in so far as it attempts to give power to fix wages. Other matters were embraced within the opinion and judgment of this court, but they do not appear to have been determined by the Supreme court. Strikes are discussed, but there is nothing in the judgment of the Court concerning them. The judgment concerns only wages.[70]

The supreme court then issued a writ of mandamus commanding the packing company to put into affect the parts of the order of the industrial court not affected by the Supreme Court. These included the basic 8-hour day award, and other minor points concerning the period of work for various classes of employees, such as having one day off per week for those in departments operating 24 hours a day and seven days a week.

The industrial court then brought another suit into the supreme court of the State asking for a writ of mandamus compelling the packing company to adhere to that part of the original order which, besides limiting the basic working day to eight hours, provided that all time worked over 48 hours per week should be paid for by time and a half. The industrial court claimed that this wasn't wage fixing, but was part of the original order dealing with hours of work.[71] This part of the order, the fixing of hours of labor, had not been touched on by the Supreme Court. The supreme court ordered that the above-named provision be in-

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70. Ibid., p. 306.

71. Court of Industrial Relations v. Charles Wolff Packing Company, 114 Kan. 487.

cluded in the other writ compelling obedience to those parts of the industrial court's order not vacated by the Supreme Court.

As a result of these actions, the Charles Wolff Packing Company then took their final case to the Supreme Court of the United States.[72] They wanted the whole order of the industrial court declared null and void. They held that the purpose of the industrial act was compulsory arbitration, which was unconstitutional. The state held that the fixing of hours of work and conditions of labor, not having been included in the first decision of the Supreme Court, did not fall with the provisions fixing wages. They also contended that the industrial court had a valid right to fix hours of labor and working conditions. The Supreme Court's answer to this was as follows:

> . . . the act, as construed and applied in the decisions of the supreme court of the state, shows very plainly that its purpose is not to regulate wages or hours of labor, either generally or in particular classes of business, but to authorize the state agency to fix them where, and in so far as, they are subjects of a controversy, the settlement of which is directed in the interest of the public. In short, the authority to fix them is intended to be merely a part of the system of compulsory arbitration and to be exerted in attaining its object, which is continuity of operation and production.[73]

Then the Court, bringing out the arguments they had formerly used in outlawing the fixing of wages by the industrial court, and using the same principle, said that they were as applicable to this case as to the other, and the same conclusion had to be reached in regard to the right to fix hours of labor and working conditions. Restated briefly, it said

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72. Charles Wolff Packing Company v. Court of Industrial Relations, 267 U. S. 552, 1925.

73. Ibid., p. 565.

> The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision, the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.[74]

The Court then decided that the authority which the industrial act gave to the industrial court to fix hours of labor was merely a feature of the system of compulsory arbitration, and had no separate purpose. As a part of that system, therefore, it shared the invalidity of the whole. The judgment of the Kansas court was reversed, saying that it should have refused to give effect to any part of the order drawn up by the industrial court.

This, then, is the record of the industrial court and the judicial proceedings growing out of it. It will be necessary now to look at what actually had happened to the court as a result of the adverse decisions handed down by the highest court in the land, and what the history of the court was after their deciding.

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74. Ibid., p. 569.

Conclusion

Just what was left of the industrial court after these decisions of the Supreme Court? First of all the criminal provisions of the statute were not directly affected by any of the rulings, meaning that the court could still prohibit union officials from inciting strikes enforceable by fine and imprisonment. The investigative provisions of the court were also untouched by the Supreme Court. The court still had the right, then, to investigate a strike, secure evidence by compulsion if necessary, and make public its findings. It couldn't establish minimum wages or hours of labor now, however, and force the parties to adhere to them, thus preventing strikes from taking place.

There were various opinions as to whether or not the industrial court was irreparably harmed by these decisions, and also various attitudes expressed concerning the correctness of the Supreme Court's position. Ex-Governor Allen, Jonathan Davis became governor in 1923, said he didn't think the decision[75] was a body blow to the court, but merely a matter that could be adjusted by a legislative amendment.

> We always felt there was a little danger in that part of the law wherein we sought to establish minimum wages. . . . But the body of the act still stands. All that will be necessary now will be a legislative amendment to meet this one objection.[76]

This certainly doesn't sound like the Governor Allen of 1920 advocating

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75. Referring to 262 U. S. 522, 1923,in which Supreme Court said industrial court could not fix minimum wages in meat-packing industry.

76. Topeka Daily Capital, June 13, 1923.

and pushing the establishment of the court. We have seen that the framers of the law were sure that constitutionally they were on firm ground. Now that ground had been spaded from under them.

It has already been seen that Governor Davis advocated the repeal of the industrial court after he came into office and after the rendering of the Wolff Company decision.[77] The general concensus of opinion was that the industrial court had been seriously weakened by the decisions.

Some thought the court could still perform much useful service in deciding industrial cases which were brought to it by parties voluntarily seeking help in deciding the question.[78] If parties in such cases would agree beforehand to abide by the decision the point would undoubtedly carry much weight. But it has been proven time and again that that is something hard to bring about. Since the industrial court was no longer able to enforce its own decisions, or have them enforced, voluntary agreement would be the only way in which it could still have been useful in deciding industrial cases.

Here was another viewpoint on the decisions:

> The decision (in the Wolff case) should be welcomed by labor and capital alike as a victory for true liberalism. Such assaults on individualism under the guise of public welfare are becoming more and more frequent in state legislation and against them all liberals should be on guard.[79]

In its roundup of editorial opinion on major issues, the Literary Digest often summarized fairly well the general country-wide thought and opinion.

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77. Loc. cit.

78. "The Industrial Court of Kansas", The Outlook, CXXXIV (June 27, 1923), p. 252.

79. "The Supreme Court Admonishes Kansas," The Independent, CX (June 23, 1923), p. 392.

It reported that most editors felt the court had had its teeth effectively drawn, some thought the court was killed entirely, but most seemed to agree with the decisions of the Court.[80] Labor leaders, of course, rejoiced at the discomfiture of the industrial court after the decisions. Conservative editors were pleased with the failure of one more attempt to regulate private business. Another blow at socialism!

Well, just what had happened to this compulsory arbitration which we have mentioned so much throughout the paper? What had the Supreme Court actually done to limit that principle as it was applied by the Kansas court. Remember, the Kansas experiment was the first serious attempt at real compulsory arbitration, or adjudication if you like, in the United States. First, compulsory arbitration in such industries as the production of food, clothing, and fuel had been declared unconstitutional. They weren't essential enough to the public welfare to be subjected to the regulation imposed upon them by the Kansas law. The Supreme Court did imply, and it has never since been seriously questioned, that compulsory arbitration in public utilities and in the railroad industry could be upheld. These industries were monopolistic in character, and the only protection the public had from their arbitrary operation was from governmental regulation of some sort. One writer did think the Supreme Court might uphold compulsory arbitration in the coal industry if a nation-wide strike were called which would threaten the health and welfare of all the people.[81]

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80. "The Kansas Court Losing Its Teeth," Literary Digest, LXXVII June 30, 1923), pp. 13-14.

81. Edward Berman, "The Supreme Court and Compulsory Arbitration," American Economic Review, XVIII (March, 1928), pp. 19-44.

William L. Huggins, the chief architect of the original industrial law summarized the effect the Supreme Court decisions had on the court in this way. He mentioned, as already stated, that they did not affect the administration of the industrial act as it applied to common carriers and public utilities.

> Neither were the penal provisions of the Act affected by either of the (Wolff) decisions. The penal provisions which remained in full force were those which the legislature intended should prevent unreasonable interference with any of the industries included within the terms of the act, whether by violence, by intimidation, threats against, or abuse of other workers, or conspiring with others persons to induce workers to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries named in the Act.[82]

The act still made it a misdemeanor, punishable by fine and imprisonment, for any person wilfully doing any of the things prohibited by the act. It was still a felony for a union official to call a strike too.

Mr. Huggins was also of the opinion that the United States Supreme Court had made some important law in the two packing cases. Under this "law" coal mines, packing houses, and flour mills were mere private enterprises not at all affected with a public interest. "Unfortunately for the public, the United States Supreme Court cannot unmake the hard facts."[83] Then followed a realistic picture painted of the hardship and suffering following in the wake of the 1919 coal strike in Kansas, the necessity of calling for volunteer miners, and the need for military protection for them. This had taught the people of Kansas, said Mr. Huggins,

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82. William L. Huggins, "Just What Has the Supreme Court Done to the Kansas Industrial Court?" American Bar Association Journal, XI (June, 1925), p. 363.

83. Ibid., p. 366.

that the coal industry was affected with a public interest, and a vital one at that.

Regardless of what men thought, pro and con, on the situation, it was an incontrovertible fact that the United States Supreme Court had thrown a body block to the industrial court. In Chapter III it was mentioned that, after 1922, the work on the industrial side of the new court declined until in 1925 it was practically dormant. Reasons were given for that, one of them being the adverse court decisions just discussed. In 1925 the Court of Industrial Relations was abolished by an act of the Kansas legislature, effective March 10, 1925.[84] The powers and duties still possessed by the court were transferred to a public service commission, consisting of 5 members appointed by the governor by and with the consent of the senate. Then, in 1933, the public service commission was superceded by the present Corporation Commission, a body principally concerned with the supervision and regulation of common carriers and public utilities in the state. As we saw during the discussion on the legal aspects of the industrial court, the United States Supreme Court did not touch the subject of compulsory arbitration in public utilities and common carriers. It can probably be said, then, that if the state now would attempt to exercise such power over these activities they would be upheld by the Court. None of the provisions of the Kansas Industrial Court act which were left to it after the Wolff cases, however, have ever been used since.

This, then, is the story of the Kansas Industrial Court. It has

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84. Laws of Kansas, 1925, Chapter 258, p. 335.

been seen how the strained conditions following the World War led to the formation of the court, the establishment of that court and the way in which it worked, and its final handling by the Supreme Court. It might be well to just say this as to why the court was no more successful, nor longer-lived than it was. A creation like the industrial court, born in times of stress, functions best in those times because it is created to suit those peculiar needs and circumstances. After 1920 industrial strife in the United States declined, the same thing being true in Kansas especially. Therefore, there was less and less reason for the existence of such a tribunal as the industrial court. Coupled with this, the opposition of the Supreme Court as to the scope the industrial court covered by its public interest principle was just to much for it.

It can't be said that the court didn't do some good, and that it was an abject failure. It admittedly wasn't entirely successful in preventing all strikes and labor disturbances, but the ones which happened might have been much more destructive if the court hadn't have enforced the anti-picketing and intimidation features of the law. Then those cases voluntarily submitted to the industrial court undoubtedly prevented many disputes from turning into strikes. The court, however, died, as much from inertia as from constitutional limitations.

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