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Peaceful Picketing as an Exercise of Free Speech

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The danger of innocent purchasers cutting off the creditor by a fraudulent conveyance pendente lite can be remedied by adoption of the rule of construction laid down in the majority of decisions under the Uniform Act. Multiplicity of suits can be avoided, and the creditor will be given the efficient optional remedy which the Act means to provide."[47]

GEORGE P. SARSFIELD.

[47]*Supra*, notes 26, 27.

PEACEFUL PICKETING AS AN EXERCISE OF FREE SPEECH

Picketing is the favorite weapon used by trade unions during their disputes with management over what shall constitute equitable distribution of the fruits of industry. It enjoys union favor because of its effectiveness in promoting labor's ends. Employers receiving the picketing "treatment" are not so fond of the process however, and acting accordingly, have challenged its legality under constitutional provisions, statutes, and the judicial precedents. A portion of the resulting body of law is to be considered herein.

Today, the books record decisions of the highest American court wherein peaceful picketing is designated as a form of speech.[1] Therefore, an activity, formerly considered tortious by many courts, rests comparatively secure under the guardianship of the First Amendment to the Federal Constitution. It will be submitted below that Montana decisions holding picketing to be speech have contributed to this rather spectacular change in the legal status of the activity, and evidence supporting such assertion will be offered. Further, it will be contended that, although the doctrine as originally announced by the U. S. Supreme Court has been seriously limited by that body in subsequent cases, Montana law on the subject has not been generally affected thereby.

The contention that peaceful picketing is simply a form of speech is as old as the legal history of the activity itself. In *Sherry* v. *Perkins*,[2] the first peaceful picketing case,[3] counsel of-

[1]Thornhill v. Alabama (1940) 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; American Federation of Labor v. Swing (1940) 312 U.S. 321, 61 S.Ct. 568, 85, L.Ed. 855.

[2](1888) 147 Mass. 212, 17 N.E. 307.

[3]Mr. Justice Brandies credits Sherry v. Perkins with being the first peaceful picketing case in his dissent in Truax v. Corrigan (1921) 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375.

fered argument based on the idea that pickets, bearing banners emblazoned with uncomplimentary references to plaintiff's labor policies, were simply defaming his business, and could not be restrained from continuing to do so because of free speech guaranties. The same approach appears somewhat later in *Beck* v. *Railway Teamsters Protective Association*[4] where the defending union relied on a section of the Michigan Constitution which provides in effect that every person may freely speak, write, and publish his sentiments on all subjects, being responsible for abuse of such rights. It was urged by counsel for the teamsters that publications used in connection with the picketing of plaintiff's business were only libels, necessarily forms of speech, and thus within the constitutional protection. Both courts, in granting injunctions, rejected the free speech arguments and sounded the condemnation that the writings were displayed in a manner which intimidated the public and were therefore beyond mere defamations of the businesses concerned.

Consideration of the free speech approach does not appear in most of the early picketing cases, however.[5] Whether counsel for the pickets in such contests overlooked the potentialities of the theory or simply regarded it as a hopeless one is not known. In view of the extreme hostility of many of the courts of the era to the whole picketing device, the latter possibility is a strong one. That is, typical treatment of the activity was to classify it as a continuing tort for which there was no adequate remedy at law, and as such it was considered fair game for the deadly injunction.[6] In the process of reaching such a result, the usual court utilized harshly condemning language which indicated that any attempt to gain constitutional sanction for picketing would have been summarily dealt with. For example, in *Glass Co.* v. *Bottle Blowers Assn.*[7] it was announced that "there is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching." It would not appear unreasonable to venture that such typical animosity deterred lawyers of the day from pressing the free speech argument although it might have seemed a more natural one to them had judicial hostility been less obvious. Admittedly, such speculation attributes an unnatural and foolish timidity to members of the bar, but the fact remains that the principal element of picketing is a publication, which certainly suggests

[4](1898) 118 Mich. 497, 77 N.W. 13, 42 L.R.A. 407.
[5]GREGORY, LABOR AND THE LAW, p. 338.
[6]GREGORY, *Op. Cit.*, p. 337.
[7](1907) 72 N.J.Eq. 653, 66 Atl. 953.

"freedom of speech" to anyone familiar with constitutional law. Whatever the explanation may be, an examination of the early cases reveals only a shadow of the concept of peaceful picketing as speech with hints as to the eventual triumph of the doctrine hidden among controversies as to particular factual situations and discussions of tort law thought to be applicable thereto.

Of course, picketing was held to be a lawful activity by some courts before the free speech argument was successfully offered. Several comparatively early decisions concluded it to be proper when peaceably conducted, without receiving or passing on such contentions.[8] There was, however, a general unwillingness on the part of the early courts to look upon picketing as a legitimate activity, and it is therefore stressed that genuine security for the process came only when constitutional guardianship was acknowledged despite later softening of the general attitude. Without further introduction, it is proposed to trace the doctrine to its present supremacy with pertinent Montana decisions selected for emphasis.

I.

As pointed out above, there is little to suggest the free speech idea in most of the early picketing cases. However, the argument was successfully used by unions in cases presenting a highly similar situation. That is, union-sponsored circulars were often distributed in connection with labor troubles and resulting boycotts. These publications usually requested the public to refrain from doing business with the boycotted employer until differences between him and the union were resolved. The appeals were often successful, and as a consequence, employers asked that distribution of the circulars be enjoined. Some courts obliged and pronounced the activity to be tortious as implying threats and resulting in intimidation.[9] Other courts disagreed and based their disagreement on the free speech idea. A search of the books reveals that as early as 1890 an Ohio trial court, deciding *Richter Brothers* v. *Journeyman*

[8]As early as 1885 it was indicated by a Federal Court in U. S. v. Kane, 23 Fed. 748, that picketing would be proper if peacefully conducted. For examples of early cases holding peaceful picketing proper see: Kargas Furniture Co. v. Amalgamated Woodmaker's Local Union 131 (1905) 165 Ind. 421, 75 N.E. 877; Rogers et al v. Evarts (1891) 17 N.Y. Sup. 264.

[9]State v. Glidden (1887) 55 Conn. 46, 8 Atl. 890; My Maryland Lodge v. Adt (1905) 100 Md. 238, 59 Atl. 721; Barr v. Essex Trades Council (1894) 53 N.J.Eq. 326, 104 Atl. 129.

Tailor's Union,[10] refused to restrain the posting and circulating of notices to the effect that plaintiff's tailoring establishment was a scab shop which was to be shunned by all fair citizens and that his employees were incompetent botches, professional tramps, and ex-convicts. The court conceded the publications to be libelous but said they could not be enjoined since they were under a constitutional guaranty of free speech and advised the plaintiff that his only remedy was an action for damages. It is admitted that this case has little significance since it was decided by a minor court with little or no influence on the more important tribunals of the day. Nevertheless, it is probably one of the earliest examples of successful application of constitutional arguments to a labor case of the type under discussion and deserves to be noted for that reason alone.

Probably the first important case denying equity the right to interfere with the publication by a labor union of an appeal to the public not to patronize the product of an unfair employer, on the ground that to restrain such publication would be to violate the right of free speech, was a Missouri case, *Marx and H. Jeans Clothing Co.* v. *Watson,*[11] decided in 1902. The acts complained of were the circularizing of the public. The court in that case relied on the section of the Missouri Constitution which provides that,

> "No law shall be passed impairing the freedom of speech; every person shall be free to say, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty."[12]

The conclusion was reached that the purpose of the constitutional provision was to abolish censorship and on this point the court said,

> "The authority to enjoin finds no better harbor in the empty pocket of the poor man than in the full pocket of the rich man. And such authority can have no existence in circumstances such as the present case presents, if the Constitution is to be obeyed. If these defendants are not permitted to tell the story of their wrongs, or, if you please their supposed wrongs, by word of mouth or with pen or print, and *to endeavor to persuade others to aid them by all peaceable means* in securing redress of such wrongs, what becomes of free speech and what of personal liberty? The fact that, in exercising that freedom they

[10](1890) 11 Ohio Dec. Reprint 45.
[11](1902) 168 Mo. 133, 67 S.W. 391.
[12]Mo. CONSTITUTION, Art. II, Sec. 14.

> thereby do plaintiff an actionable injury, such fact does not go a hair towards a diminution of their right of free speech, etc., for the exercise of which, if resulting in such injury, the Constitution makes them expressly responsible. But such responsibility is utterly incompatible with authority in a court of equity to prevent such responsibility from occurring." (Emphasis supplied.)[12a]

The result reached here was unsuccessfully urged before the Michigan court in connection with the *Beck* case a few years before with a nearly identical constitutional provision[13] serving as the basis of the argument. As noted above, the contention was rejected by that tribunal which held that the picketing done in connection with the boycott necessarily gave the circulars an improper coercive character, notwithstanding the merely persuasive import of the words actually chosen by the union. It was apparently this concept of picketing which led to the difference in the two cases since the *Beck* decision acknowledged that the workers could have presented their case in newspapers or circulars with no attempt at "coercion," i.e., picketing, peaceful or otherwise, and such publication could not have been enjoined. Whether the Missouri court would have decided the *Marx* case differently had picketing been an element to consider is, of course, not known. In view of language in the case, questioning whether free speech could remain in a jurisdiction where workers are not permitted "to persuade others to aid them by all peaceable means," one might reasonably conclude that peaceful picketing would have enjoyed the same immunity from injunction as was extended to the publication of the circulars actually involved. In any event, the steam was removed from the *Marx* case by a later Missouri decision,[14] dealing with the same problem, which said the plaintiff employer went to court to complain against the declaration of a secondary boycott, not the publication thereof, and it was remarked, apparently with a straight face, that "If the boycott itself is enjoined, there would be no occasion for complaint against its publication."

In 1908 the problem was presented to the Supreme Court of Montana in *Lindsay & Co., Ltd.* v. *Montana Federation of Labor*.[15] Since the provisions of the Missouri and Montana Constitutions regarding free speech are very similar[16] and the factual

[12a]Marx & Jean's Clothing Co. v. Watson *supra* note 11, at p. 395.
[13]MICH. CONSTITUTION, Art. II, Sec. 4.
[14]Lohse Patent Door Co. v. Fuelle (1908) 215 Mo. 421, 114 S.W. 997.
[15](1908) 37 Mont. 264, 96 P. 127.
[16]MONT. CONSTITUTION, Art. II, Sec. 10. "No law shall be passed im-

situation facing the court was nearly identical with that offered by the *Marx* case, it is not completely surprising to find the courts reaching the same result. In the *Lindsay* case circulars were printed and distributed describing the plaintiff as unfair to organized labor, and requests were made to the public not to trade with it "for your own protection and the protection of organized labor." An injunction forbidding such publication was secured and an appeal therefrom was taken. After holding the boycott to be legal, the court examined the means of effecting it, i.e., the circulars. In this connection, the free speech argument was approved. After quoting the pertinent section of the Montana Constitution[17] which provides for absolute freedom of speech and responsibility for abuse thereof, the court said,

> "It cannot be said that a citizen of Montana is free to publish whatever he will on any subject while an injunction preventing him from publishing a particular item on the subject hangs over him like the sword of Damocles, ready to fall with all the power which can be invoked in contempt proceedings, if he does the very thing the section of the Constitution says he may do. It is impossible to conceive the idea that the individual has an absolute right to publish what he pleases, subject to the restriction mentioned, and at the same time entertain the idea that a court may prevent him from doing so. The two ideas cannot possibly co-exist. The language of the section is not susceptible of any other meaning than this: That *the individual citizen of Montana cannot be prevented from speaking, writing, or publishing whatever he will on any subject.*" (Emphasis supplied).

It was then announced that if the individual citizen could publish the circulars, the Montana Federation of Labor, an association of individuals, likewise had the right, and the injunction was dissolved.

In *Iverson* v. *Dilno*[18] a pure picketing problem was presented to the Montana judges. Pickets, carrying a banner proclaiming a Great Falls boarding house to be unfair to organized labor, patrolled the walks in front of the premises. The court reaffirmed the doctrine of the *Lindsay* case "so far as applicable" and refused to enjoin the publication of the criticisms displayed

pairing the freedom of speech; every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; . . ."

[17] *Supra*, note 16.

[18] (1911) 44 Mont. 270, 119 P. 719.

on the banners. It was held, however, that blocking of public streets could be an enjoinable nuisance and the case was sent back for a hearing on that portion of the problem. The case may be cited as authority for the proposition that peaceful picketing is speech, but it seemingly limited the *Lindsay* decision by implying that a "threatening" publication could possibly be restrained.

The next Montana case, pertinent to the subject, was *Empire Theater* v. *Cloke*.[19] It appeared that a union was displeased with the employment of unorganized musicians by a Butte theater. To publicize this displeasure, the union stationed peaceful pickets, bearing banners marked with appropriate messages, along the approaches to the plaintiff's building. The Theater Company sought the aid of the courts, claiming the picketing activity was illegal, and thereby gave the occasion for the unqualified extension of the *Lindsay* doctrine to peaceful picketing.

The court answered contentions that the *Lindsay* doctrine was bad law based on inadequate and repudiated decisions[20] by saying, ". . . we were and still are unable to conceive how anyone can possess the right to publish what he pleases subject only to the penalty for abuse and at the same time be prevented by any court from doing so." With this sentence, peaceful picketing clearly became recognized as a form of speech, on par with the *Lindsay* circulars, entitled to protection of the supreme law of Montana, and thereby gained security immeasurably greater than that known before. Unlike their Missouri brethren, the Montana judges met the issue squarely, and the straightforward language of their spokesman, Mr. Justice Sanner, indicates that they thought no other conclusion remotely possible in view of the applicable law.

II.

Twenty-three years after the *Cloke* decision, the Federal Supreme Court in deciding *Thornhill* v. *Alabama*[21] agreed with Montana that peaceful picketing was an exercise of speech to which constitutional safeguards should be applied and the new

[19](1917) 53 Mont. 183, 163 P. 107.

[20]Counsel for the plaintiff apparently believed his main hope lay in convincing the court that the Lindsay case was erroneously decided. No great effort was made to distinguish the Lindsay circulars from the picket-borne banners of the Cloke case, although some argument concerning nuisances took place. In other words, there is no suggestion by counsel that because the pickets were involved, greater coercion was in the air. The attitude seemed to be: If the Lindsay case is right, then the plaintiff is wrong.

[21]*Supra*, note 1.

security became nationwide. Whether or not the Montana holdings account in part for this present prominence of the doctrine cannot be absolutely known. It is suggested, however, that there is a strong possibility of an indirect, but no less real, connection between the *Cloke* and *Thornhill* results. Such a statement is prompted by the following speculations.

Justice Brandies' remarks in *Senn* v. *Tile Layer's Protective Union*[22] are said to be the first hint[23] that the Supreme Court would seriously consider peaceful picketing as speech and are acknowledged to have influenced the *Thornhill* result by the court which decided that case.[24] In the *Senn* decision, which held a Wisconsin law limiting the use of labor injunctions to be constitutional, it was stated, "Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. *Members of a union might without special statutory authorization by a State make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.*" (Emphasis supplied). The emphasized portion of the quotation is the essence of what the Montana court said twenty years before with reference to peaceful picketing and the Montana Constitution,[25] and Justice Brandies probably knew as much, since his 1923 dissent in *Truax* v. *Corrigan*[26] called attention to these decisions holding peaceful picketing to be legal. It is true that the *Truax* dissent did not mention the constitutional basis of Montana's liberal views with regard to the matter. Nevertheless, the fact that the cases were noted insures Justice Brandies' complete familiarity therewith, for it is unthinkable that such a judge would accept second-hand versions of the significance of particular decisions. It is therefore

[22](1937) 301 U.S. 468.

[23]*Supra*, note 5.

[24]In the Thornhill decision, Justice Murphy explicitly quoted Brandies' remarks concerning free speech and signified the court's agreement therewith.

[25]That is, the Cloke case held peaceful picketing to be a form of speech announcing labor troubles and as such, under constitutional protection. It is true that Truax v. Bisbee (1918) 19 Ariz. 379, 170 P. 121 reached a similar result but the court there relied very heavily on the Lindsay case and was obviously influenced by the Montana attitude while the case of Lisse v. Local Union No. 31, Cooks and Waiters (1935) 2 Calif. (2nd) 312, 41 P. (2nd) 314, proceeded on the theory that peaceful picketing is speech, was decided 18 years after the Cloke case. Ex parte Lyons (1938) 27 Calif. App. (2nd) 293, 81 P. (2nd) 190 based on the Lisse case, explicitly held peaceful picketing to be free speech, but there is no evidence that it became a particularly prominent decision, and the same may be said for Kirmse v. Adler (1933) 311 Pa. 78, 166 Atl. 566.

[26](1921) 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375.

ventured that the famous remarks in the *Senn* case did not result solely from their author's independent thinking on the subject but were, in part, products of his reflections on the Montana cases he had encountered theretofore. If such be an accurate surmise, the courts of Montana as well as Justice Brandies deserve some credit for the *Thornhill* doctrine. In any event, the *Cloke* case stands as a contradiction of an intimation by one writer that no impartial person took such free speech arguments seriously before the *Senn* case.[27]

III.

Though the broad holding of the *Thornhill* case has been noted above, its exact scope as "explained" by later decisions has not been discussed. It is proposed at this point to consider limitations developed and their possible affect in Montana.

Picketing in the *Thornhill* case was of the "simple" variety, since Thornhill was a striking employee picketing his employer's plant with no third parties directly involved. The boycott was a primary one, in other words. Although the language of the decision seemed broad enough to extend constitutional sanction beyond a pure employee-employer picketing situation, troublesome questions arose in this connection.

It is acknowledged that freedom of speech is subordinate to a state's right to protect itself and is subject to reasonable regulation and restriction for the public welfare.[28] Some states have considered secondary boycotts as incompatible with the public good, and since the *Thornhill* decision, the Supreme Court has had to concern itself with the reasonableness of such attitudes because of their effect on peaceful picketing. Although many believed the *Thornhill* doctrine was broad enough to safeguard peaceful picketing when used to announce labor's grievances in any case,[29] they were found to be erroneous for in *Carpenter's and Joiner's Union of America* v. *Ritter's Cafe*[30] the Supreme Court announced,

> "It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute peaceful picketing may be a

[27]GREGORY, at page 338 of his book "LABOR AND THE LAW," makes the statement referred to. He was apparently unwilling to consider the decisions of the Supreme Courts in Montana, Arizona, California, and Pennsylvania as important. (See note 25, *supra*).

[28]ROTTSCHAEFER, AMERICAN CONSTITUTIONAL LAW, p. 757.

[29]See Justice Reed's dissent in Carpenter's Union v. Ritter, *infra*, note 30.

[30](1942) 62 S.Ct. 807. See also Giboney v. Empire Storage & Ice Co., (1949) 69 S.Ct. 684, 336 U.S. 490, 93 L.Ed. 649.

> phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that states must be without power to confine the sphere of communication directly related to the dispute."

Thus the Supreme Court cleared the way for states to restrict peaceful picketing when used in connection with secondary boycotts.

However, the rise and fall of the *Thornhill* fortunes in this respect should be a matter of complete indifference to the courts of Montana when called upon to handle picketing cases. Peaceful pickets in this state were acknowledged to be exercising their right of free speech long before Mr. Thornhill's troubles in Alabama and his rescue therefrom by the Supreme Court and can continue to enjoy such status quite independently of the "new" Federal doctrine. The *Cloke* decision specifically pointed out that the free utterance provisions of the United States Constitution are not so broad as those appearing in its Montana counterpart and then concluded that federal decisions with regard to the matter need not be considered controlling.[31] Although there has been no indication that the *Thornhill* doctrine will be entirely consigned to history, if such does come to pass, the *Cloke* decision should stand as firm as in the days before Alabama's law collided with a court particularly conscious of civil rights.

It would not appear that attempts to break through peaceful picketing's constitutional protection by attacking the boycott it publishes would meet Montana approval. Counsel for the plaintiff in the *Cloke* case proceeded on such a theory arguing by the Missouri formula as laid down in *Fuelle* v. *Patent Door Co.*,[32] to wit: "If this boycott itself is enjoined, there would be no occasion for . . . its publication." This contention met with little success, the court answering, in effect, that boycotts, secondary or otherwise, were legal under the common law of Montana. The fact that the *Ritter* case suggests a somewhat different approach, i.e., free speech is not absolute but is subordinate to an over-

[31] "We thought, as we still think that this second clause of our provision conveys the idea of liberty, unchecked as to what may be published, by anything save penalty and is therefore so material a departure from the meaning given to the national provision that the federal cases have little, if any significance." From Empire Theater v. Cloke, *supra*, note 19. . . . The First Amendment to the Federal Constitution provides, "Congress shall make no law . . . abridging the freedom of speech or of the press." For the Montana free speech provision, see *supra*, note 16.

[32] *Supra*, note 14.

riding public policy, namely one against secondary boycotts, gives no greater cause for concern since again it may be answered that secondary boycotts are proper in Montana.

That is, the *Cloke* case, in re-emphasizing the rationale of the *Lindsay* decision, stated that every person has a right to deal or not to deal with whomever he pleases and that he may exercise such right singly or in combination with others. There are no indications whatsoever in either the *Cloke* or *Lindsay* case that this refusal to deal must be aimed at the employer who is the primary target of union activity. On the contrary, the court makes it abundantly clear in both decisions that a concerted refusal to deal with a neutral is as proper as such a refusal when directed toward an actual disputant. Therefore, union men may combine to boycott and may direct the power so generated at anyone incurring their displeasure. Such conclusion needs no greater support than the following declaration of Montana common law appearing in the *Cloke* decision,

> ". . . We come to the result common to both the *Lindsay* and *Dilno* cases, which is to declare that labor unions are not unlawful in this state; that such unions may publish and pursue a peaceful boycott against *any person or enterprise deemed by them unfriendly* and that a combination for such purposes cannot be viewed as a conspiracy." (Emphasis supplied).[32a]

Of course, a refusal to deal has little effect unless the person boycotted knows where he stands with the union and why he is in such position. In reality then, the heart of the secondary boycott is a threat to neutrals which necessarily involves a publication. That is, the union announces to third persons through pickets, circulars, etc. that it will boycott them unless they cease to deal with the employer being pressured. In some jurisdictions, such as Texas where the *Ritter* case arose, this is said to result in unjustifiable coercion. Montana disagrees, saying in the *Cloke* case that the threat is primarily a publication of a legitimate intention, and incidental coercion involved does not deprive such publication of due constitutional protection.

In view of the above analysis, one may sum up the Montana stand on secondary boycotts as follows: The common law of the state permits concerted refusals to deal with any person regardless of such person's position in connection with the particular labor dispute involved. The union may publish its intention to

[32a]Empire Theater Co. v. Cloke (1917) 53 Mont. 183 at 192, 163 P. 107 at 109.

cease dealing with the neutral, or the reasons for an accomplished boycott against him, at any place where such announcement will be effective, and the publication will be protected by the free speech provisions of the state Constitution. In other words, the concerted refusal to deal and the publication thereof are justified on separate grounds. The former is upheld under the common law while the latter is considered to be under constitutional protection.[33]

It is true that the Montana Legislature, in charting an area for legitimate industrial strife, could change the common law by branding a combination to cease dealing with neutrals as criminal conspiracy. But what of publication of a conspiracy so condemned? It would appear that peaceful picketing, even in furtherance of the illegal boycott, would necessarily be immune from injunction (the pickets might be subject to punishment after the event) since the *Lindsay* and *Cloke* decisions announced in unmistakable terms that the publication of *anything* could not be enjoined under the supreme law of the state. Put another way, an injunction should not issue against peaceful picketing in Montana regardless of where it is being carried on,[34] even in cases where such activity would be inconsistent with an anti-boycott statute.

Whether picketing with a "background of violence" could be enjoined in Montana is another question. In *Driver's Union* v. *Meadowmoor Dairies*,[35] a U. S. Supreme Court case, undisciplined union men bombed dairies, beat up truck drivers and generally conducted a terroristic campaign to organize plaintiff's workers. Later, the union officially put out a picket line which was peacefully conducted. At the dairy company's suit, an injunction against violence and picketing was granted. The union, maintaining the trial court's order was too broad because it re-

[33]Although the facts in the Cloke case do not present a typical secondary boycott situation since the pickets were operating around the place of business of their primary opponent, the court indicated by its language that the idea of classifying boycotts according to their targets would mean nothing in Montana. In the Lindsay case secondary boycotts were under way. The court assumed that the union had ceased to deal with those found patronizing the wholesaler against whom the organizing campaign was directed, and that notice of such fact was implicit in the circulars involved.

[34]Picketing done in a manner constituting a nuisance under Iverson v. Dilno, *supra*, note 18, would not be peaceful. Further, federal interference in the manner of Truax v. Corrigan, *supra*, note 26, presumably is no longer cause for concern, because Justice Brandies said in the Senn case that such intervention is not justified in peaceful picketing cases.

[35](1941) 312 U.S. 287, 85 L.Ed. 837.

strained peaceful picketing as well as violence, appealed to the Supreme Court and pointed to the *Thornhill* case. It was held that the violence which preceded the picketing gave the whole "show" the effect of force and intimidation, and the injunction was upheld.

It is suggested that the *Meadowmoor* route to restraint of picketing should not be open in Montana. As noted above, the Montana court, when deciding what is meant by free speech under its own Constitution, does not consider itself bound by decisions interpreting the narrower federal guaranty. Therefore, it should solve a "background of violence" problem independently of the *Meadowmoor* case. . . . It is re-emphasized that in the *Lindsay* decision the court said, "the individual citizen of Montana cannot be prevented from speaking, writing, or publishing whatever he will on any subject." Certainly such a pronouncement is broad enough to protect a publication from injunction though it is likely to result directly in violence. In view of such fact, a Montana court, agreeing with the *Meadowmoor* case, would leave the law in a rather anomalous state. That is, constitutional law, opposed to the restraint of any publication, although it be one naturally resulting in violence (i.e., criminally or civilly libelous statements cannot be enjoined)[36] would at the same time be willing to allow injunctions against publications peaceful in themselves but "tainted" by *past* violence caused by other forces.

It is conceded that even the "absolute" free speech provision of the Montana Constitution probably would not prevent a court from restraining blasphemy or solicitation simply because both are accomplished through publications.[37] For example, it is thought that the Montana tribunal could properly agree with the U. S. Supreme Court's recent holding in *Giboney* v. *Empire Storage & Ice Co.*[38] to the effect that picketing may not be used to pressure another into the commission of a crime. Even in these extreme cases, however, the unusual emphasis placed on free speech by the framers of the Montana Constitution would have to be recognized, and in view of the interpreting language

[36]The Lindsay case specifically points out that libelous publications cannot be enjoined.

[37]Attention has been called to limits imposed by nuisance statutes in note 34 *supra*.

[38](1949) 69 S.Ct. 684, 336 U.S. 490, 93 L.Ed. 649. Montana might consistently rule that picketing can be constitutionally maintained through to represent that the picketers intend to do an unlawful act, on the one hand, but that it cannot be continued to try to "coerce" a *third* person to commit an unlawful act.

in the *Cloke* and *Lindsay* cases, no great criticism could be justifiably directed at a decision holding such publication to be immune from injunctions.

IV.

To summarize, the following conclusions are repeated: Peaceful picketing has been recognized as a form of speech entitled to the broad protection of Article II, Section 10 of the Montana Constitution for over thirty years. The fact that such picketing is done in connection with a secondary boycott is immaterial under present law. Even in cases where the picketing is used to further an illegal purpose, it should be free from injunctions, with possible exceptions arising from situations where the right is abused beyond all reason. These conclusions should not be weakened by federal cases taking a narrower view of the matter, due to differences between the pertinent provisions of the two constitutions concerned. The Montana Court, unlike some other tribunals, has refused to employ a double standard in determining when free speech doctrines are to be applied. From the beginning, it has been held that labor, as well as other segments of society, is entitled to free speech, and it is thought that such fairness should prevail whenever the matter is tested in this state.

DAVID WILLIAMS.

WRONGFUL DEATH OF MINOR—PROPER PARTY PLAINTIFF

The Revised Code of Montana, 1947, Section 93-2809 (9075) provides:

> "A father, or in the case of his death or desertion of his family, the mother, may maintain an action for the injury or death or a minor child, and a guardian for injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another . . . ."

We are here concerned with the ability of the mother to bring suit under this section.

The Montana Supreme Court has indicated a necessity for strict compliance with the terms of this statute in the parties it qualifies as plaintiffs. Thus, the mother must affirmatively allege the death or desertion of the father or ". . . the complaint