COMMONWEALTH v. HUNT

This article will survey a landmark of American labor law. It will be prefaced by a short recapitulation of general views which have been developed at length in another article.¹

The handful of American labor cases before 1850 are striking illustrations of the nature of some law as an index of social direction—an index less like a compass showing direction in relation to some fixed lodestar of human harmony than like a weather-vane—harder to read, however, since the true direction of the wind it swings to is not always clear. Each of the cases showed a complex force resulting from the moment’s collisions of an heterogeneous variety of wills, wants, interests and values which it is convenient, though over-simple, to conceive as two opposing sets, each set more consistent than such a hodge-podge as distracts a normal individual or political party, one set describable as Tory and the other as Jeffersonian. Most of the cases showed Tory pressures as strongest, though the Jeffersonian always modified them and sometimes prevailed.

The economically successful or adventurous tend, with exceptions, whatever their politics, towards the Tory position that such welfare as social inferiors may enjoy depends upon social superiors, to whom, therefore, submissive loyalty is due. This position, like its Jeffersonian opposite, may be supported by irrefutable evidence and be held by people who are intelligent and humane. It was almost universally held by such people in the Middle Ages.² And powerful and penetrating minds (Hobbes, for instance, Alexander Hamilton, John Adams, John C. Calhoun; in our own time, some among the many who are leaning towards Fascism), seeing that modern social theories have also failed to produce a world in which satisfactory living is more than conceptually normal, have concluded that the best hope for society, bad though it may be, lies in submission to superior power. Though my own bias is Jeffersonian, I use the word Tory to describe, not to disparage.

Throughout the nineteenth century, that word was opprobrious in the United States. Toryism remained vigorous notwithstanding. But in law, politics and economics, it was driven under cover. In labor cases it hid behind concepts from the Jeffersonian stock: the rights of man, the equal liberty of individual men, laissez faire. The root question in these cases was always the same: whether workmen in combination should be permitted to obtain benefits which were beyond their several

¹ See Nelles, The First American Labor Case (1931) 41 Yale L. J. 165.
² See Tawney, Religion and the Rise of Capitalism (1926).
reaches. To benefit its members, a labor union must variously coerce; to stand out against a strong union, if possible at all, is unpleasant, perhaps dangerous; members join and employers concede demands because, as a practical matter, they must. It was easy to base a speciously Jeffersonian case against a union upon its coercive acts and tendencies. The case was premised upon the illusion that freedom both can be and is absolute, and has a determinable boundary wall—the equal freedom of others. Individual workmen have liberty to do as they please. But when by combined refusal to work with another workman, they coerce a master not to hire or to discharge him, they invade the equal liberty of that master or of that workman.

Such argument had no room for a weighing of the benefits of an effective labor union to its members against its detrimental effects upon employers and strike-breakers. But since it employed concepts to whose currency Jefferson had contributed, it satisfied or silenced many nominal democrats whose Jeffersonianism was only skin-deep. True Jeffersonians it did not satisfy, though it sometimes perplexed. Their feeling, though efforts to express it were usually bungling after doctrines of natural rights and equal liberty had been turned against them, was for freedom in fact—which depends upon power, and involves getting as well as pursuing enough economic security to nourish self-respect and permit at least an occasional self-respecting self-indulgence. They believed in *laissez faire* because they thought that more people would win through to relative freedom and satisfaction under a law chary of interference with their efforts than under nagging restrictions. Constitutional checks and balances were to keep government at a minimum, assuring *laissez faire*. And when, as was seen to be inevitable under this system, enterprising and highly endowed, or unscrupulous, individuals, pursuing economic advantage, should win oppressive superiorities of power, it was expected that less powerful individuals, let alone by law,

---

3 All the known cases which preceded that which is the subject of this article are summarized *infra* in an Appendix, and will be cited in the article by the numbers given them in the Appendix. Examination of the Appendix will show that the argument stated above in the text was the invariable mainstay of prosecution.

4 The terms which an employer will offer and a workman accept are affected but slightly by the free will of either. But the philosophers, judges and business men of the absolute-liberty-bounded-by-the-equal-liberty-of-others school were blandly unperturbed either by the frequency with which the words "free" and "coerced" are interchangably descriptive of the same concrete act or by the factual impossibility of the enjoyment of equal freedom by A and B when they are unequal in power. One of the ablest of them could seriously assert, in substance, that under a statute providing that any five persons might form a water supply corporation, a coal heaver was as free to do so as Leland Stanford. Field, J., *dissenting* in Spring Valley Water Works v. Schottler, 110 U. S. 347, 356, 4 Sup. Ct. 48, 52 (1884). A delightful demonstration of the emptiness of the concept that liberty is absolute and equal is by MAITLAND, *Mr. Herbert Spencer's Theory of Society* in *1 Collected Papers* (1911) 247.
would devise means to check and balance them. Combination is such a means. And consistency with Jeffersonian laissez faire would have required that labor unions be let alone by law to become an effective check upon the rising power of industrial entrepreneurs.

Of course oppressions would not have ceased or freedoms have become equal in industrial society. Jeffersonians misstated their own aims when they so stated them. The real Jeffersonian aim was simply that more living should become more free and more satisfying, without sacrifice of human excellences which competition stimulates and hopelessness of success stifles. Intelligent supporters of the labor side expected that such would be the result or tendency if organized wage-earners were let alone to make effective use of their combined power in competition with that of employers and unorganized wage-earners. Society would remain competitive, and instances of oppression and defeat would still be incident to the rough-and-tumble. Labor power, like employers' power, would become tyrannous if it could. But it was devoutly believed that law could not compete with nature in providing checks upon economic tyranny. In fact the natural cure of labor tyranny was clearer than in other troublesome situations in which nature was thought to be self-correcting: if higher wages were exacted than the traffic would bear, the traffic would diminish, and unemployment would break up the labor union.

Jeffersonianism, never quite coherently articulate, opposed Toryism concealed in borrowed concepts in twenty known labor cases before 1850. The series began in 1806 with the Philadelphia Cordwainers' case, where Toryism shakily prevailed in a nominally Jeffersonian community and court. It ended in 1842 with Commonwealth v. Hunt, a seeming victory of Jeffersonianism in a Tory state and in the court dominated by the great but far from Jeffersonian Chief Justice Shaw. This paradox I shall undertake to explain.

I

A good deal of haze dimmed my picture of the fact situation in and behind Commonwealth v. Hunt until I obtained a transcript of manuscript notes of the testimony at the trial made in the court room by the

---

5 "It would, I grant, be impossible for employers in any branch of manufactures to produce a permanent depression of wages, because others would find it their interest to embark in the business on more liberal terms. . . . The competition of interest must inevitably break up every combination of the kind." Gibson, J., in Commonwealth v. Carlisle, Appendix, Case 6.
6 Considered in Nelles, supra note 1; noted briefly, Appendix, Case 1.
7 The defendant's trial and conviction in the Municipal Court of Boston are reported in Thacher's Crim. Cas. 609 (1840); the reversal and arrest of judgment in 45 Mass. (4 Metc.) 111 (1842).
defendants' counsel, Robert Rantoul, Jr. The published report of the trial left it open to suppose that the case was like most other labor cases,—that an influential body of employers had instigated and backed legal proceedings to crush a striking labor union. Economic depression had, however, virtually wiped out the strong labor movement of a few years earlier, and it was hard to see how there could have been an aggressive union at Boston in 1840. Rantoul's notes, with their gaps and obscurities repaired from other sources, clarify the case.

The Boston Journeymen Bootmakers' Society was organized in 1835. It was local to Boston. Its members worked only in one branch of the much ramified footwear industry, the making of a standard sort of high-grade boots. The pay in 1835 was $1.50 a pair. The years 1835 and 1836 saw wild currency inflation by the state banks following Jackson's destruction of the Bank of the United States. The cost of living was mounting rapidly. In 1835 the newly organized Boston bootmakers raised their pay, by striking, to $1.75 a pair; in 1836, again by striking, to $2.00. In the depression following the Van Buren panic of 1837 the Society survived, but with reduced vitality. There were no further strikes for better wages; $2.00 was still the rate in 1840, less twenty-five cents for "findings" if the master furnished them, and another twenty-five cents for shop room unless the journeyman worked at home. And the standard of quality had so increased that a man who could make five pairs a week in 1835 did well to make four in 1840.

*Acknowledgment of my profound gratitude is due to Rantoul's granddaughters, the Misses Harriet and Edith Rantoul of Salem and Beverly Farms, who allowed me to examine these notes and other manuscripts and pamphlets preserved in Rantoul's file of the papers he used in Commonwealth v. Hunt. The inaccessibility of the Rantoul notes in print has required that the exposition should include verbatim, usually in footnotes, everything in them which is not obviously trivial, merely cumulative, or hopelessly unintelligible.

†1 Commons and Associates, History of Labour in the United States (1918) Part iii, by Edward B. Mittelman. This work will be cited simply as Commons. All references are to its first volume.

‡1 Except for sparing addition of punctuation obviously called for, my liberties with Rantoul's notes (some of which are by his partner, John S. Kimball) consist of inserts necessary to completeness or coherence. These inserts are indicated by brackets; authority is cited for all inserts except the merely formal. The sources from which Rantoul's notes have been supplemented and corrected are:

The report of the trial by Judge Thacher, who presided. This will be cited as Thacher.

Detailed reports in the Boston Advertiser (Whig) of Oct. 23, 1840 (reprinted in the Semi-Weekly Advertiser of Oct. 24), and the Boston Morning Post (Democratic) of Oct. 21, 1840.

Brief items in these and other Boston papers of the fortnight in which the case was news.

None of the reports is stenographic.

1 Commons, at 348-350.

1 Details of this wage and strike history from Rantoul's notes (cf. Thacher, at 616-7):

"Dennis Horne. Some of them got it up and I joined. We struck for
Though the Society did not prevent the employment in Boston of a good many non-members in its members' branch of the trade, it remained strong enough to prevent non-members as well as members from working below its wage scale.

The prosecution in 1840 of seven leaders of the Society resulted from a squabble with a willful journeyman named Jeremiah Horne. Horne had been a member; his troubles with the Society seem to have commenced when he did extra work on a pair of boots without charging for it. The Society imposed a fine, but "took it off" when his master, Isaac Wait, paid Horne at the regular rate for the extra work. Horne continued, however, at outs with the Society, which undertook to fine him for another infraction. Wait testified, according to Rantoul's notes: "I offered him the dollar and advised him to pay it. He said he shouldn't do it." Friction continued, until finally the Society was demanding that Horne "sign the rules" and pay, before re-admission to membership, "fines" aggregating $7.00 itemized as follows: "one dollar for going off with the books; fifty cents as an initiation fee; fifty cents for the breach of a rule; and five dollars for slandering the Society." Wait, having been "told of the trouble," advised Horne to pay and join; and when Horne refused, Wait discharged him. Horne laid a complaint before the District Attorney, and then sent his cousin Dennis, who was a member, to see the leaders of the Society—most of whom, like the Hornes, were probably Irishmen—and "settle with them." Rantoul notes that Dennis testified:

"They said they wouldn't give three cents to settle. They asked if Horne was going to prosecute. [Dennis replied]: Yes. Lawyer said sue if another would join! [Woods said]: 'I suppose if we give him $100 he would settle it.' I said he wanted nothing but his rights. O'Neal asked me if I should be a witness. I said I was as deep in the mud as they were in the mire. [O'Neal

$1.75; we had $1.50 a pair. Since that we struck for $2.00. To raise the prices was my objects. The employers did sign. I made on an average—count them 5 pair. We put more work into them [now]. I cannot make 4—sometimes none. 2 pair a week. I couldn't mean I ever made 4 pair since.

"ISAAC WAIT. When they begun, they wanted me to sign a paper. I said I would pay the wages, I didn't like to sign. No threats. They kept on work. ... The wages were not unreasonably high. Provisions were rising both times. The work is done enough for it better.

"DAVIS HOWARD [employer]. Fall of 1835, $1.50 a pair. 5 pair then. Prices rose. 4 pair now. Work is done considerably better.

"JOHN J. DUNHAM. I employ three men. Wages not high. Can make four pair a week. 25 cents for shop room. 25 cents finding. Provisions rose in 1835—$1.50 to $1.75; in the fall of 1836, $2.00. The work is better done."

34 THACHER, at 615. Cf. Rantoul: "WAIT. [Horne was] fined for stitching rands. I did allow him the pay, and his fine was taken off."
35 THACHER, at 615.
then observed that Dennis was a G—— d—— ———. Others interrupted with 'Shut up! Let him alone! What is the use of talking?'] I said they had fined the wrong man. [Nothing was done at the time.]”

Shortly afterwards, early in October, 1840, Dennis attended a meeting of the Society. Rantoul thus notes his account of it:

"[They] asked if I had been before grand jury. They asked me to retire, Dee did. I said I wished to see the last of every meeting. One said hoped never. Shout: 'Heave him down stairs! Kick him out!' Mr. Odiorne moved to adjourn, and do no business. I said I would go out. I told Odiorne it would look well before the grand jury. He said Parker had a long head and would question me pretty tight. As I was going down stairs, one of them said, 'He is kicked out!' Says I, 'Do you hear that? They said they would leave the hall to me.' Did not do violence to me. No one struck me."

It seems clear, both from positive implications of the testimony and from the absence of any contrary suggestion in any of the reports, that there was no strike or threat or thought of a strike in 1840; no difference or friction whatever between masters and journeymen, or the Society; and that the prosecution was instigated single-handed by Jeremiah Horne. District Attorney Samuel D. Parker, however, took up the case with zeal.

The indictment, found October 8, 1840, within a few days of the meeting from which Dennis withdrew, charged luridly in many counts that an effective labor union was a criminal conspiracy to oppress and impoverish employers and non-conformist workmen. The trial commenced on October 14, and was concluded on October 22. The main-stays of the prosecution's case were the paper constitution of the

---

37 The two inserts are from the report in the Post.
38 THACHER, at 616, puts "It will look well before the grand jury" into Odiorne's mouth instead of Dennis', thus reversing the implication.
39 District Attorney Parker had been appointed in 1832 by Governor Levi Lincoln. He was of the Boston Brahminical caste, a son of the Rt. Rev. Samuel Parker, rector of Trinity and Bishop of Massachusetts. See Mass. Hist. Soc'y, clippings of obituary notices of Charles H. Parker from Boston papers of April 9-12, 1908.
40 Washed of the color imparted by the rhetorical verbiage which is still conventional in criminal pleading, the charges were that the defendants agreed not to work for any master who, after notice to discharge, should continue to employ any workman who was not a union member, or who had broken any union by-laws and not paid a sum to the society as penalty; and that by means of this agreement they compelled Wait to discharge Horne. The first count charged a bare agreement; the second added its effect on Horne; the other three merely varied the description of intention to conform with the formula of Serjeant Hawkins [see Nelles, supra note 1, at 196], the third and fourth stating it as to "impoverish" Horne "by indirect means," the fifth to "impoverish" Wait, Blanchard, Howard and divers other employers unknown. See Commonwealth v. Hunt, supra note 7, 4 Metc. at 112, 113, 114, 115. The indictment is more fully set forth there than in THACHER.
Society\textsuperscript{21} and the "oppression" of Jeremiah Horne and his employer Isaac Wait. There was no definite evidence that Horne had suffered otherwise than in his feelings.\textsuperscript{22} Wait testified that though he "did not

\textsuperscript{21} Rantoul's papers include a pamphlet copy of this constitution, stated on the title page to have been adopted Oct. 12, 1835 and printed in 1837. Thacher's report prints extracts.

\textsuperscript{22} He was not permitted to testify; see note 25, infra. There was no evidence that he found employment harder to get than formerly, or took lower wages, except that Rantoul notes that Dennis testified Jere "could get no employment."
feel at liberty to employ any but society men,” because he “would not wish to lose five or six good workmen for the sake of one,” he “had not been injured or impoverished”; that wages fixed by the society were not “unreasonably high” and “the society men were all good workmen.”\(^{23}\) The efforts of the prosecution to present the Horne episode as part of a pernicious series of oppressions by the Society were not strikingly impressive.\(^{24}\)

Thacher omits this—probably because it was shown to be untrue. Wait was not asked whether Horne was a good workman. Rantoul’s notes:

“JOHN SCHAIER. Master. Employed Jere Horne 3 weeks; took him as soon as he left Wait. I think it was the 8th. I hired Horne. Never notified [by defendants to discharge him]. I dismissed him because I had not work for him. I do not ask if a man belongs. I pay what a man is worth. PETER ROONEY. I have worked with Jere Horne 5 or 6 months. He was not a steady workman. He often left work undone. He had two pair of shoes to make and he made one shoe.

“We have no right to put in this: ‘When he had work, he did not earn his board.’ Ruled out. John Callinan [and] Alexander Church would swear he did not work when he had work. Also Oren Faxon who now employs [him].”

\(^{25}\) Thacher, at 614-15.

\(^{26}\) Rantoul’s notes of witnesses called by the prosecution (classification and arrangement mine; bracketed inserts in WAIT, DENNIS HORNE and HOWARD from Thacher, at 614-17):

Generalities as to the Society’s control. “WAIT. Never had a strike in his shop. [Employed mostly members of the society.] I never was notified not to employ a man. They would tell me there was trouble. I would advise a man to comply, and he would. . . . If there is a fine, I advise them to settle. Never notified by anyone of these men that there would be a strike. [Knew the rules of the society, and the consequences that would follow, if he should violate them.] Society men work for some, scabs for others. DAVIS HOWARD. Hires 5 to 8; society men. [Had had some trouble on account of the society. Did not feel himself at liberty to employ any person who was not a member.] I have had notices, can’t say from whom. I suffered nothing. I dismissed a man; can’t say that was the reason. Society [men] first rate workmen. Wages are not unreasonably high. I have not suffered from it. Work has gradually improved. [The better work now done on boots is not the consequence of this combination.] JOHN AUGUSTUS. I have had no particular trouble. General trouble enough. I must sack or be sacked—the chart I go by. We guide our faith and works by it. It is our Revised Statutes. The wages are not too high. Wood worked for me and was not then a member. A committee came round. JOHN J. DUNHAM. I employ three men. I am not a member. I never had any difficulty nor paid a fine. I decline answering if I helped framing the constitution; I should implicate myself. I never dismissed a man for not belonging. Wages not high. The work is better done. Believe outs get as much as ins. Shops hire outs and I never heard of any difficulty. No violence used. I am benefited by the society. It [work] is 12½% better. Morals of men improved. I never said this society hurt their employers. I never said it hurt journeymen. I never said ‘Damn the society’ nor kicked over a table. At the formation of the society I did not think it would be good. Of late, I thought it did good, since I went round among the journeymen and saw the decided improvement in work and in the morals of the [men].”

Troubles about particular workmen. “[WAIT. Heard Hayes, one of the defendants, say that John Cleary and William Cleary, who were each fined $3.00 by the society, paid this penalty.] WILLIAM CLEARY. Never met with any trouble in my life from this society. Paid no fines. LEANDER M. ERL. Journeymen and master. I decline answering if I lost work by not belonging to this society because I might be prosecuted. I never lost work by not belonging or by not paying fine. Payne never dismissed me. ELIAS D. BLANCHARD. Has 10 or 12; has had society men, and some not. I have had Rimmen and son 4 or 5 years ago. He did not belong. I had 5 or 6 who did—all but 2. Farrington
Rantoul, true to professional conventions, made it as hard as he could for Parker to put in his evidence. Jeremiah Horne was excluded from testifying upon the ground that he was an atheist. The constitution of the Society went in evidence over objection that its connection with the defendants, whose membership was not conceded, had not been shown. The prosecution probably gained more than the defense from

[a defendant] gave me a written notice. I discharged the society men; I thought I would try how it would operate. Found Rimmen and son could not do my work. I advised them to join. They did. I had to discharge Strickland because they would not work with him. Mr. Rimmen is a first rate workman. I paid him the same as I do members. RIMMEN. I signed my name to a list of names and paid a fee, 50 cents. . . . Compulsion compelled me to pay fines. [It is inferable that he probably said also that he joined unwillingly, to keep his job.] DAVIS HOWARD. In February and March last, Samuel Thomas worked for me, or his apprentice. Did not comply with rules, so Sylvan Whitney told me. I did not dismiss Thomas. Odiorne and Farrington [defendants] left my employment. The affair was settled with the society, and Od. and Far. went to work. JOHN FISKE. I employ 12 to 20. A man brought me a paper of rates and compelled me to sign it. In February or March I employed Sam'l Thomas. Mr. Gale said Thomas had not complied with rules; must settle up or they would leave. We told him Thomas was one of our best men. They would give him time to think of it. None of the defendants had anything to do [with] it. I told him it was a hard case in a free country. It was settled. I had no other trouble since 1835. SYLVAN WHITNEY. He is now a master; has been a journeyman. Never had difficulty in getting work [before joining?]. I worked for Mr. Howard. A man by the name of Thomas worked for Howard. It was stated by the secretary that Thomas had broken rules. I told Howard I wouldn't work if Thomas did. He refused at that time to give any definite answer. In two days I understood it was settled. He told me Farrington was satisfied. SAMUEL THOMAS. Declines answering about the society. [Claims privilege against self-crimation.] I was invited to join, but not by either of the defendants. I never saw either of the defendants at a meeting. MICHAEL SCULLEY [an ex-member]. Worked for Howard. He told me he didn't like my work, and didn't want me any longer. I worked for Mr. Fiske, and he said my work would not answer. Odiorne and Farrington [defendants] worked for Howard, Hunt for Fiske. I have always got work since I left. Ræssle [presumably his present employer? not a society shop. He hires 5 or 6 men."

When Horne was called to the stand, Rantoul objected and was allowed to prove his disqualification. Rantoul's notes: "JOHN CALLINAN. Frequently conversed with Horne. I have heard him deny the existence of a Supreme Being. Believed in God in a bucket of water. When he died, he expected to be thrown into a hole, and that would be the end of him, etc. PETER ROONEY. He said he did not think he was any more than dirt or clay. He said he didn't believe in any of their damned Relig. DUNN. I was with Horne. He boasted he would [rather] have his life than a 'knife and two stones. He did not believe in Heaven or Hell. He seemed to always boast of his irreligion in the shop. He was a Catholic in his younger days. DENNIS HORNE. His cousin. I have seen him at Catholic Church. Don't know his religious belief. I have not been to church for six months. I have talked with him. Just for the sake of opposition like, and to keep up talk. Sometimes took one side, sometimes the other. JUDGE THACHER. He is excluded. S. D. PARKER [the district attorney]. Horne is the prosecutor. This spoils some ______."

Rimmen, Cleary and Dennis Horne testified that each paid fifty cents initiation fee, signed a list or constitution, and was given a book. Other journeymen had no memory or claimed privilege against self-crimation when asked about signing or receiving a book. The pamphlet copy of the constitution identified by Dennis Horne as that which "they" gave him was received in evidence. There was doubtless testimony, though Rantoul's notes do not show that it was complete, that each of the defendants was present and active at meetings.
such tactics; Rantoul notes this as one of the major themes of the District Attorney's summing up: "The shyness of admitting the fact is in wonderful contrast to the pretense that it is lawful."

One of Rantoul's unsuccessful objections to the form of testimony by witnesses for the prosecution was aimed deeper than his merely obstructive technicalities. This was the question to which his test objection was overruled: "Do you feel yourself at liberty to employ or hire any person you please, whether a member of the society or not?" The district attorney was allowed directly to ask for, and the witnesses to state, the conclusion that the Society's acts were coercive. Much, to be sure, could be said in favor of a law of evidence which would allow at a trial complete license to paint pictures in full color. Our theory that testimony must not include reactions to things seen and heard does not work. A competent trial lawyer not only can, but practically must—it is one of the skills his wage scale depends upon—deliberately violate and evade the prohibitive rules. And the by-play incident to demands for their enforcement often—perhaps usually—results in making partisan inferences and their connotations more contagious to jurors than if their expression had not been dramatized by a leap at or through inefficient obstacles. For the juror's sympathy is with free expression; fact to him is not drab fact, but fact with the natural color imparted by his own interest and emotion. He sees himself in the place of the lawyer or witness who does not want to falsify in neutral language. The most drastic enforcement of the rules fails to blot out color spilled upon the fact picture before the rules can be invoked. But though such enforcement of the rules as is possible is insufficient to make them effective, to overrule objection to a particular violation is to magnify its power to make partisan feelings contagious. When, as in the bootmakers' trial, the court officially sanctions chromatic testimony, the juror is likely to feel that truth and justice have defeated an effort to obstruct them. It was true, of course, that the employers and journeymen who so testified had been "compelled" by the Society to comply with its demands.

27 From Rantoul's copy of the bill of exceptions (the files of the Supreme Judicial Court which would include the official copy are said by the Clerk of that court no longer to exist):

"2nd. Elias P. Blanchard, a master bootmaker in Boston, was sworn and examined as a witness for the prosecution; and to the following question which was put to him by Mr. Parker for the Commonwealth, 'Do you feel yourself at liberty to employ or hire any person you please, whether a member of the society or not?' (meaning the society which was alleged to constitute a conspiracy), Mr. Rantoul objected, on the ground that it called for the opinion of the witness in a matter where, by no rule of law, such opinion could be given in evidence. But the Judge overruled the objection and the witness, in answer to the question, said 'that he did not.' To which ruling of the court, and evidence of the witness, defendants entered their exception, and the same was allowed."

28 See testimony of Wait and Howard in Thatcher, at 615-16, and of Augustus and Rimmen, supra note 24. Under Fiske, Rantoul has "A man brought me a paper or rates, and compelled me to sign it."
But such words as "compel" and "coerce" connote unlawfulness. The tendency of the ruling which gave to conclusions of coercion the status of primary evidential facts was to eliminate from the case the question whether the coercion in which the society had indubitably engaged was justifiable.

No substantial issue was on trial unless that was. And the court did not consistently exclude evidence relevant to it. Half a dozen masters called by the defense strengthened points that Rantoul had commenced making on cross-examination of those called by the prosecution; all testified that they had been benefited by the Society; work was much better in quality than before the Society was organized; the men were steadier and "blue Mondays" had become infrequent; the wages fixed by the Society were moderate, and non-members as well as members could get them; only a few comparatively large shops were closed against non-members—who, if they were competent workmen, got employment in the smaller shops as easily and on the same terms as members, the Society raising no objection and making no trouble. To show that association for the promotion, inevitably coercive, of common interests is normal and proper, Rantoul called representatives of several professional and commercial organizations—the closest analogue being that of the Boston Bar, of which Judge Thacher, the District Attorney, Attorney-General Austin, Chief Justice Shaw and Daniel Webster were members. Its rules fixed minimum fees "as the lowest which we can reasonably and honorably receive," and forbade members "to advise or consult, or be in any manner associated" with any non-member attorney who should not have subscribed to its rules. The Boston Medical Association had what similar rules, and in addition a disciplinary committee at whose instance a physician had been expelled for associating with "scabs." The Bar Association had dissolved itself in 1836—a time of excitement with respect to the Trades' Union—and the prosecution contended that its successor organization was merely nominal; but Rantoul could argue that it merely substituted an equally efficacious gentlemen's agreement for formally definite obligations.

---

29 No shop was very large. The masters who were not free to employ non-members were Wait, employing more than 6, Blanchard 10 or 12, Howard 5 to 8, Fiske 12 to 20. Those who hired whom they pleased were Whitney 2, Leach 6 to 8, Field 2, Tyler 1 to 2, Smith 3 to 5, Schaier 2, Dunham 3. As to his own witnesses Rantoul's notes add nothing of consequence to what appears in Thacher, at 619-620.

30 Cf. the Board of Judges provided for by the constitution, supra note 21. There was no evidence that this board existed or functioned.

31 See infra, text above n. 88-97.

32 According to Rantoul's notes the constitution of the later bar association expressed "an opinion that the following rates are proper" instead of expressly making it obligatory not to charge less. The range of its provision that members might be expelled for "ungentlemanly" conduct would seem at least as broad as that of the bootmakers' requirement that members be of "approved moral character."
Though this much evidence upon the question of justification was received without question, the court excluded other evidence which was equally relevant if that question was in the case. The legitimacy of the object announced in the preamble to the Society’s constitution was not challenged:—“to maintain the rate of wages necessary to insure us the necessaries of life.” But when Rantoul, to support argument that its organization and subsequent activities were reasonably necessary to effectuate that object, offered to prove the cost of living at the time of its organization, Judge Thacher ruled that the cost of living was irrelevant.38

The main arguments of counsel and the judge’s charge will be outlined later. Except for these, the foregoing covers all that is collectible of what, in the court room, was put before the jurors who found the defendants guilty. Of course the case was tried out of court as well as in. The presidential campaign which resulted in the defeat of Van Buren by Harrison and Tyler was at its highest intensity. At the beginning of his closing argument the district attorney expressed the wish that the trial could have been delayed a month—until after election? Rantoul’s notes of the last day of trial contain also the following:


“Remarks of a morning paper!

“Ruled out.”

38 Bill of exceptions, supra note 27:

“(1st.) After the jury were empanelled to try the issue divers witnesses were sworn and examined in support of the prosecution, and among others, Grant Leonard. [Rantoul’s notes have only this after his name: ‘I paid no fines. I was at no meetings. Defendants propose five questions. Ruled out.’] After having stated in his cross examination that he believed that the Society of the Boston Journeymen Bootmakers’ was formed five or six years ago, the said Leonard was asked by R. Rantoul, Jr., Counsel for the defendants, ‘What was the price of flour at that time?’ To this question S. D. Parker, Esq., for the Commonwealth, objected, that the indictment did not allege against the defendants any charge of conspiracy for raising their wages, and therefore that the inquiry was wholly irrelevant to the issue of the trial. Mr. Rantoul, in answer to this objection, stated that it was shown by the preamble to the constitution of the society which had been read in evidence and is to be referred to as on file in any future proceedings in this or in the Supreme Judicial Court, that the object of the defendants, who were members of the same, in its formation, was to maintain that rate of wages which was necessary to assure to them the necessaries of life; and he contended that this was the true and only object of the association. Hence he inferred that it was competent for the defendants in their defence to go into the inquiry as to what was, at that time, the price of flour and of the other necessaries of life. But the Judge ruled that the prices of the necessaries of life were not relevant to the issue and therefore excluded the evidence. To which ruling of the Court the defendants entered their exceptions, and the same were allowed.”

In an opinion supporting this ruling the trial judge said that “as the defendants are not charged with conspiring to raise their wages” evidence of relation of wages to cost of living which “might be pertinent” (as showing justification?) to that charge was irrelevant. “Whether the object of the club was good or bad, can derive no light from an inquiry into the price of flour. . . . One crime [raising wages?] can be no justification for another.” Thacher, at 638.
No confident conjecture as to the remarks in question results from a search of the Boston papers. All but the Post were ardently Whig, and their slant and emphasis were favorable to the prosecution. The Post's initial reaction had been similar; its brief item on October 9th stated that an indictment had been found against the bootmakers, and that their constitution subjected workmen who declined invitation to join their society to two dollars fine; "This is levying blackmail with a vengeance," was the comment. The Post of October 16th announced that "we have taken means to secure a report of the trial, for the purpose of publication, when closed." The item continues:

"We ought to state that the apparently obnoxious provision in the constitution of the bootmakers' society, upon which a censuring comment was made when the case was first mentioned in our report, has been completely misunderstood in consequence of a misprint in the article as it appears in the pamphlet."

The "misprint" explanation was disingenuous. The true ground of the Post's rescission of its censorious construction was probably the fact that so important a Democrat as Rantoul represented the defendants. The Post's promised report of the trial was published October 21st, after the evidence had closed, but before the case had gone to the jury. Though the Post gave more space to the defense and less to the prosecution than the Whig Advertiser, its report was objective; neither there nor in any of its briefer items except the early one above quoted did I note anything which the district attorney could have found useful or objectionable.

The Advertiser's detailed report was not published until the trial was over. It had this in conclusion:

"As this trial has apparently created some political feelings, it may be proper to remark that the jury was composed of gentlemen of both political parties."

Feelings, "political" or not, would naturally have been warmest among bootmakers. Disinclination to incur their resentment seems as apparent in some of the witnesses called by the prosecution as friendliness to the Society in others. Resentment towards the prosecution was not confined to members of the Society. One Michael Sculley testified at the trial that he had lost two jobs, inferably because he had

---

34 See Art. 13, sec. 1, supra note 21, reprinted in full, Thacher, at 611.
35 See notes 24, 26, and 28, supra. "I was invited to join," said one witness "but not by either of the defendants. I never saw either of the defendants at a meeting." The printer who printed the constitution "could not remember" with whom he had dealt. (From Rantoul's notes.)
ceased to be a member.\(^\text{36}\) After he had left court and, it was said, had fortified himself with drink, a non-member named Dowling reproached him for interfering with what was none of his business. Fisticuffs followed; Sculley had Dowling arrested, but later entered a \textit{nol. pros.}\(^\text{37}\)

II

The initial reaction of most Bostonians of native stock such as composed the jury\(^\text{38}\) was probably like that of the Post. Even in those who were party Democrats\(^\text{39}\) the dominant political feeling would naturally have been repugnance to Irish\(^\text{40}\) coercion of American masters to discharge workmen with whom they were satisfied. This feeling was doubtless heightened and rationalized by the district attorney’s arguments and the judge’s charge. Rantoul to be sure was always heard with attention upon any subject at whatever length he spoke. But it is unlikely that his arguments shook even momentarily the initial presumption of jurors as to the mandate of their Americanism.

At least from the early moment of the trial when the court held that the defendants’ needs had no bearing upon the criminality of their Society, it must have been evident to him that his one hope lay in the power of the jury to judge law as well as fact—a power then still, though grudgingly, conceded to be rightful.\(^\text{41}\) He argued law to the jury as if to a court—the published reports of his arguments at the trial and in the Supreme Judicial Court are, indeed, virtually identical.\(^\text{42}\)

A modern lawyer arguing such a case in an exceptionally enlightened court might as his main point claim justification for the defendants upon this ground: The benefits incident to the efficient maintenance of a closed shop by a labor union outweigh the harms. I do not

\(^{36}\) Supra note 24.

\(^{37}\) Boston Post, Oct. 26 and 27, 1840.

\(^{38}\) These were the jurors’ names: Oliver C. Greenleaf, Jeffrey Richardson, Albert A. Bent, Andrew E. Belknap, John T. Quigley, Aaron Guild, Enoch H. Wakefield, Nathaniel N. Bates, William A. Brabiner, James C. Converse, Samuel Floyd, Henry K. Hancock. Boston Advertiser, Oct. 15, 1840.

\(^{39}\) A Whig liquor license law had been the burning issue in Boston until the presidential campaign of 1840 crowded it out. Opposition to it had made many Democrats and cost the Whigs the governorship for a year.

\(^{40}\) Chief Justice Shaw’s fairness at the trial of the Convent Rioters in 1834 won approval from the Catholic Bishop in which by no means all native born Bostonians had joined. \textit{CHASE, LEMUEL SHAW} (1918) 216.

\(^{41}\) It was not until 1845, in \textit{Commonwealth v. Porter}, 51 Mass. (10 Metc.) 263 (1845), that Chief Justice Shaw undertook the annihilation of this “right” of the jury which he completed, almost in the teeth of the state constitution, in \textit{Commonwealth v. Anthes}, 71 Mass. (5 Gray) 185 (1855). In a prosecution in 1839 under the liquor license law, \textit{supra} note 39, Judge Thacher had said that he “could not say that a juror had not a right in a criminal case to disregard the opinion of the court upon the law.” Pamphlet, \textit{The Common Law and Jury Trials}, reprinting a series of articles which appeared in the Boston Post in Sept. 1839 (copy in Rantoul’s papers).

\(^{42}\) See note 7, \textit{supra}. 

This content downloaded from 130.132.171.224 on Sat, 15 Jan 2013 20:04:22 PM
All use subject to JSTOR Terms and Conditions
doubt that conviction that this was true was the main motive of Rantoul's exertions. He came no nearer to stating it, however, than when he claimed that the moving purpose of the defendants' organization—to maintain wages high enough to assure them the necessaries of life—involved negation of the alleged purpose to oppress Horne and Wait. He himself saw that this was unsatisfactory. But no lawyer of his time could have conceived that the policy question was legal. Had he argued that labor power strong enough to minimize labor sufferings in the competitive scramble is justified by its social usefulness, even though a sufficient power cannot be maintained without restricting the freedom of masters or of an occasional Jeremiah Horne, he would have seemed guilty of professional impropriety.

For no Holmes had as yet seen rights and wrongs as relative, or the boundaries between the lawful and the unlawful as broad penumbra. Every legal right or wrong had, conceptually, the sharp definition of day or night in the tropics, where no twilight connects them. In the sphere of torts and crimes, law was thought of as a body of prohibitions; whatever was not forbidden was lawful. The prohibitions were established, settled, known. They had been established by the consent of the governed. The governed had consented to no delegation of legislative power; they kept it in their own hands, even though they necessarily exercised it through representatives. The agency of the courts was merely to enforce known laws; judicial legislation would be tyranny. Though all rightful power was bounded by the common good, that good required above all else that only the established, settled, and known be given effect as law; for otherwise society would incur the greatest of all evils, arbitrary power. Established rules must therefore be given effect, whatever the cost in social disadvantage. Argument of their inexpediency should be addressed not to courts but to legislatures. The legal question was always, what is the rule, never what rule would be for the common good. Though a supposed social advantage was often the horse with which a sagacious judge or advocate made his technical arguments move, it was necessary to hitch that horse behind, not before, the cart of legalism. This necessity often excluded one side of a case from presenting its considerations of social advantage. For a court did not have to weigh them. And unless the mind of the court were more

---

43 On a slip of scratch paper among his notes he wrote that a proper main object is not necessarily exclusive of incidental unlawful objects.

44 It is to be noted that Marshall, the most legislative of judges, always represented his constructions as compelled by the plain meaning and intent of constitutional provisions—as evinced, to be sure, by considerations of social advantage. He seems to have believed intensely, and not always in the abstract, that the judicial function was solely to execute, never to create. See Marshall, C.J., dissenting in Bank of the U. S. v. Dandridge, 25 U. S. (12 Wheat.) 64, 90-116 (1827).
open than minds usually are, considerations which the court preferred not to weigh were apt to be treated as contraband.

Benthamite realists, of whom Rantoul was one, dissented not at all from the conventional ideals. They dissented vehemently, however, from orthodox assumption that these ideals were realized in practice. Recognizing that society is actually regulated less by common consent than by superior power, most of them demanded that the greatest number vest themselves with superior power, and restrict the courts to ministry of known rules established by the greatest number for their greatest good. The actuality and variability of the judicial legislation which Rantoul found palpable in law did not lead him, as it has modern realists, to urge that legal uncertainty be conceded as inevitable, and wide doors opened for either the ideally candid or the humanly uncandid disposition of the "real question" of every case upon "true grounds." Rantoul's Benthamite aim was that the personal wills and social views of judges should be reduced to innocuousness by a complete code of rules so definite and certain as to allow no loop-hole for judicial legislation. Pending codification, courts were if possible to be kept from legislating where the common law was silent or uncertain.

Consistently both with his Benthamism and with the professional conventions of the time—and also with the wise practical policy of not exciting Tory antagonisms further than was unavoidable—Rantoul relied in Commonwealth v. Hunt rather upon negation of claims that there was law against effective labor organization than upon affirmation of its social expediency. His arguments were not original. They had been

---

45 "Law is the command of the sovereign" was the backward-looking formula, the truth of which they toiled up-hill to prove: for superior powers in society are complex, shifting, and often obscure. Jurists whose construction of Austinianism is absurdly literal find it easy to prove its absurdity; e.g. ALLEN, LAW IN THE MAKING (1930).

46 Rantoul's notes for his argument show that he read to the jury part, probably including the following, of his oration at Scituate, delivered July 4, 1836. "How can that which is definitely settled and well known, be applied otherwise than as a positive and unbending text? It is because judge-made law is indefinitely and vaguely settled, and its exact limits unknown, that it possesses the capacity of adapting itself to new cases, or, in other words, admits of judicial legislation. ... The law should be a positive and unbending text, otherwise the judge has an arbitrary power, or discretion; and the discretion of a good man is often nothing better than caprice. ... Why is an ex post facto law, passed by the legislature, ... unconstitutional ... while judge-made law, which, from its nature, must always be ex post facto, is not only obeyed, but applauded? ... No man can tell what the common law is; therefore it is not law; for a law is a rule of action. ... The judge makes law, by extorting from precedents something which they do not contain. ... Almost any case, where there is any difference of opinion, may be decided either way. ... We must have democratic governors, who will appoint democratic judges, and the whole body of the law must be codified." HAMILTON, MEMOIRS, SPEECHES AND WRITINGS OF ROBERT RANTOUL, JR. (1854) 278-281.

47 FRANK, LAW AND THE MODERN MIND (1930).

ably presented by Franklin in 1806 and Sampson in 1810.49 They had been pressed unsuccessfully in a number of later cases. But Rantoul was probably the most powerful lawyer who has ever whole-heartedly defended an American labor case. His mind had depth and range; he inspired both liking and respect, even among those who differed with him; though he had not attained to a political position more impressive than that of minority leader in the state legislature, he was expected to.50

His first point after he had assured the jury that they were judges of law, was that there was no law against conspiracies in restraint of trade unless common law. There should be no such common law crime; it would be too uncertain. "Man makes law for his dog"; unless it is clear and simple, the dog does not know how to behave; he is not regulated, but confused. "Misera servitus ubi jus incertum atque vagum." That criminality should depend upon ex post facto judicial legislation may be well enough in a stationary society like that of China. It is intolerable in a society where everything is changeful.

"We have not adopted the whole mass of the common law of England, indiscriminately, nor of the English statute law." Our Constitution continues only such as had been used and approved and usually practised before its adoption—only such, moreover, as suits the condi-

49 Appendix, Cases 1 and 3.
50 Rantoul, 1805-1852, was the son of another Robert Rantoul who was also well known for humane and liberal activities. At Harvard, Robert, Jr. "was chiefly instrumental in forming a society for literary exercises on a freer and more generous principle of election to membership than prevailed in the societies previously existing. He effected the union of this association with two others of earlier date under the name of the 'Institute of 1770,' which was divided into several sections for the cultivation of general literature, chemistry, geology, and natural history." It would have distressed him to foresee that his college society was to depart somewhat from its original aims.

After practicing law in Essex County with success, in spite of near-ostracism at the beginning for his democratic politics, and serving brilliantly in the legislature (where his main exertions were for penal reform, codification, and education, and against corporate "monopolies"), he shifted his office to Boston shortly before the bootmakers' case. After Dorr's Rebellion he was as obvious a choice to defend Rhode Island rebels as Daniel Webster to prosecute them. He was appointed Collector of the Port of Boston in 1843 and United States Attorney in 1844. Towards the end of his short life, somewhat inconsistently with his hostility to corporate privileges in Massachusetts, he lobbied through the Illinois legislature, against the opposition of Abraham Lincoln, the charter of the Illinois Central. Within a few months after his election to Congress in 1851 by a coalition of Democrats and Free Soilers, he died suddenly.

His ideas and advocacy must be passed with such slight mentions as occur here and there in this article. Personally he was vivid; people cared for him deeply—though I suspect that Hawthorne, who was in politics only for jobs, may rather have cultivated than liked him. For Rantoul took his politics seriously. See Hamilton, op. cit. supra note 49; M. E. Curti, Robert Rantoul, Jr. (1932) 5 N. E. Quat. 264; Stewart, Hawthorne and Politics, id. 237; 36 Hist. Collections of the Essex Institute (1889) 34 ff.; 17 id. (1880) 159 ff.; 34 id. (1898) 195; 21 id. (1884) 264 ff.; Robert Rantoul, Jr. (1850) 5 U. S. Mag. and Dem. Rev. 348; Robert Rantoul, Jr. in 3 Sumner, Works (1875-1883) 76.
tions of a free people who have thrown off monarchy and the class
discriminations that go with it. "We might as well be governed by
England as to adopt blindly in mass her laws which grow out of her
institutions and state of society." Her government is founded upon
property. Her laws restraining laborers from interfering with trade
sacrificed them to the ruling classes. "Laws against acts done in re-
straint of trade belong to that portion of the law of England which
we have not adopted. They were part of the English tyranny from
which we fled. They are repugnant to the Constitution and to the first
principles of freedom."\(^5^1\)

His further more technical arguments as to the law of conspiracy
and criminal pleading, though they made no impression upon the trial
court, were to such an extent adopted by Chief Justice Shaw, whose
opinion will be discussed later, that they will not be stated at this point.
He addressed the jury for two solid days, doubtless with warmth and
color of which but few traces survive in his notes or the summaries in
the printed reports. It seems fair to conclude, however, that most of
what he said was better adapted to the understanding of an appellate
court than a jury. The friendly Boston Post made no attempt to con-
vey any of his points to the public, saying only that his argument was
"most elaborate. . . . As a review of the English laws respecting the
working classes, it was one of the most instructive arguments ever made
in Boston." The judge commenced his charge with the remark that the
jury's patience had already been "well disciplined." The district at-
torney commenced his closing argument by characterizing Rantoul's
speech as suitable for a lecture hall or legislature; small part had any
bearing on the case; but "a certain mystification has been thrown over
it which I will try to disperse."\(^5^2\)

It does not appear that Rantoul tried directly to counteract the
emotions which were likely to defeat him—sympathy with bootmakers
who had to join or quit their jobs, and with masters who were forced
to acquiesce; fear of labor tyranny. The district attorney and the
judge, on the other hand, probably succeeded in heightening these
emotions. When the introduction of machinery gave rise to trade unions
in England, said the district attorney in his opening, "the utmost energy
of the government was required for the preservation of the laws and
the protection of the community." Such prosecutions as this are not
new. The tailors of Cambridge were convicted in 1721;\(^5^3\) there have

\(^5^1\) The above is taken mainly from the notes Rantoul used in making his
argument, which consist of eight formulated propositions with a mountain of cita-
tions under each; his more technical arguments are adequately summarized in the
reports, supra note 7.

\(^5^2\) Boston Advertiser, Oct. 23, 1840.

\(^5^3\) See infra, note 64.
been many cases in this country, especially in New York.\textsuperscript{54} But there has been no difficulty in suppressing trade unions, “for their spirit is anti-republican, and public sentiment has aided the law in checking the mischief. . . . What can be more tyrannical than for the journey-
men of any trade to combine and take preventive measures, that no man shall be employed in their trade, unless he pays them for admission into their society, and submits to their dictation and rules? No choice is allowed. There is absolute and over-bearing compulsion.” It is true that lawyers have had bar rules, and physicians their tariff of fees. “But one conspiracy is no justification for another.” When trade union societies began to be in vogue in Massachusetts, moreover, the Suffolk Bar set the good example of abolishing their rules regulating fees.\textsuperscript{55} The bootmakers’ society “may have some good objects, and do some good, . . . but it is oppressive . . . and intended so to be—a coercive, rigid, persecuting society.” In this particular it differs from the bar and medical societies.\textsuperscript{56}

Judge Thacher’s emotional appeals were less restrained: “You may have perceived in this case, as in other secret societies, the strength of the spirit of the society.” Members were unwilling witnesses against it. But its constitution speaks for itself, and cannot be contradicted.\textsuperscript{57} “You must judge whether they do not propose, by means of this league, to control all masters, journeymen, and apprentices in their art; and to compel the people of the commonwealth to pay for their boots and shoes whatever price this society shall set.” If they are held justi-
fied in law, “they will probably make new and still more burdensome regulations.” And masters, under equal protection of law, will combine and oppress journeymen, till ultimately every profession, trade, and occupation will be “disfranchised of their ancient . . . rights and liberties, and subjected to new, secret, and unknown tribunals, and to varying laws by which their property will be taken from them against their consent, and without trial by jury.” “The question is not whether the society have used their power to the extent of mischief of which it is capable, but rather whether they have not assumed a power . . . which in the hands of irresponsible persons, is liable to great abuse.” If such associations should become general, “all industry and enter-
prise would be suspended, and all property would become insecure. It would involve in one common, fatal ruin, both laborer and employer, and the rich as well as the poor. It would tend directly to array them

\textsuperscript{54} He cited only the New York Cordwainers’ Case and People v. Fisher, Appendix, Cases 3 and 16.\textsuperscript{55} Boston Post, Oct. 21, 1840; cf. Thacher, at 614.\textsuperscript{56} Thacher, at 635, 653.\textsuperscript{57} Both the judge and district attorney dwelt upon provisions of the constitution concerning the operation of which there was no evidence. See note 21, supra.
against each other, and to convulse the social system to its centre. A frightful despotism would soon be erected on the ruins of this free and happy commonwealth."\(^{58}\)

Of course all this had a sub-structure of assertion as to the law. The jury's right to judge the law was conceded. They must do it upon evidence, however—expert evidence, since they cannot be expected to read "the hundred law books produced on each side." The court is the constitutional witness; they should not rely upon other testimony than his.\(^{59}\) The common law is as certain as statute law. That of this commonwealth rests not only upon that of England but also upon cases adjudged here since the Revolution. Our supreme court "have decided that conspiracy is an offence at common law, as adopted in Massachusetts, and by this decision and that of this court you must abide." The object of a conspiracy need not be an act criminal if performed by an individual; the conspiracy is criminal if the object is only civilly unlawful.\(^{60}\)

"Although it was lawful for these defendants, individually, to refuse to work for any master bootmaker who should employ a journeyman not a member of their society, yet if they combined together to control, by the force of numbers, the employment of other persons, or to extort from any one the payment of sums of money not justly due, I consider that both the means and the object were violations of law."

They usurp governmental power. And that is unlawful; for the Constitution provides "that every individual in this commonwealth has a right to be protected by the government in the enjoyment of his property, according to standing laws." Their fines are taxes; and only the legislature may lawfully tax. "It is my duty to instruct you, as matter of law, that this society of journeymen bootmakers, thus organized for the purposes described in the indictment, is an unlawful conspiracy against the laws of this commonwealth."\(^{61}\)

After the verdict of guilty, imposition of sentence was deferred until the Supreme Judicial Court should have ruled upon Rantoul's exceptions. That court found it unnecessary to pass upon three of the four exceptions\(^{62}\) since it sustained the fourth. The exception sustained was to the trial court's refusal to instruct the jury,

---

\(^{58}\) *Thacher*, at 647, 650-654.

\(^{59}\) *Id.*, at 636, 640.

\(^{60}\) *Id.*, at 640-642, citing cases in 1803 of conspiracies to commit civilly actionable frauds which were not then indictable.

\(^{61}\) *Id.*, at 644-5, 648, 649, 650, 653.

\(^{62}\) Exceptions not passed upon were to permitting witnesses to state conclusions of compulsion, *supra* note 27, to the exclusion of evidence of the cost of living, *supra* note 33, and to the exclusion of evidence that Horne was habitually slack as a workman, *supra* note 22.
“that the indictment did not set forth any agreement to do a criminal act, or to do any lawful act by any specified criminal means, and that the agreements therein set forth did not constitute a conspiracy indictable by any law of this commonwealth.”

Chief Justice Shaw’s opinion was a consummate fusion of considerations of social advantage with technicality, adopting, with subtle modifications, all of Rantoul’s contentions as to the law of conspiracy.

The common law of Massachusetts, he said, derived from that of England the rule that it is criminal to combine to do that which is unlawful or criminal. But much that was unlawful or criminal in England is not unlawful in Massachusetts. Many English rules as to laborers, both statutory and at common law, were not adapted to our conditions and are not law here. Since we have no legal limits on wages, The King v. Journeymen Tailors of Cambridge is not a precedent for a prosecution here of a combination with the same object. The only other reported case of the eighteenth century in which a labor combination was held indictable at common law was Rex v. Eccles. The indictment there charged conspiracy, by means not stated, “to deprive and hinder” a tailor from exercising his trade; the court must have deemed this object unlawful, whatever the means by which it was to be affected; it is not so here. The only American labor case which seemed to Shaw worth mentioning was People v. Fisher, explainable on the ground that in New York, by statute, restraint of trade is a criminal object when it is the object of a combination. Such is not the law in Massachusetts.

Shaw found his own abstract definition of conspiracy unsatisfactory. He agreed with Rantoul that the pattern conspiracy is a combination to commit a crime; the exception which his decision sustained was framed on that theory. Yet, respecting the authority of cases sustaining convictions for conspiracy to defraud or to seduce when the execution of the contemplated fraud or seduction would not have been a crime, he was forced to say that if the intended object or means, though not criminal, was unlawful, the combination might be a conspiracy. “But yet it is clear, that it is not every combination to do unlawful acts, to the prejudice of another by a concerted action, which

---

63 Commonwealth v. Hunt, supra note 7, 4 Metc. at 127.
64 8 Mod. 10 (K. B. 1721); the object of the combination was to raise wages higher than a statutory maximum. The case was badly reported or loosely reasoned; but it seems to have been held that an indictment for conspiracy to do what is unlawful by statute need not aver contra formam statuti.
65 Leach, C. C. 274 (1783), an obscurely reasoned, loose decision of Lord Mansfield’s. See Nelles, supra note 1, at 197 et seq.
66 Appendix, Case 16. The court in that case clearly purported to find that the statute was declaratory of the common law.
is punishable as conspiracy." The line defies precise definition by words. The specific object or means must be examined to see upon which side of it a case falls.

Therefore an intended object or means that will stamp the combination a conspiracy must be specified in the indictment. Question-begging pleader’s conclusions will not do. Nor will evidence at the trial repair their insufficiency. “Whatever illegal purpose can be found in the constitution of the Bootmakers’ Society, it not being clearly set fourth in the indictment, cannot be relied upon to support this conviction. So if any facts were disclosed at the trial which, if properly averred, would have given a different character to the indictment, they do not appear in the bill of exceptions, nor could they, after verdict, aid the indictment. But looking solely at the indictment, disregarding the qualifying epithets, recitals and immaterial allegations, and confining ourselves to facts so averred as to be capable of being traversed and put in issue, we cannot perceive that it charges a criminal conspiracy punishable by law.”

Having thus made a case for reversal with an old-style technical rigor which was not always characteristic of him, Shaw supplemented it with powerful argument on the merits. Under the indictment before him, the defendants could be punished for innocent, even laudable, acts and aims. For stripped of pleader’s conclusions, the charges are two: (1) that the defendants formed a society and agreed not to work for anyone who should employ a non-member after notice to discharge him; (2) that their object was to impoverish Jeremiah Horne and certain masters. They may have done and intended all that is charged, and yet have done or intended nothing unlawful or improper.

Their manifest purpose to induce all those engaged in the same occupation to become members of their society is not unlawful. “It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. . . . Such an

---

[67] When the criminality of a conspiracy consists in an unlawful agreement . . . to compass some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality . . . consists in the agreement to compass . . . some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended use of fraud, force, falsehood, or other criminal or unlawful means must be set out in the indictment.” Commonwealth v. Hunt, supra note 7, 4 Metc. at 126.

[68] “This is required, to enable the defendant to meet the charge and prepare his defence, and, in case of acquittal or conviction, to show by record the identity of the charge, so that he may not be indicted a second time for the same offence.” Id., at 25-6.

[69] Id., at 136.

[70] Id., at 128-136.

[71] Shaw recited the averment in the indictment of purpose to boycott workmen who would not pay fines levied by the Society for breach of its rules (id., at 131), but without dignifying it by discussion.
association might be used to afford each other assistance in times of poverty, sickness and distress; or to raise their intellectual, moral and social condition.” If, under cover of meritorious avowed objects, people associate for secret purposes “injurious to the peace of society or the rights of its members,” it is undoubtedly a criminal conspiracy. Or if the leading spirits of an innocent association turn its powers to purposes of oppression and injustice, “it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members.” But no such criminal objects are averred.

“Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means.” The proposed means averred is not working for employers of non-members. Unless this involves breach of employment contracts,72 which is not to be supposed without averment, they are “free to work for whom they please, or not to work, if they so prefer. . . . We cannot perceive that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests.” Test this by assuming an indubitably laudable object—the discouragement of intemperance—and means like that alleged—not to work for employers of habitual drinkers. Persistent drinkers would find employment hard to get or keep; employers would suffer by losing skillful but intemperate workmen. But “as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy.”

It was averred in one of the counts that “by means of said conspiracy, the defendants did compel one Wait to turn out of his employ one Jeremiah Horne.” If this could be construed as averment of an intended object or means;73 the question would be of the construction of the word “compel.” It sometimes means “coercion, or duress, by force or fraud.” With a context of averments of intended force or fraud,

72 “The case supposes that these persons are not bound by contract. . . . We do not understand that the agreement was, that the defendants would refuse to work for an employer to whom they were bound by contract . . . ; nor that they would insist that an employer should discharge a workman engaged by contract for a certain time, in violation of such contract. . . . If a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together, it would present a very different question. Suppose a farmer, employing a large number of men, engaged by the year, at fair monthly wages, and suppose that just at the moment when the crops were ready to harvest, they should all combine to quit his service, unless he would advance their wages, at a time when other laborers could not be obtained. It would surely be a conspiracy to do an unlawful act, though of such a character, that if done by an individual, it would lay the foundation of a civil action only, and not of criminal prosecution. It would be a case very different from that stated in this count.” Id., at 130-1.

73 He thought it could not; if no criminal object is distinctly averred, inference from averments of overt acts cannot supply the defect. Id., at 132.
“especially if it might be fairly construed . . . that Wait was under obligation, by contract, for an unexpired term of time, to employ and pay Horne,”74 compel might have that meaning. But the word “is disarmed and rendered harmless by the precise statement of the means, by which such compulsion was to be effected. It was the agreement not to work for him, by which they compelled Wait to decline employing Horne longer.”

As to counts stating the defendants’ object as “to impoverish” Horne or Wait by unstated “indirect means,”75 but little need be added. Suppose a baker had the exclusive custom of his village, and was making large profits; and some of his customers, when he would not reduce prices, set up a competing bakery. “The effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved that the purpose of the associates was to . . . impoverish him. . . . The same thing may be said of all competition in every branch of trade and industry; and yet it is through competition that the best interests of trade and industry are promoted.” An association whose object is to adopt measures which may tend to impoverish is not criminal unless its contemplated measures are criminal or unlawful.

These were the points of Shaw’s opinion. Rantoul might have been dissatisfied with much that he said. Shaw was careful, it will have been noted, to leave open various doors through which, should occasions arise, law could move to break effective labor organizations. Yet the main points which earlier counsel in American labor cases had pressed in vain seemed established for good and all: that special unlawfulnesses peculiar to labor organizations were not to be transplanted from England, and that whatever one person may lawfully do, any number may lawfully undertake, even if the result is to maintain the closed shop. These points were indeed regarded as established from 1842 until after the Civil War.

III

To comprehend why Shaw thus overthrew the sub-structure upon which a Tory criminal law against labor organizations could respectably have been established requires consideration of much that was not in the record before him or touched upon in his opinion. He was no sentimental friend of the poor working man. A week or so, at most, before the decision of Commonwealth v. Hunt, he had breathed life into the fellow servant rule:76 if a locomotive engineer is injured by

74 Id.
75 By enforcement of the closed shop rules, in fact.
the negligence of a switchman, the railway company which employs both is not liable. Such a rule, he argued, “is founded upon the expediency of throwing the risk upon those who can best guard against it.” It will make for the protection of both the public and fellow workmen from injuries due to workmen’s negligence. For, knowing that they cannot get compensation if injured, engineers, for example, will quit their jobs rather than work on the same railway with a careless switchman. Railways will discharge careless switchmen to prevent this. Therefore switchmen will be careful. Whatever the legal consistency of letting workmen help themselves against fellow servants in one case, and against employers and competing cheap labor in the other, inconsistency between the two cases is at least as obvious from a Jeffersonian point of view.

Shaw, though gruff, was a tender-hearted man. But he had no more liking for democracy or respect for the common man than Hamilton or Webster. At a time when an intelligent Jeffersonian could reasonably hope that juries would continue to correct judicial biases and rigidities often and importantly enough to outweigh their frequent imbecilities, Shaw contributed greatly to depriving jury service of dignity and responsibility. Neither his greatness nor his conscientiousness as a judge is open to the slightest question. His conscience was Tory. The constituency to which his sense of obligation was keenest comprised State Street and Beacon Hill, the bankers, the textile manufacturers, the railway builders. With most of that constituency, he had shifted from Congregationalism to Unitarianism—of the safe and sane variety which looked askance at the audacious social and religious views of Emerson and Theodore Parker. He was often bitterly denounced by radicals. For example Richard Henry Dana, whose abolitionist fervor laid him open to retort in kind, described Shaw as “a man of intense and doting biases in religious, political, and social matters.” Though he spoke respectfully of “liberty,” he was one of many judges who have found in “license” strict limits to the scope of that flexible concept. Abner Kneeland’s “blasphemy” seems to have been an honest and sober

---

17 CHASE, op. cit. supra note 40, c. xi. This work, with Professor Beale’s short memoir in 3 LEWIS, GREAT AMERICAN LAWYERS (1907) 455, make it easier to get a personal impression of Shaw than of most other American judges even of comparable distinction.

78 See note 41, supra.

79 A line of his decisions, commencing with Stebbins v. Jennings, 27 Mass. (10 Pick.) 172 (1830) also shifted church properties to the Unitarian seceders.

80 It may be evidence that he was tolerant of intellectual idiosyncrasy that Herman Melville, his son-in-law, dedicated Typee to him.

81 CHASE, op. cit. supra note 40, at 216. Shaw sustained the Fugitive Slave Law against an attack in habeas corpus by Rantoul and Dana. Id., at 166. But he abhorred slavery.
statement of religious disbelief; but Shaw sustained his conviction.\textsuperscript{82} When Rufus Choate admonished a professional colleague to remember that under Shaw "liberty and property are safe,"\textsuperscript{83} he meant the extraordinary and perhaps licentious degree of liberty which, since it depends upon successful acquisition, comparatively few can enjoy. Though "property" to Shaw was sacred, he did not conceive its immunities as absolute. He agreed with Taney, as against Marshall and Story, that a merely private interest must yield to interests in industrial expansion.\textsuperscript{84} This policy would account more reasonably than the explanation he gave for his position on the fellow servant rule—also for his holding that a railway's insurer's liability ends when it has unloaded freight in its own depot.\textsuperscript{85} Railways had yet to establish themselves; and there was much feeling that capital needed encouragement to invest in them.

He was liberal in the sense that another great Tory judge, Lord Mansfield, was liberal; his eyes were wide open to what was going on in the world; he was impatient of narrow legalism, well though he could use it; he wanted law to promote fair dealing in business transactions; he wanted enterprise to prosper; he was sagaciously alert to promote these and other interests which seemed to him to be those of the supposed entity called "society." Holmes wrote of him: "The strength of that great judge lay in accurate appreciation of the requirements of the community whose officer he was. Some, indeed many, English judges could be named who have surpassed him in accurate technical knowledge; but few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred."\textsuperscript{86} Holmes himself owes much to him. Shaw anticipated him, for example, when he said: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience." The context in which Shaw said this, however, distinguishes him from Holmes—whose Toryism is greatly modified, much as John Adams' was, by Jeffersonian values. It was said as preface to Shaw's argument of the sound policy in the fellow servant rule.

For all the meagerness of the bill of exceptions filed in his court, Shaw undoubtedly knew all that was worth knowing about the trial of

\textsuperscript{82} Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206 (1838).
\textsuperscript{83} Chase, op. cit. supra note 40, at 289.
\textsuperscript{84} Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851). Cf. Taney in Charles River Bridge v. Warren Bridge, 36 U. S. (11 Pet.) 420 (1837); in that case Shaw had as counsel in the Massachusetts courts argued for the side which would have prevailed had Marshall survived.
\textsuperscript{86} Holmes, The Common Law (1881) 106.
Commonwealth v. Hunt. He was a judicial statesman—and to represent judicial statesmanship as a thing entirely different and distinct from political statesmanship is nonsense. His statesmanship, following his conscience, was Tory. The political organization through which in his time Toryism, applying that word to Jacksonian democracy, was fighting for more sun and air, was the amorphous Whig Party. Judicial aloofness from political campaigns does not amount to indifference to their outcome; and it would be strange if Shaw, always alert to what went on in his community, had not at the time anxiously considered the danger that the trial of the bootmakers in October, 1840, might divert votes from Harrison in November. To his constituency the campaign of 1840 seemed the most important since 1800; upon Whig victory depended salvation from crazy Jacksonian banking, disorganization and insecurity of currency and credit, and above all, perhaps, diminution of tariff protection. Seeing their coming triumph in the air, most Boston Brahmins might have exulted in the incidental crushing by the law of what was left of the trades' union movement which had alarmed them in 1835 and 1836. But a Brahmin so level-headed as Shaw might have wondered whether Judge Thacher and the district attorney were not creating an unnecessary political risk.

Their game might well have seemed not worth the candle. Relations between the organized bootmakers and their employers were harmonious. If a few employers did not like the journeymen's society, there were more who did. None of them thought that union wages were too high or that union workmen were unsatisfactory. There had been no strike or threat of strike—no serious labor trouble or indication of its likelihood. Of all the cases in the history of labor law in which the nominal complainant has been an aggrieved workman, Commonwealth v. Hunt is the only one that occurs to me in which it seems probable that no employing interest was actively concerned.87

In the depression of the early forties, to organize labor in any important industry in Massachusetts would have been as impossible as for an existing organization to undertake an aggressive policy. Even in the middle thirties Massachusetts employers had feared the trades' union movement with less reason than employers elsewhere. The Middle States had been the main field of that wave. Manured by the currency inflation,88 local societies of journeymen in particular skilled

87 In several of the earlier cases it is certain, and in all the rest it seems likely, that prosecution was instigated by employers, often organized for that purpose and engaging distinguished counsel. See Appendix.
88 Superabundant money, even such as it was, meant rising prices, brisk business, and increased demand for labor; therefore opportunity for workmen in the skilled trades, if they could get together, to raise their wages (though probably not in proportion to the increased cost of living), and incidentally to strike blows
trades had sprung up like mushrooms. At New York, Philadelphia, Baltimore, New Brunswick, Newark, Albany, Troy, Schenectady and other centers local societies of many trades had somewhat fused into *trades' unions*—more like modern "city central" labor organizations than like modern *trade* unions. Backed by the newspaper organ, funds and boycotting power of a trades' union,90 a local society could usually, in the prosperous years before the Panic, weather and win its strikes. In several trades, of which the cordwainers' was one, there was also loose fusion of neighboring local societies into what aspired to be a national society of the trade.90 Such a society, though much less potent than a trades' union, could give moral and perhaps a little financial backing to local societies of the trade in places too small to have trades' unions. The terrifying though not terrible National Trades' Union had at least such existence as could be conferred by two annual conventions with published proceedings.91

It is not intended to imply that this movement did not touch Massachusetts. There was a trades' union at Boston and a good many local societies were organized. But the proportion of the laboring class which organized was much smaller than in the Middle States. The largest manufacture, by long odds, was of textiles. And then, as before and since, operatives in the textile mills were for the most part unorganizable.92 The building trades organized to some extent. But whereas, at Philadelphia, not only these trades but even the unskilled coal-heavers won after short strikes demands for a working day lasting only from six to six, with two hours out for meals,93 the Boston carpenters only added a new chapter to their history of failure—and their disastrous

against practices which it had been futile to fight in the leaner years which preceded: hours from dawn to dark, prison labor, dispensing with trained men by dividing handiwork (machinery, except in the textile mills, had scarcely commenced its devastations) into separate processes which could easily be taught to women or boys. Boys, called apprentices, were counted upon to run away long before they had served their time; their use was to dispense with trained men, not to multiply them. Commons, at 335 ff.

90 Id., at 360-364.
91 Rantoul's papers include a pamphlet, *Proceedings of the Convention of Cordwainers Holden in the City of New York in March, 1836*. Delegates attended from as far away as Wilmington and New Haven. Those from Albany and Washington were unable to attend because of expense. There were none from Boston or near it. The convention adopted a standard list of wages, and appointed a committee to stimulate organization and strikes, especially in New England, where wages were said to be far below those in the middle states. It endorsed a few strikes in the neighborhood of New York, but it had no funds with which to support them. A proposal to assess members for a strike fund was considered.

92 Commons, at 357-454.
93 About half were farm girls between eighteen and twenty-five, often in the mills for only a year or so; most of the rest were children. C. F. Ware, *The Early New England Cotton Manufacture* (1931).
94 Commons, at 390-2.
strike seems to have lasted seven months.\textsuperscript{94} As against a tendency toward successful strikes in 1835-36 in the middle states,\textsuperscript{95} the single success in Massachusetts noted in Professor Commons’s work was of the Salem plasterers.\textsuperscript{96} Doubtless there were other successful strikes there in addition to those of the Boston bootmakers.\textsuperscript{97} But the painstaking though inevitably incomplete investigation by Professor Commons’s associates uncovered only 16 new societies at Boston in 1835-6 as against 52 at New York.

It is to be noted that the Boston organization was of bootmakers—not, as in the middle states, of cordwainers more generally.\textsuperscript{98} Probably more people worked at making footwear in eastern Massachusetts than in all the middle states put together.\textsuperscript{99} But most of them were unorganizable. For comparative mass production of many sorts of footwear cheap workmen had been specialized in separate processes.\textsuperscript{100} And the cheaper grades of boots and shoes were made largely by semi-professionals in farmhouses in their spare time in winter.\textsuperscript{101} It is not therefore extraordinary to find no mention of any society of cordwainers anywhere in Massachusetts at this period, except the Boston bootmakers. Even in the middle thirties such societies would have been few, and very few indeed of them would have lasted into the depression following the Panic of 1837. The fully trained workman may have retained an importance in bootmaking which he had lost in other branches of footwear manufacture. At Boston, in the manufacture of superior boots for a superior market, he may have had a special importance. The survival of the Boston society under conditions in which it would have been suicidal to press for higher wages was doubtless aided by the generally harmonious relations between its members and their employers from its inception. Most of the shops were so small that the employers—many of whom as journeymen had belonged to the Society in the beginning—would have had somewhat the feelings of fellow workmen.\textsuperscript{102}

In other branches of the footwear industry even the entrepreneurs

\begin{itemize}
  \item \textsuperscript{94} \textit{Id.}, at 388-9. They had failed also in 1825, 1830, and 1832. \textit{Id.}, at 303, 310.
  \item \textsuperscript{95} \textit{Id.}, at 371, 381 \textit{et seq.}
  \item \textsuperscript{96} \textit{Id.}, at 387.
  \item \textsuperscript{97} \textit{Supra}, text above n. 12.
  \item \textsuperscript{98} Note 90, \textit{supra}. The only division at New York seemed between workers on men’s and on women’s footwear.
  \item \textsuperscript{99} HAZARD, \textit{THE ORGANIZATION OF THE BOOT AND SHOE INDUSTRY IN MASSACHUSETTS} (1921) 113.
  \item \textsuperscript{100} \textit{Id.}, at 42 ff. At Lynn in 1833 there were about 1600 women shoe-binders getting from 12 to 50 cents a day. The Female Society of Lynn succeeded momentarily in enrolling nearly 1000 of them. But after losing a strike against a reduction of wages, the Female Society disintegrated. \textit{Commons}, at 355-6.
  \item \textsuperscript{101} HAZARD, \textit{op. cit. supra note 99}, at c. iii, iv.
  \item \textsuperscript{102} See note 29, \textit{supra}.
\end{itemize}
of mass production were usually recent graduates from the work-
bench. In the early forties they might well have regarded the Boston
society with unconcern, if not with friendliness, as a peculiar isolated
phenomenon which neither touched nor threatened them. The cheap
labor which they required was superabundant; effective organization
of it was unthinkable; if trade should improve, fresh labor supplies
could be tapped in the farmhouses, and sufficiently trained farmer-
workmen brought into the shops. Thousands of people in Massachu-
setts, with no very sharp lines between employers and workmen, made
footwear; and to consult their interests and prejudices was politically
important. But feeling that the Boston society was a menace would not
have been intense or general among them.

Such feeling would have been more intense among those interested
in the prosperity of the textile mills. Whigs generally identified that
prosperity with the welfare of the Commonwealth—rightly, moreover, if
such an identification was justified by the fact that nearly everyone's
income was at least indirectly affected by the ups and downs of the
mills. The incomes of a very large proportion of the "better element"
were directly affected. Stock in the mills was no longer closely held.
The founders had ploughed back into the industry the fat dividends of
the first period of mechanical weaving; their great wealth (liquid in
the forties and available to capitalize railways) was not immediately
derived from dividends, but from unloading most of their holdings upon
others of the well-to-do as over-expansion made it clear that dividends,
if any, would thenceforth be moderate. As early as 1834 it was
said that seven-eights of the merchants of Boston had direct stakes in
the mills. The numerous stockholders were seldom free from worry
lest dividends fall below nine per cent on stock for which they had
probably paid a good deal more than par. The better the earnings,
the safer the salaries of agents and executives. And the interests of
other numerous groups—mill bankers and distributors of mill products,
for example—were scarcely less direct. To all such any increase in
labor costs might spell disaster, and labor organization, even if remote
from the mills, seemed a menace. There was little over-supply of cheap
labor that the mills could draw on until the wave of Irish immigration
in the middle forties. The dismal lives of mill hands were a constant
theme for reformers; and though the mill hands were unorganizable,

209 HAZARD, op. cit. supra note 99.
204 WARE, op. cit. supra note 92, c. v, vi.
205 COMMONS, at 305.
206 As sales of textile stocks were usually private, no market prices are ascer-
tainable. WARE, op. cit. supra note 92, at 149.
attempts to organize them had not infrequently made trouble for mill managers.\textsuperscript{107}

In 1840, when \textit{Commonwealth v. Hunt} was tried, textile interests, enjoying a precarious moment of comparative prosperity,\textsuperscript{108} would have been anxious lest mill hands be stimulated by an acquittal of the defendants. In 1841, however, when the appeal was argued,\textsuperscript{109} Whig exultation in victory was already dampened,\textsuperscript{110} and the textile industry was depressed.\textsuperscript{111} In 1842, when, after about a year’s consideration, the appeal was finally decided,\textsuperscript{112} the depth of depression made labor trouble in the mills unthinkable. And tariff protection, then the absorbing concern of textile interests, required workingmen’s support. Any excitement of resentment among even a small group of workingmen might jeopardize the prospect of securing the desired legislation.

The situation of the textile industry was desperate. If the Democrats should completely abolish the tariffs on their staple products—coarse sheetings and shirtings—they would not be hurt. There was no longer danger of foreign competition in those products. It was domestic over-expansion and over-production which made them sell at a loss in glutted markets. The brains of the industry wanted to adapt much of its overgrown productive equipment to the manufacture of finer goods. But for this to be profitable, a tariff which would prevent the importation of such goods was essential.\textsuperscript{113}

The death of Harrison had clouded the sunshine which his election had shed upon New England investors. Tyler, a disgruntled Democrat, had let their Whig Party use him to elect Harrison; but, obstinately conscientious, he would not let them use him in Harrison’s stead. If Congress voted them a tariff upon finer cotton goods, Tyler might veto it. It was essential that Massachusetts should stay Whig. It was Whig normally. But it could go Democratic unless the Whigs were careful; it had done so in 1839. In spite of the great Whig majority in 1840, the balance of parties was nearly even again in 1842; in the fall of that year Rantoul was to come within two hundred votes of beating the old Whig war-horse, Leverett Saltonstall, for Congress.\textsuperscript{114} Great efforts

\textsuperscript{107} \textit{Id.}, at c. ix, x; N. \textsc{Ware}, \textit{The \textsc{Industrial} \textsc{Worker}}, 1840-1860 (1924) c. iii, iv.

\textsuperscript{108} \textsc{Ware}, \textit{op. cit. supra} note 92, at 103.

\textsuperscript{109} \textit{Commonwealth v. Hunt}, \textit{supra} note 7, 4 Metc. at 115.

\textsuperscript{110} Harrison must have died within a few days of the unascertainable date when the appeal was argued in March Term, 1841.

\textsuperscript{111} \textsc{Ware}, \textit{op. cit. supra} note 92, at 105.

\textsuperscript{112} The precise day when the decision was rendered may have been later than March, though in March Term, 1842. The Clerk’s docket entry “Judgment arrested. Defendants to go without day” was on July 18th.

\textsuperscript{113} \textsc{Ware}, \textit{op. cit. supra} note 92, at 106.

\textsuperscript{114} \textsc{Essex Banner (Haverhill)}, Nov. 5, 1842.
were being made to win everyone possible, especially workingmen, to the "American System" of protection; in the first half of 1842 there was scarcely an issue of a Whig newspaper that did not contain tariff propaganda, or reports of propagandist meetings. The campaign was going well. Under the Compromise Act of 1832 all tariffs were near the vanishing point. The Whig papers were loudly announcing the danger, which not all Democratic papers quite dared to deny, of vast importations of shoes from France. On March 2, 1842, there was a convention at Boston of the Shoe and Leather trade to "consider the effects of anticipated changes in duties on American Labor." Amasa Walker, a Democrat, presided. The meeting was addressed by Abbott Lawrence, one of the great men of textiles, and by Rantoul. The resolutions adopted, after bowing (perhaps in deference to Rantoul) to free trade as an ideal, declared its impracticality while Britain sought commercial monopoly. "The products of American labor (unless guarded by wholesome legislation) must fall beneath the shock of European competition."

"As the manufacture of Boots, Shoes and Leather is almost exclusively labor, the manufacturers of these articles have a right to claim (if not demand) of Congress the protection which shall enable them to perform their relations with comfort to themselves and honor to their country." "The 40,000 shoemakers of the Old Bay State are ready to raise their voices to the last, and cast their all against any measure that shall have a tendency to give to the monopolists of Europe the profits of our industry." While such appeals were ringing in their ears, it would be dangerous to throw out among workingmen any fresh bone of contention; demagogues and reformers might win enough votes to sway the balance of power.

I am convinced that Shaw was subconsciously if not consciously influenced by such a thought when he decided Commonwealth v. Hunt. Much evidence to support it was within his knowledge. He doubtless knew a better reason for not following the New York case, People v. Fisher, than he gave in his opinion. A trial judge in that jurisdiction relied upon its authority in the prosecution of some journeymen tailors in 1836. The tailors were convicted and sentenced. Their fines were paid by subscription. At a public meeting attended, it was said, by 27,000 persons, "chiefly radicals," both the trial judge and Chief Justice Savage, who had written in People v. Fisher, were burned in

---

114a Record of these speeches was found while this article was in press. See Added Note following Appendix.
115 Massachusetts Ploughman and Yankee Patriot, March 5 and 19, 1842.
116 See supra, text above n. 66.
117 Appendix, Case 17.
effigy, and resolutions adopted for the formation of a workingmen's party.\textsuperscript{118} The resulting organization, fusing with the Loco Foco Party and endorsing Whig against Tammany candidates, defeated two out of four Tammany candidates for Congress; one of the successful Tammany candidates, Ely Moore, who was president of the National Trades' Union, had the workingmen's support.\textsuperscript{119} Tammany continued similarly to be beaten until it bought the schismatic leaders into its fold. This much Shaw would have known from newspapers and conversation. The presence in Rantoul's file of papers used in \textit{Commonwealth v. Hunt}, of a pamphlet report of the proceedings of a convention of the National Society of Cordwainers in 1836 suggests the possibility, of course doubtful, that Shaw may have become acquainted with some of the rhetoric which agitators applied to Chief Justice Savage and his opinion.\textsuperscript{120} He may have heard also of the unfavorable reactions of juries at Philadelphia and in New York state to Judge Savage's view of the law.\textsuperscript{121}

The soil of New England, though uncongenial to effective labor unions, was congenial to movements, three quarters ethical, one quarter political, which somewhat obstructed the march of Tory industrialism. The traditional social faith of farmers of the rocky hillsides such as had joined Shay's Rebellion or opposed ratification of the Constitution was an emotional Jeffersonianism. This faith spread from the farms into towns where other than textile manufacturers were developing. When labor movements turned, as they always did, from unsuccessful strikes to less unsuccessful agitation for reforms, they found allies in the farmers. In 1830 "farmers, mechanics, and workingmen," protesting that while the producers of wealth were becoming poorer, the consumers of wealth were becoming richer, had elected candidates to legislatures.\textsuperscript{122} A few years later the New England Association of Farmers, Mechanics and other Workingmen had cut a swath—though not a very wide one, since the Association found that "the more industrious and useful part

\textsuperscript{118} \textit{COMMONS}, at 408-410.

\textsuperscript{119} \textit{Id.}, at 461-465.

\textsuperscript{120} A large part of the pamphlet, supra note 90, is a report of a committee to investigate \textit{People v. Fisher}. A brief sample of the committee's rhetoric must suffice: "The gist of all this is, that the journeyman mechanic shall not have the privileges enjoyed by others. ... The judge has forgot ... the conspiracies and the combinations of the rich against the poor. ... The only difference is that the poor have not the means nor the power to prosecute \textit{successfully} those pirates upon the products of labor. ... The mechanics have been obliged to resort to combinations among themselves, to obtain that which the God of Nature intended as their right, but which avarice denies them—a comfortable subsistence. And after having been compelled to resort to such a measure, they are to be ... incarcerated in a loathesome prison."

This rhetoric was restrained in comparison with that of other labor spokesmen upon the same subject. \textit{COMMONS}, at 408-410.

\textsuperscript{121} Appendix, Cases 18 and 19.

\textsuperscript{122} \textit{COMMONS}, at 290-296.
of the population" were "too intent upon their daily occupation to form
combinations for mutual advantage, or to guard against the devices of
their better informed or more enterprising neighbors." Politicians
turned the propaganda of such movements to their own uses. Where,
as in New York, New Hampshire and Maine, the Democratic Party was
strong, "Fed-ism" and "Workey-ism" were natural allies; but where,
as in Massachusetts, Federalist-Whigs were normally in power, alliances
between Workey-ism and Jackson-ism were equally natural.

In 1842 the air of depression was charged with intimations of what
might become formidable radical movements. Orestes Brownson was
citing the wretched lives of mill hands as evidence of the need of de-
throning special privilege. More respected exponents of equally
radical philosophies were troubling and perhaps half-convincing large
audiences of the respectable classes: Emerson, Thoreau, Theodore Par-
ker, the Channings, Whittier, Lowell in his early phase, and many
others then as well known. Though the experiments of which Brook
Farm is the least forgotten came a little later, there was already propa-
ganda for Fourrierism—communistic association which would assure
to everyone "the full product of his toil" and the expansion of his
personality; on March 1, 1842, Horace Greeley gave the Fourrierist
Albert Brisbane a column in the first issue of the New York Tribune.
If such a man as Rantoul, whose basic tenet was the class struggle,
but who could talk to Gloucester fishermen in language which drew an
approving letter from John Marshall, and who, as Democratic leader
in the Massachusetts legislature in the later thirties, had, with Whittier's
help, blocked many cherished schemes of the Whig majority—if such
a man were given the bootmakers' case to take into politics, the repercus-
sions upon the campaign for tariff protection might be disastrous. The
result expected from protection, prosperity, could be trusted to dis-
solve radicalism. During depression it would not have been sensible
to risk further excitement of uneasy minds and consciences by declaring
the criminality of an actually inoffensive labor union in a case with which
no important interest was in fact deeply concerned.

Enough conscience had already been troubled by labor conditions

---

123 Id., at 302-318.
124 Id., at 495.
125 2 PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (1927) 315-351, 379-425.
126 COMMONS, at 501; N. WARE, op. cit. supra note 107, c. iii, xi.
127 HAMILTON, op. cit. supra note 46, at 300 et seq., and passim.
128 Id., at 155.
129 Id., at 308-424.
130 Prosperity until 1846 in fact ensued, though not for the mill hands or
cordwainers. WARE, op. cit. supra note 92, at 107; N. WARE, op. cit. supra note 107, c. iv.
to demand and obtain some measures in alleviation. Van Buren, by executive order, had established the ten hour day for federal employees in 1840.\textsuperscript{131} On March 3, 1843, the legislature of Massachusetts made it unlawful to employ children under the age of twelve in the mills for more than ten hours a day.\textsuperscript{132} Since experience had shown that small children were not usually worth their sixty-seven cents a week, this legislation was objectionable to textile interests only upon principle.

There can be no question but that Shaw's holding that a labor organization could lawfully compel employers and independent workmen to comply with its regulations was similarly objectionable. But Shaw, sure that he knew better the best interests of the textile industry than mill stockholders themselves, was not the man to invite trouble for the sake of a sterile rag of principle. Unradical though he was, he was not the sort of unradical, latterly common in Massachusetts, whom Anatole France might have called, as he did Cicero, "a Moderate of the most violent description." Shaw was level-headed.

He was at pains therefore to convey to textile interests that they need not fear increased danger of labor organization in the mills as a result of his decision. Several times in his opinion he went out of his way to iterate that a combination to break contracts of employment, or to induce their breach, would be criminal.\textsuperscript{133} Mill labor, though subject to lay-off if business became slack and to discharge virtually at will, was customarily employed by contract, often in writing, for a year's work. In the girl-power mills, the operators agreed to remain with the company for twelve months at fixed rates of wage, to live in the company boarding houses, to observe whatever might be the company's regulations, to attend public worship, not to drink or smoke, and not to organize or strike on pain of forfeiture of wages (which were payable not oftener than monthly).\textsuperscript{134}

IV

What has preceded suggests that the campaign for tariff protection may have had a larger share of responsibility for the decision of \textit{Commonwealth v. Hunt} than the reasons stated in the opinion. But whatever

\textsuperscript{131} Commons, at 395.
\textsuperscript{132} Ware, \textit{op. cit. supra} note 92, at 289.
\textsuperscript{133} Supra note 72. It will be observed that Shaw treated as obvious the doctrine whose public career was not to commence until Lumley v. Gye, 2 El. & Bl. 216 (Q. B. 1853).
\textsuperscript{134} Id., \textit{op. cit. supra} note 92, at 263-8. The following is an example of a contract used in a child-power mill: "Agreed with Abel Dudley for himself and family to work one year from the last day of March past at the following rates, viz.: self, four shillings threepence (71 cents) per day to tend picker, Mary eight shillings ($1.33) per week, Caroline four shillings (67 cents) per week. Mary and Caroline have the privilege of going to school two months each, one at a time, and Amos is to work at four shillings per week when they are out." Id., at 260.
may have been the "real question" in that case and the "true grounds" of the decision, the case was taken at face value as meaning that workmen could lawfully do in combination any act that they could lawfully do individually, and there were but few resorts to law to restrain effective trade unionism in the ensuing twenty years. It does not appear that any labor case in that period was fought through to a finish. In spite of this wide gap in the long line of labor cases, Dr. E. E. Witte, whose opinions are always entitled to respect, says that Commonwealth v. Hunt "seems to have had comparatively little effect upon the development of the law of labor combinations; . . . that there were not more such cases [in the next twenty years] is readily explained by the almost complete absence of strikes." But that there were not more strikes (Commons estimates that there were four hundred in 1853-1854) may be as readily explained by the probability that a good many employers, on the advice of counsel to whom few names were as great as Chief Justice Shaw's, put up with labor unions which, had Commonwealth v. Hunt gone the other way, the law would have been invited to crush. After prosperity arrived in the fifties, trade unions became stranger and more numerous than at any earlier time, and no comparable period has such a record of non-resort to the courts against their activities.

With another opinion of Dr. Witte's I agree entirely: that the law and labor situation prior to Commonwealth v. Hunt has been misrepresented by most of the few writers who have given attention to it. The impression is abroad that medieval legal doctrines had been enforced against labor unions with medieval ferocity. The facts are that the basic doctrine was one which has sharpened its teeth in the modern injunction era; that, though nearly all the cases were criminal prosecutions, in none "was a single workman sentenced to jail, and only in the New York tailors' case were heavy fines imposed"; and that we have record of only nine convictions as against four acquittals. Throughout the period before the Civil War the power of Jeffersonianism was

---

135 Dr. Witte's patient and careful research has found newspaper mention of the beginning of only three cases in this period, and no mention of further proceedings in any. Early American Labor Cases (1926) 35 Yale L. J. 825, 829, n. 18. In 1853 some Baltimore employers of machinists circulated among their employees the written opinion of some lawyers that a combination to raise wages is criminal. Commons, at 611-12. The statement in Commons, loc. cit., that in 1853-1854 "employers quite often invoked the aid of the law" is not supported and seems misleading.

136 Witte, supra note 135, at 828-9.

137 Commons, at 607; N. Ware, op. cit. supra note 107, c. xv.

138 Id., at 575-623.

139 See supra, text above n. 4.

140 See Appendix. The nine convictions were in Cases 1, 2, 3, 5, 7, 8, 10, 13 and 17; the four acquittals (including verdict for the defendant in the one civil action) in Cases 12, 14, 18 and 19.
tremendous. There would have been more cases otherwise. And when Toryism pressed and won an occasional case, its moderation in victory was well advised.

Though the long run tendency of cyclical depressions and prosperities in the forties and fifties was to nourish Toryism, Americans remained for the time being preponderantly Jeffersonian. The conflict that came as near to a Golden Age as our democracy has enjoyed, that Shaw’s decision contributed.

In many of its aspects this not-very-near Golden Age was unlovely. The common man held the center of the stage, bowing his head to none. If he did not see himself beautiful as Narcissus, he wore his ugliness with complacency. The cult of the Hamiltonian bitch-goddess, Success, was embraced by Jacksonians foul with tobacco juice, who stripped it of decencies that had been dear to the old Federalist aristocracy. Finess of living had often either to hide in corners or be ostracized for its idiosyncrasy. “The society around Poe had no more use for an architectural imagination than the Puritan had for decorative images; the smoke of the factory chimney was incense, the scars on the landscape were as the lacerations of a saint, and the mere multiplication of gaunt sheds and barracks was a sign of progress and therefore an earnest of perfection.” The Jefferson who solaced himself with a violin and built the University of Virginia would surely not have found this society excellent.

Yet he might have found it on the whole better than most others—better, for instance, than a society in which Tory interests would not have needed public relations counsel of the calibre of Webster and Clay. For there was another side to the picture. If even in the best of times the life of the common man was arduous, nevertheless at all times he could live relatively well. In depressions the poorest and worst hit were safe from starvation. The Lynn shoemakers “were able to weather repeated depressions in their trade because they were more than shoemakers. They were citizens of a semi-rural community. Each had his own garden, a pig and a cow. They were fishermen, more or less, and during a spell of depression in the shoe trade they could keep alive, at

141 The short-hand description of social conflict as between Toryism and Jeffersonianism may both invite and deserve adverse criticism. The conflict might more accurately be described as many-sided. But the simple antithesis seems useful, and more complex analysis superfluous.

The conflict should not be represented as between altruistic principles to the exclusion of dumb animal appetites. Principles are often enough mere window dressing. It is intended, perhaps unsuccessfully, that the words Tory and Jeffersonian shall convey the whole body of opposing wants, wants for more money and more food as well as wants to live in a good or best possible society.

142 Mumford, Sticks and Stones (1924) 81-2.
least, on sea-food, pork, and garden truck.”143 Though in the forties and fifties these conditions were changing, so long as land in the industrial regions was generally under cultivation, for food rather than for money crops, the unemployed artisan or day laborer could earn his living, even without going West. He was not helplessly dependent upon a machine which at any moment might cease to need him. Between laborers, mechanics, small merchants and professional men the gaps were narrow. All were rather generally persons of some consequence. They counted. Work was more often congenial than under later conditions; in spite of increasing production of shoddy wares, there was more chance for satisfaction in workmanship and in the social intercourse of the job. Family life was more often affectionate, and social relations more genuinely cordial. Diversions, lean as they may seem—lectures, sermons, barbecues, church socials, parlor music—were more diverting. Countless families of no very exalted social position have left evidence that imagination and taste, whatever their level, were active: libraries of romantic poetry and fiction, “original” sentiments and verses inscribed in neat Spencerian hands on the flower-bordered pages of red leather blank books, diaries and letters painfully concerned for literary elegance. If intellectual excellence was rare, so was intellectual emptiness. The fishermen and farmers of Scituate listened for hours on the Fourth of July to Rantoul’s profundity. As to the intelligence of their reactions nothing need be hazarded. At least the effect was not that of the same number of hours at the movies or within sound of a radio. Mediocre faculties were in general exercised with variety and zest. Life was lived with an approach to fullness by vast numbers of commonplace people. It may be questioned whether in any other time or country so large a proportion of the population have enjoyed such substantiality of satisfactions.

Commonwealth v. Hunt was not, I think, trivial among the factors that helped maintain for a while the upstandingness of the common man and the considerableness of his living. And the breakdown of its authority may be seen as one of the factors that have made the contemporary social landscape.

In New Jersey in 1867, in a case whose facts were virtually identical, Commonwealth v. Hunt was “distinguished.”144 In the Supreme Judicial Court of Massachusetts in the same year it was held controlling against a sailor’s boarding housekeeper who sued civilly a combination of other crimps who had destroyed his business by boycott.145 But never afterwards in a labor case. When it was said in Massachusetts in 1896

143 N. Ware, op. cit. supra note 107, at xiii.
144 State v. Donaldson, 32 N. J. L. 151 (1867).
145 Bowen v. Matheson, 14 Allen 499 (Mass. 1867).
that the lawfulness of various sorts of trade union activities seemed "to have been decided as long ago as 1842 by the good sense of Chief Justice Shaw," the opinion was by Holmes, J., dissenting.146

WALTER NELLES

YALE SCHOOL OF LAW

146 In Veglahn v. Gunter, 167 Mass. 92, 109, 44 N. E. 1077, 1082 (1896). I shall deal in other articles with the labor law of the period between the Civil War and 1900. One article upon the events of 1877 which mark the commencement of resort to equity in labor cases has been published: Nelles, A Strike and Its Legal Consequences (1931) 40 YALE L. J. 507.

APPENDIX

AMERICAN LABOR CASES BEFORE COMMONWEALTH V. HUNT

This Appendix notes at least the facts deemed crucial and the result (when ascertainable) of every one of the known cases. I have not attempted the probably useless task of finding cases other than those discovered by Professor Commons' associates, Professor Eugene A. Gilmore and Dr. E. E. Witte, whose results are published in the DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (1910), here cited as Doc. Hist., and in COMMONS AND ASSOCIATES, HISTORY OF LABOUR IN THE UNITED STATES (1918), here cited as COMMONS.

Counsel and judges in Commonwealth v. Hunt mentioned specifically only Case 3 (Sampson's pamphlet report of which served both sides as a text-book), Case 7. Case 9 (cited by Shaw in connection with his contract dicta), and Case 16 (which had been the only case against a labor union to go further than a trial court). These cases are here summarized fully. Probably no reports of any others were accessible at Boston. But the notoriety, still recent in 1840-1842, of Cases 14, 15, 17, 18, 19 and 20 has seemed to justify inclusion of more details about them than were likely to be clearly known at Boston. Though it was doubtless known that there had been earlier cases, impressions were probably very vague. The notes of the other cases have therefore been cut down to little more than bare mention. Citations, except of the five cases reported in volumes accessible in well-equipped law libraries, are to the reprints of pamphlet and newspaper reports in Doc. Hist. Unless otherwise noted, the cases are criminal prosecutions for conspiracy.

A. Cases in the period of manufacturing expansion stimulated by the Napoleonic Wars, 1805-1815.

1. Philadelphia Cordwainers' Case, 1805-6, 3 Doc. Hist. 39. The charge of the court was doctrinally very broad and loose. In Case 6 Chief Justice Gibson explained this case, consistently with its facts, as holding that the coercion of unwilling journeymen was an unlawful object or means. Defendants fined $8.00 and costs.

2. Baltimore Cordwainers' Case, 1809, 3 Doc. Hist. 249. It was charged that the 39 defendants had compelled a master to discharge certain journeymen and prevented them from obtaining employment. After two weeks' trial, one defendant was found guilty. There is no record that he was ever sentenced.

3. New York Cordwainers' Case, 1809-1810, reported sub nom. People v. Melvin, 2 Wheeler's Crim. Cas. 262-282; fuller pamphlet report by Sampson, reprinted in 3 Doc. Hist. 251. In 1809 a union comprising about half of the journeymen in the city called a strike against a master who gave work to a non-member's apprentice; and when the master (probably backed by an employers' association formed to combat the union, though evidence to that effect was excluded as irrelevant) got his work done in other masters' shops, the union called a "general" strike. Twenty-four members were then indicted, the celebrated Thomas Addis Emmet being retained as special prosecutor. The prosecution focussed upon the union by-laws forbidding members to work with non-members or for employers' hiring non-members. In 1809 Sampson8

8 This case is the subject of my article cited supra note 1.

9 William Sampson, 1764-1836, formerly, like Emmet, a Dublin barrister, had been deported like Emmet for participation in the activities of the United Irishmen. In this case he spent himself upon the motion to quash before Mayor Clinton, thereafter revising and publishing his argument which was penetrating as well as monumental. His research has been serviceable not only to Bantoul, but also to Sir R. S. Wright [Law of Criminal Conspiracies, (1873)] and Professor Sayre [Criminal Conspiracy (1922) 35 HARV. L. REV. 393]. At the trial of the Cordwainers' Case he was compelled, himself exhausted, to address a tired jury after eight o'clock at night; and seems to have been driven to reading from his former argument. 3 Doc. Hist. 372-374. That he was ineffective is evidenced by the fact that Emmet, the next day, ventured arduity to say so, opening his argument with the statement that he did not intend to advert to a single law case "because he had observed with what pain the jury had endeavoured to listen to the elaborate arguments of his learned adversaries." The most intelligent jurors that ever empanelled could not, said Emmet, "be expected to follow the clearest logician through a range of arguments which it must have both a practiced and educated lawyer so much time and trouble to compose"—a fact which makes it wise that they take the law from the court, and not their right or power to decide law as well as fact. Id., at 380. The district attorney read this to the jury in Commonwealth v. Hunt.

This content downloaded from 130.132.173.224 on Sat, 15 Jun 2013 20:04:22 PM
All use subject to JSTOR Terms and Conditions
COMMONWEALTH v. HUNT

and Colden, for the defendants, argued a motion to quash upon the same grounds later urged successfully by Rantoul in Commonwealth v. Hunt. Mayor De Witt Clinton, presiding at General Sessions, doubtless recognized the case as political dynamite. For he was still holding the motion undecided when he went out of office some months later. His successor, Jacob Ratcliff, declined to decide it, saying it was not competent for counsel hearing motions which the report leaves obscure, finally abandoned their motion and went to trial. Mayor Ratcliff’s charge is the first succinct assertion of what became the mainstay of labor prosecutions—the doctrine that the defendants’ refusal to work with non-members is coercive, and therefore unlawful, because it is concerted action by a number of persons. Defendants fined $1.00 and costs.

4. Pittsburgh Cordwainers’ Case, 1814, unreported. Stated, 4 Doc. Hist. 27-28, to have been commenced by the journeymen paying the costs and abandoning a strike for higher wages.

5. Pittsburgh Cordwainers’ Case, 1815, 4 Doc. Hist. 15. The court, on facts like those of the preceding cases, treated the Philadelphia case, supra Case 1, as a controlling precedent. The spee clair pro was Thomas Sprague, the leading voice of the “Western Country,” later appointed by President Jackson to the Supreme Court. Baldwin’s efforts were directed mainly to convincing the jury that the prosecution was consistent with “sound Republicanism.” Recorder Levy, the presiding officer of the “Republican” faction (non-violent) of the freedom of other workmen to obtain employment, were inconsistent with “the words penned by Mr. Jefferson in the declaration of our independence. Protesting that a common sense rather than common law, he expatiated upon the dangers of labor organizations to the morals and prosperity of an outfitting station for westward-moving pioneers. Defendants fined $1.00 and costs.

B. Cases in the period of manufacturing prosperity which commenced with the second administration of Monroe, 1821-1829.

6. Commonwealth v. Carlisle, 1821, Brightly’s Nisi Prius (Pa.) 36. Gibson, J., declined to quash a grand jury’s indictment by journeymen seated in the silk-ware tables, for conspiracy to depress wages. The question, was did the defendants want to re-establish or to disturb a wage-scale prescribed by Nature (= supply and demand). Only a jury could answer it.

7. People v. Trequier (New York Ratters’ Case), 1823, 1 Wheeler’s C. C. 142. On internal facts almost identical with those of Commonwealth v. Hunt except that the nominal complaining witness was probably a cat’s-paw of an employers’ association fighting an aggressive union, the court charged that the defendants’ combination to exclude the complaining witness from employment by refusing to work with him was unlawful. Defendants found guilty. Sentences not reported.

8. Buffalo Tailors’ Case, 1824, 4 Doc. Hist. 93. The meager newspaper report mentions that “a singular custom among the Jours. to coerce the refractory was proved to exist throughout the United States, by which the person who should refuse to come into the measures of the majority, or who . . . should . . . [during a strike] labor . . . for less than the wages demanded, was stigmatized by an appropriate name, and rendered too infamous to be allowed to work shop work, or to have his name known.” One jury disagreed. In any jury “under direction of the court, found the defendants guilty, and they were fined $2.00 each.”

9. Boston Glass Manufacturer v. Binney, 1827, 4 Pick. 425. In a civil action between rival manufacturers for ousting an entirely plaintiff, was the court (rejecting Chief Justice Parker’s holding at the trial) held that “the defendants had a legal right to make a contract with the plaintiff’s laborers to take effect after the expiration of their term of service with the plaintiff.” Lennel Shaw was of counsel.

10. Twenty-Four Journeymen Tailors, Philadelphia, 1827, 4 Doc. Hist. 99. Following a difference in the interpretation of an agreed wage-scale, an employer discharged six workmen; fourteen others struck, backed by their union. The shop was picketed, and there was violence, clearly unpunished, on both sides. Following the court’s charge, the jury acquitted the defendants on counts charging overt acts of violence, and found them guilty on a count charging conspiracy to induce the re-employment of the six discharged workmen by the unfair means of endeavoring “by promises, offers of money, threats and otherwise” to induce other workmen not to work in the struck shop and other shops to refuse to execute its commissions. Sentences not reported.

11. Philadelphia Spinners, 1829, 4 Doc. Hist. 265. Three striking textile operatives who had threatened strike-breakers were bound over to keep the peace. The court enlarged upon the will of the law to protect workmen as well as employers if they will but resort to it. No record of any further proceedings.

12. Baltimore Weavers, 1829, 4 Doc. Hist. 269. Journeymen and other masters alike had joined in condemnation of a master weaver who tried to cut his men to a cash rate lower than the wages paid, largely in truck, by his competitors. Most of the journeymen of the city took and kept an oath not to work for him. He had thirteen indictments of conspiracy to impoverish him. The court directed an acquittal.

13. Chambersburg Shoemakers, Pennsylvania, 1829, 4 Doc. Hist. 273. The defendants were convicted on an indictment charging conspiracy “to prejudice such as were not members,” as well as to raise wages. Ringleader fined $10.00 and costs, and three others $5.00 each.

C. Cases during the boom of the middle 1830s.

14. Thompsonville Carpet Manufacturing Co. v. Taylor, Connecticut, 1834-1836, Supplement (a separate solution of the Civil action for damages by the defendants, 5. Doc. Hist. 7 15. Civil action for manufacturing by a strike or lock-out. The company had refused to increase wages on the ground that diminishing tariff protection made it impossible, and locked out its men, offering to take them back upon their acceptance of new and exasperating regulations. The primary object of the action seems to have been to intimidate the men by arrests of leaders under civil process. But it was carried through against one obdurate leader after the strike had been broken by importa-
tion of eleven weavers to instruct unskilled hands. At the first trial, August, 1834, the verdict was for the defendant. On re-trial in the Supreme Court a month later the jury disagreed. At the third trial, January, 1835, there was evidence that pickets had met all arriving boats during the last year, left without applying for jobs, and in some instances after receiving a dollar or so from the strikers to pay their fares. The strikers had hissed and spat at a weaver who, after his arrest in the action, had gone back to work on the company's premises. The prosecution claimed that the men was lawless, if their intention was merely to withhold their labor until their conditions were met, unlawful if the intent was to coerce the company by interruption of its business. Verdict was for the defendants.

5. 16. People v. Fisher, New York, 1835, 14 Wend. 2. The indictment charged that the defendants, journeymen shoemakers employed by one Lum at Geneva, N. Y., agreed that coarse boots should not be sold for less than $1.00 a pair, that any journeyman making such boots for less should be fined $10.00, and that until his fine was paid no journeyman should work for any master who gave him work; that in August, 1833, one Pennock made a pair of coarse boots for Lum for seven cents refused to pay the fine, and the defendants compelled Lum to dismiss Pennock by refusing to work until he did so.

A decision below sustaining a demurrer was reversed by the Supreme Court. Chief Justice Savage reasoned as follows: "Without any officious or improper interference on the subject, the price . . . will be regulated by the demand for the manufactured article and the value of that which is paid for it; but the right does not exist to enhance the price of the article, or the wages of the mechanic, by any formal or artificial means." The mechanic "may say that he will not make coarse boots for less than one dollar per pair, but he has no right to say that no other mechanic shall make them for less. . . . If one individual does not possess such a right over another, no group of individuals can possess such a right. All combinations therefore to effect such an object are injurious, not only to the individual particularly opposed, but to the public at large. In the present case, an industrious man was driven out of employment by the defendants, and is compelled by the decision to the community, by diminishing the quantity of productive labor, and of internal trade."

The indictment was under a provision of the N. Y. Revised Statutes of 1829 including among criminal conspiracies or combinations to injure trade or commerce without definition. The court considered the statute as continuing a common law crime, not a new one.

Whether, after the Supreme Court's decision, the case was tried below is unknown. The statements of the controversy—the first indictment had been found in November, 1833—makes it likely that it was not. But the decision was given wide publicity, and had its bite in the next case.

17. Twenty Journeymen Tailors, New York City, 1836, 4 Doc. Hist. 315. Three months after a successful strike for higher wages, the tailors struck again, in January, 1836, to enforce compliance with a demand that the masters post on slates "the names of their journeymen as they successively took out their jobs; no one was to take a job out of his turn, and no one to have a second job until all had been supplied." Squads of 8 to 15 pickets paraded all day before the strike shop, "often spreading their cloaks and coats before the windows to darken them, insulting, vilifying, and applying the most opprobrious epithets to the journeymen who continued in employment; dignifying them with the name of 'dunces'; following and interfering their movements when they went out to work, or in returning home, trying to enervate them with threats, and threatening them with whip, club, and work and joined them. These acts of outrage and insult continued for nearly or quite three months, . . . to the great loss and detriment of employers, the frequent disturbance of the peace, the collection of tumuluses and assemblages, the alarm in the whole vicinity." The "Journeymen Tailors Society was backed in the strike by the Trades' Union.

The twenty journeymen were tried for conspiracy to injure trade and commerce. They were also indicted "for riot, and assault and battery, etc.;" but it does not appear that these charges were ever tried. The charge of Judge Edwards, following People v. Fisher, supra Case 16, treated the Society as criminal irrespective of the alleged violence and disorder; the defendants' offence was complete when they acted however moderately, for any master who employed men below their rates or otherwise violated their requirements. "I mean not for the jury to say whether any body of men could raise their crests in this land of law, and control others by self-organized combination."

The jury found the defendants guilty, recommending clemency. The court fined one $150, another $100, and the rest $50 each, in all $1,150 which was paid at once by subscription. A court officer contributed three weeks' pay to the fund.

Judge Edward said in passing sentence: "In this favoured land of law and liberty, the road to advancement is open to all, and the journeymen may by their skill and industry, and moral worth, soon become masters of the trade. Every American knows . . . that he has no better friend than the laws, and that he needs no artificial combination for his protection." Such combinations "are of foreign origin, and I am led to believe are upheld mainly by foreigners." Defendants' counsel stated that eleven of the twenty defendants were native born, two Irish, three Scottish and four English; and that five of these alien born were naturalized.

18. Five Shoemakers, New York, 1830, 4 Doc. Hist. 277, reprinting a pamphlet circulated as propaganda against People v. Fisher, supra Case 16. The principal evidence for the prosecution concerned the situation as between the complaining witness, a "boss" named Mosier, and the Shoemakers' Society. Mosier undertook to reduce wages below the Society's scale. His men struck. Mosier offered to pay sixpence more than the Society's rate; the strikers could get no men because he would not pay a fine of $25.00 imposed by the Society for reducing wages. He then travelled job-hunting, was backed by a few unemployed journeymen left town without taking work from him because he was "told he was a scabbed boss" and "did not want to do anything after the strike."

The prosecution relied upon People v. Fisher. The defendants offered no evidence. Their counsel to the W. E. Edwards cases and People v. Fisher, anticipated the economics of the next century in his argument: "To justify any conviction the injury must be to the trade of the whole community. Although Mosier and Shattuck may have sold less, yet masters must sell more. The same number were made and consumed . . . I cannot comprehend
how an injury to the trade of one part and a corresponding benefit to another part, can operate to
injure the interest of the whole. Nor can I see any clearness in the reasoning on these combinations.
If the mechanic gets more pay, I can see how we, who are not mechanics, have more to pay. We
may become poorer, but he will be just so much the richer—yet I can see no
diminution from the aggregate wealth of the community. It appears to me that the thing, if left
alone, will regulate itself. If the journeymen tailors, by means of their combinations, get the
prices of their work so high that we cannot afford to pay them, we shall not go without clothes,
we shall make ourselves as you now and for the same reason, because we cannot afford to
pay the price.
Nor will our whole city be without bread, because the journeymen bakers are extrava
gant in their demands. We will make it ourselves, as many of us do now. If they persist in
their extravagance, they must either starve from their obstinacy, adopt some other calling, or retrace
their steps until they find the proper level with other things in the community. If the farmer
raises the price of provisions, the mechanic will raise the price of his fabrics, and thus the
whole matter will regulate itself. The mischief is, when everything else is enhanced in value,
that you will attempt to keep any one class down to old values, and thus exclude them from a
just participation in the general prosperity.

The charge of the court was seemingly for conviction: “Heretofore all combinations of this
nature have been deemed unlawful”; such proceedings as the defendants’ strike home to the feel
ings; in a case parallel with this [People v. Fisher] the Supreme Court decided the statute was
violated. But it was not necessary to say whether the combination in this manner had a
tendency to injure trade. And they were told that it was their duty to judge of the law, and
if they were willing to assume the responsibility and say that the Supreme Court was wrong, they
had a right to do so.

They did so, finding the defendants not guilty. And on the title page of the pamphlet publica
tion of the record, the case is described as one “where Twelve Patriotic Jurymen set aside by
their verdict of Chief Justice Savage, thus rescuing the rights of the Mechanics from the
grasp of Tyranny and Oppression.”

29. Philadelphia Plasterers, 1836, 4 Doc. Hist. 655. It seems that two plasterers refused to
work for an employer while he employed whites. The employer charged the grand jury which found the indictment that though “the law permits individuals to value their own services at their arbitrary will, . . . the moment the combination is formed for the purposes of combining others . . . it becomes a felony,” and the
complaining witness, “having been convinced of his folly,” abandoned the prosecution; “in this
dilemma, Mr. Todd, the Attorney General of the State . . . seeing, as he said, an ‘immens
premise’ invested in this case,” became the responsible prosecutor.” It quotes the Public Ledger as saying that at the trial Mr. Todd displayed “one talent, in which he was certainly preëminently; we
mean the talent of vituperation.” For the defendants’ David Paul Brown “exhibited the in
sightful, and the want of certain language of the indictment, which charged the defendants with having driven away (by doing nothing) Mr. Cowperthwaite’s ‘hands.’”

Charles J. Ingersoll, also for the defendants, “illustrated his position with numerous instances”: a faithful, honest, industrious colored woman in his employ “un
fortunately had a violent temper, and the consequence was that oftentimes the other servants had
come to him and said they would not stay in the house if he kept her, and many had left because she
was retained; and would the Attorney General, he asked, indict all these people?” The
defendants were acquitted.

“During a parade of some 200 or 300 coal-heavers who were on strike for a 25 cent increase in their
daily wages, several were arrested for rioting . . . . The mayor, it was said, in fixing bail ($2,500 each) declared that he was determined ‘to lay the axe at the root of the Trades’ Union.’ This threat, together with the excessive bail, aroused the Union to action. . . . For the first time it admitted unskilled labourers to membership and appointed a committee ‘to procure counsel.’ A writ of habeas corpus was secured and the labourers were brought before Judge Randall’s court for examination. The examination lasted several weeks. The Coal Speculators brought up their forces, and several of the respectable gentlemen came themselves to testify against the labourers,
but the court finally decided ‘that there was no evidence of a breach of the peace.’ The coal
defendants were brought to a hearing on conspiracy against the labourers, but here the court
denied that there was ground for an indictment.”

ADDED NOTE

to be read in connection with note 114a, supra.

While this article was in press I learned through Professor Norman Ware of a pamphlet
‘Proceedings of the Shoe Laborers’ Convention, and examined the copy presented to Presi
dent Tyler, Cong. Lib. HF 2651 B 85 C 7. It is illuminating of the state of tariff feeling which
Shaw must have sensed. The canvassed shoe manufacturers, purporting to speak also for operatives
between whom and themselves there was ‘no great or invidious distinction . . . which God grant
may always be the case,’” were unanimous in desire for higher duties. There was hot objection
to concession in the resolutions that international free trade would be ideal; Amsa Walker
supported yet conceded on principle; Ebenezer Hussey said that “it meant little or nothing”
that free trade is “safe for us to talk about in the abstract, for there is no danger that other
nations would ever meet us on that common ground.” Abbott Lawrence’s advocacy of protection
was a triumphal reward. The memorial to Congress disclosed the principle of protecting
representing revenue as the object of the specific duties asked for, and claiming that they would
operate as a tax on luxuries, barely, if at all, affecting common articles. Rantoul in his speech
guaranteed for revenue a sensible proportion of duties for raw materials, which they would do the most good. He avoided offence to the convention by avoiding the subject of
tariff protection; protection he was for,—through a sound currency, which would prevent such
over-speculation in manufactures as the result of imprudent financial expedients; the

Rantoul’s presence indicates that his defence of the Boston bootmakers had made him in
fluential in the trade generally. The motion to invite him “to take a seat in the convention”
had an effect as of saying “check” to the similar invitation to Abbott Lawrence.

This content downloaded from 130.132.173.224 on Sat, 15 Jan 2013 20:04:22 PM
All use subject to JSTOR Terms and Conditions