THE KANSAS INDUSTRIAL RELATIONS ACT OF 1920

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INTRODUCTION

The shortcomings of compulsory arbitration of industrial disputes have been apparent to many observers of labor problems for many years. Labor and management have usually looked upon compulsory arbitration with much distrust and hostility. The use of labor courts usually means the compulsory submission of labor disputes to a special court for settlement, thus placing such conflicts in the same category with commercial disputes. Compulsory labor arbitration can be of two types, the interpretation of an existing contract or the writing of a new agreement when the parties are unable to agree to a new contract. In this paper we shall be concerned with the latter.

States have from time to time attempted to create industrial courts to arbitrate labor and management differences. These attempts have usually had little success in achieving industrial harmony and tranquility. The most notable example of such an experiment was made by the state of Kansas in 1920 following the serious nation-wide coal strike of 1919. This was indeed a bold attempt to substitute compulsory arbitration for industrial combat to thwart subsequent public harm and discomfort which may occur as a result of work stoppages in certain fields.

The purpose of this study is to review the history and experiences of the Kansas Industrial Relations Act and to explore the limits within which the compulsory arbitration of labor disputes may be constitutionally applied in a democracy. It is the objective of this paper to point out some of the pitfalls of compulsory arbitration in settling labor-management conflicts.

The author has made use of the personal documents and letters of the leading figures who were involved in the enactment of the Kansas law and who participated in the Court's work. These files are located in the Kansas Historical Society and in the office of the state Labor Commissioner. The leading court cases which tested the Act's constitutionality have been reviewed and analyzed. The author has interviewed many people who participated in the Kansas experiment.

THE DEVELOPMENT OF THE KANSAS INDUSTRIAL RELATIONS ACT

The first idea for a court of industrial relations in Kansas came from a self-made lawyer, William L. Huggins of Emporia, Kansas.[1] This gentleman was first attracted to the need for the "legal adjustment of industrial controversies" during the Pullman and Railway strike of 1894. Several of his friends were union railway workers and were involved in this strike. Some of these friends were not in favor of striking. But they felt that they had to go along with the rest of the workers in walking out and striking or else they would lose their union standing and be ostracized by the union wherever they would seek employment. The union lost the strike and many of the strikers lost their jobs. Some of Huggins' friends who were strikers were "blacklisted" by the victorious railroads.[2]

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[1] Signed but undated letter to the secretary of the Kansas Historical Society from William L. Huggins (in the Archives of the Kansas Historical Society, Topeka, Kansas).

[2] William L. Huggins, Labor and Democracy (New York: the Macmillan Company, 1922), p. 1.

Need for Compulsory Arbitration of Industrial Disputes

Mr. Huggins, a law student and principal of a ward school in the city of Emporia, Kansas, was deeply impressed by the statement of Blackstone, "that the genius of common law was such that it offered a remedy for every wrong against person or property." However, this remedy was not available for these men who had first been compelled to strike against their own will and then were blacklisted by the railroads as a result of their participation in the strike. Huggins could not see how these men could receive justice. He stated that there was a "lapse of law" here in that there was no judicial tribunal open to them in which they could air their complaints.[3]

Shortly thereafter the Debs case was decided. Huggins was impressed by Justice Brewer's statement in deciding this case "that Congress had the power to outlaw strikes that interfered with interstate commerce and carriage of the mails."[4] Huggins thought that the law could mete out justice and that the answer to the problem of labor and industrial disputes was the creation of an industrial relations court which would have the power to adjudicate disputes between labor, capital, and the public.[5]

In 1911, a bill was passed by the state legislature of Kansas providing for the regulation of public utilities. Huggins studied this bill and supported it in its entirety. He was enthusiastic about the possibility of

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[3] Ibid., p. 3.

[4] In Re Debs, Petitioner, 158 U. S. 564, 15 Sup. Ct. 900 (1895).

[5] Domenico Gagliardo, The Kansas Industrial Court (Lawrence, Kansas: University of Kansas Publications, 1941), p. 30.

it being the basis of a law that would regulate corporations dealing with public services.[6] He stated that public opinion and court rulings had made a complete circuit going from the theory of laissez-faire back to the view reached by Sir Matthew Hale almost 250 years previous, namely, the belief in public regulation and control of industry.[7]

Huggins reasoned that the "capital side" could be controlled. The statement of Justice Brewer's in the Debs case had showed that the state could use its police power to prevent interference which stopped or retarded interstate commerce. The state, Huggins inferred, could stop the same in intrastate commerce. But the question "could labor still be protected and given justice with the right of the strike removed?" still remained in Huggins' mind.

It appeared to Huggins that this problem of justice to labor was solved with the case of Wilson v. New in 1916. The decision in this case upheld the emergency Adamson Act. The United States Supreme Court decided that Congress did have the power to avert "a great emergency and protect the public from the evils of a great strike" by regulating the hours of work for laborers engaged in interstate commerce.[8] The opinion handed down in this case appeared to convince Huggins that it was possible and feasible to adjudicate industrial disputes. The United States Supreme Court's decision may also explain why the Kansas Industrial Relations Act of 1920 applied

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[6] William L. Huggins, "Essays on the Public Utilities Commission," (Archives of the Kansas Historical Society, Topeka, Kansas).

[7] Letter of William L. Huggins to the secretary of the Kansas Historical Society.

[8] Wilson v. New, 243 U. S. 332 (1917).

only to industries that were affected with a public interest and only to controversies involved therein which endangered the public health, peace, and general welfare.[9]

During the years of 1918 and 1919 Huggins, while serving on the Kansas Public Utilities Commission, expounded his views on arbitration and its role in resolving industrial disputes. He appeared before numerous public audiences, including the 1919 International Rotary Convention. In October of 1919, Huggins, influenced by unrest in the Southeast Kansas coal fields, outlined clearly and precisely the basic framework and principles which an industrial relations law should include.[10]

Huggins had studied the New Zealand, Australian, and British arbitration laws. The Kansas law was to be a complete departure from all previous arbitration laws. It was to be an adjudication court, not an arbitration court.[11] Disputes were to be adjusted, rather than determined or fixed at the discretion of an arbitrater. Huggins had the full support of Governor Allen and had aroused the interest of many prominent Kansas lawyers and legislators. However, their opinions of the law were mixed and divided and gave Huggins little help in making any revisions to his original draft.

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[9] Huggins, Labor and Democracy, p. 34.

[10] William L. Huggins, "Is There a Labor Problem?" (Topeka, Kansas: State Printing Plant), (no date).

[11] Herbert Feis, "The Kansas Court of Industrial Relations, Its Spokesmen, Its Record," Quarterly Journal of Economics, XXXVII (August 1923), p. 707.

Coal Strike of 1919

During the First World War, Kansas had been relatively free of any major strikes; nevertheless, there had occurred during this period numerous strikes of a short and irritating nature.[12] In November of 1919 the bituminous coal miners of Southeastern Kansas, organized under the aggressive and "invincible" leadership of Alexander Howat, and the United Mine Workers of America suddenly made demands upon the United States Fuel Administration. The union had little success with its demands and set a strike for November 1, 1919. To combat this emergency, the Federal government intervened and declared that the war was not really over and that the strike was therefore illegal under the Lever Act. The President asked the Attorney-General to apply for an injunction to stay the strike. An injunction was immediately given by a Federal judge in Indiana halting the work stoppage. John L. Lewis, the national president of the mine workers, canceled the strike order. After conferring with other union officials, he said that they had no desire to fight the United States government. But the cancellation order of Lewis and the national union was almost completely disobeyed by the rank and file miners.[13]

In Kansas, Howat ordered all mine operations to be completely suspended.[14] Kansas, taken by surprise, was inflamed and incensed with the

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[12] Henry J. Allen, The Party of the Third Part (New York: Harper and Brothers Publishers, 1921), p. 49.

[13] Selig Perlman and Phillip Taft, History of Labor in the United States, 1896-1932 (New York: the Macmillan Company, 1935), pp. 469-473.

[14] Ibid., pp. 473-476.

insurgent Kansas coal miners' strike. The State of Kansas intervened. The Governor of Kansas attempted to use his personal influence by urging both the mine operators and the union to negotiate under his direction. The mine owners were willing to negotiate a separate contract apart from the national negotiations, but Howat and the local unions refused. Numerous injunctions were brought by the Federal government, but they were to no avail.[15] Howat and his men continued their work stoppage. Howat was quoted as saying that "regardless of all injunctions, prisons, and judges" he would not alter his stand concerning the work stoppage.[16] Nevertheless, it was still hoped that the Federal government could compel Howat to call off his strike.

Realizing that conditions were slowly deteriorating and that the emergency was far from over, the Governor began to consider what action the state could take to alleviate the growing problem and to protect the public welfare. The possibility of the state taking over the mines and operating them was considered. The Governor conferred with the Attorney-General. They decided to pray for a court injunction which would put the struck coal mines into state receivership.[17] The injunction was granted on the grounds that "a conspiracy or combination to cease production in violation of the state anti-trust laws existed."[18]

Armed with this order to put the coal mines into receivership, the

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[15] Allen, op. cit., pp. 50-55.

[16] Topeka Daily Capital, November 9, 1919.

[17] Gagliardo, op. cit., pp. 17-19.

[18] State of Kansas v. Mallams-Halstead Coal Company, Number 22,700, (application for receivership).

state, on November 17, 1919, took control of mines that produced about ninety-five per cent of the state's coal output. The Governor again pleaded with the miners to go back to work. He offered them their previous wages and agreed to make retroactive to this time any wage increase that would come from further national contract negotiations. Howat and his miners refused and added that the union miners would work only if the demands by the national union were conceded to them.[19]

Finally, Governor Allen, realizing the futility of further attempts to immediately settle the strike, decided to call for volunteers to work in the mines. Eighteen hundred troops were dispatched to the scene to protect the enthusiastic volunteers composed of college students, farmers, and local unemployed laborers. The mine operations began on December 1, 1919 under extremely harsh and unfavorable conditions. The volunteers had little experience in mining and mining techniques. Many had never seen the inside of a mine. Therefore, operations were confined to the strip or open mines. The Governor's office cleared the orders for the needed coal and distributed it through the local governments. The coal that was mined was of poor quality and many complaints were made to the state officials.[20]

The operations were short-lived. A temporary settlement was made with the union. On December 11th and 12th Governor Allen met with union and mine officials and signed an agreement which was to last for sixty days. The contract gave the workers a fourteen per cent increase in wages and further

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[19] Debate between Samuel Gompers and Henry J. Allen (New York: E. P. Dutton and Company, 1920), p. 18.

[20] Gagliardo, op. cit., pp. 20-22.

provided that the award of the national negotiations would be binding on all parties.[21]

Enactment of Compulsory Arbitration

After having finally succeeded in getting coal operations resumed, Governor Allen called a special session of the legislature to convene on January 5, 1920. Allen decided that Kansas should enact a labor relations law regulating labor disputes in certain industries. These industries were the mining or production of fuel; the manufacture of clothing; the manufacturing or preparing of food products; the transportation of fuel, clothing, and food; and the operation of public utilities and common carriers.[22]

The controversy surrounding governmental regulations of industrial disputes became very intense and serious. Much debate followed concerning the rights of labor, capital, and above all, the rights and welfare of the public. Representatives of labor and capital were very critical of any attempts on the part of the state to interfere with their actions and rights.

Labor's arguments were presented chiefly by Frank P. Walsh, Chairman of the United States Commission on Industrial Relations and a strong friend of labor. He contended that the Kansas bill contained all of the vices and none of the virtues of compulsory arbitration.[23] Unions, he felt, would

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[21] Ibid., pp. 22-23.

[22] Allen, op. cit., p. 212.

[23] William M. Duffus, "The Kansas Court of Industrial Relations," American Economic Review, X (March, 1920), pp. 407-412.

slowly die off with extreme state regulation and the whole process of collective bargaining would become a farce. He also stated that such a law would be declared unconstitutional because it would be unreasonably discriminatory. The law would cover only certain industries which were essential to the public welfare. Walsh maintained that all industries were essential to the public.[24]

Colonel John S. Dean represented the employers' drive against having the state enter into industrial conflicts. He based his arguments on the fact that such a law would tend to be confiscatory and that it would also lean toward the involuntary servitude of labor.[25]

William L. Huggins and Governor Allen presented to the legislature the public's point of view on the proposed measure. However, most of the legislators had already made the decision that some type of industrial relations court was necessary even before the special session had been called due to the publicity which the controversy had received.[26]

With William L. Huggins' guidance and Governor Allen's support, the Kansas Industrial Relations Act of 1920 was put into a final draft. The Senate and the House made relatively few changes in it. In the House, the vote was 104 in favor with seven against it, and in the Senate there were 33 votes for it and five against it. The bill was immediately signed by the Governor on January 23 and it became effective on January 24, 1920.[27]

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[24] Gagliardo, op. cit., p. 37.

[25] Ibid., pp. 38-39.

[26] Allen, op. cit., pp. 79-91.

[27] Gagliardo, op. cit., pp. 46-49.

We can see from the chain of events leading up to the enactment of this law that the Kansas Industrial Relations Act of 1920 was not a piece of hasty legislation. Its evolvement came about because many people had given serious consideration to such a law and because of the serious coal strike of 1919.

THE FUNDAMENTALS OF THE KANSAS LAW

The original Kansas Industrial Relations Act of 1920 was composed of thirty separate sections. It is beyond the scope of this paper to analyze all of the sections of the law. This paper is limited to the major provisions of the law.

The Act created a tribunal of three persons to be appointed by the Governor for terms of three years. One member's term was to expire each year. No specific qualifications were required for those serving as judges. The salary for each judge was set at $5,000 per year.[28]

The Industrial Court had all the powers of higher courts and was given wide powers of investigation into industrial problems and conditions. The law provided that the Industrial Court must be given free access to all papers and books belonging to the parties involved in an industrial dispute. However, the tribunal did not have the direct power of issuing subpoenas and injunctions. It had to apply for these through the regular court channels. This aspect of the court lessened to a great extent the Industrial Court's ability to function properly and expediently in cases

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[28] Kansas, Laws of Special Session, 1920. Chapter 29, Section 1.

that demanded immediate attention and correction.[29]

The most important section of the Act was section 3a. This section declared that certain industries and utilities affected the public interest and were "therefore subject to supervision by the state" for the purpose of "preserving the public peace, protecting the public health, preventing industrial strife, disorder, and waste, and securing regular and orderly conduct of all businesses directly affecting the living conditions of the people of the state and in promotion of the public welfare."[30] The specific industries were: the manufacture or preparation of food products; the manufacture of clothing; the mining or production of fuel; the transportation of food, clothing, and fuel; and all public utilities.

The Kansas legislature added to the list of industries formerly regarded as affected with a public interest at least three others. These were the manufacture of food, the manufacture of clothing, and the mining or production of fuel. In fact, it was stated during the hearings on the bill that these three items, clothing, food, and fuel, were the three prime necessities of every civilized people and that they were in fact clothed with more of a public interest than transportation facilities and public utilities.[31]

The law stated that the named industries and utilities must "be operated with reasonable continuity and efficiency." Reasonable continuity and efficiency was to allow for seasonal fluctuations that might occur. The

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[29] Gagliardo, op. cit., pp. 48-49.

[30] Kansas, loc. cit., Chapter 29, Section 3.

[31] Huggins, Labor and Democracy, p. 53.

law further declared that "any willful attempt to hinder, limit, or suspend such continuous and efficient operations for the single purpose of evading the intent and original purpose of this Act" was unlawful and punishable by the Industrial Court.[32]

Any willful violation of this Act or of an order of the Industrial Court was made a misdemeanor and punishable by a maximum fine of $1,000 or a prison term not to exceed one year, or both. If the willful violator was an officer of a labor organization or an employer, the violation was termed a felony and punishable by a maximum fine of $5,000 or a prison term of not more than two years, or both.[33]

The Industrial Court was obligated to hear controversies in the named industries and utilities upon a complaint from labor or management. In addition, any ten citizen taxpayers of a community had the right to petition to the Industrial Court. The Attorney-General was also vested with the power to initiate complaints and the Industrial Court was required to rule on them. The only requisite necessary for a person to be heard was that the parties involved must be unable to agree on the issues and that such disagreements must threaten the continuity or efficiency of service in the declared essential industries.[34]

The Industrial Court could intervene upon its own initiative in industrial disputes when it appeared that such controversies would threaten the continuity and efficiency of service to the extent that it endangered

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[32] Kansas, loc. cit., Chapter 29, Section 6.

[33] Ibid., Sections 19 and 20.

[34] Huggins, op. cit., pp. 70-73.

the public peace or threatened the public health. The Industrial Court rulings were binding on all parties. However, both sides did have the right to appeal to the state Supreme Court. The right of appeal to the state Supreme Court existed only if the appeal was made within ten days after the Industrial Court had made its decision. If the belligerent parties would not accept the orders of the Industrial Court, it could bring action to the state Supreme Court to compel the parties to comply with its orders.

The Industrial Court was given the authority to approve, upon proper showing, the commencing, limiting, or ceasing of operations in any of the affected businesses. It was unlawful for operators in any of the covered industries to willfully cease or limit operations for the purpose of limiting transportation or production or to effect prices for the purpose of avoiding any of the provisions of the Act.

The Industrial Court had the emergency power to take over and operate any of the named industries and utilities when its suspension or limitations of operations endangered the public peace or threatened to harm the health and welfare of the public. The emergency powers existed "for such reasonable time" as was necessary to preserve the public health and peace.

The Act stated that in the interest of the public welfare, the workers in the named employments should "receive fair wages" and have "healthful and normal working surroundings," and that capital "shall have a fair return for its use."[35] The Industrial Court was given the power to regulate hours, wages, and working conditions, under terms that were fair and reasonable. Cases could be reopened after sixty days of compliance by either party. If

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[35] Kansas, loc. cit., Chapter 29, Section 7.

the Industrial Court ordered an increase in wages, it was to be made retroactive to the beginning of the court proceedings.[36]

Neither party was to be assessed any court costs when the Industrial Court acted in its behalf. The Industrial Court was soon called the "court of the penniless man." In fact, the advocates of this law felt that the only way justice could be had for all parties was to make the Industrial Court's services free to anyone who had a valid and legitimate complaint.[37]

Collective bargaining was still recognized. Labor associations or unions which incorporated under the law were considered legal entities. They could be represented before the Industrial Court by anyone of their own choosing. Unincorporated unions had to appoint representatives in writing. Bargaining could still continue, but if the parties in the named industries failed to agree on the issues, then the Industrial Court was given the power to adjudicate the differences.

The right of an individual to quit employment at any time was recognized. However, it was declared unlawful for any employees to conspire together to quit employment for the purpose of hindering, delaying, or suspending operations or to intimidate others with the intent to induce them to quit their employment or with the intention of preventing others from accepting employment at that place of business or at any other place of business.

The law stated that it was unlawful to discriminate against any employee because of the testimony given by him or because of any action

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[36] Ibid., Sections 8 and 9.

[37] Huggins, op. cit., pp. 409-410.

taken by the Industrial Court. This provision was included so that any party with a complaint would voice it. Finally, it was declared unlawful for two or more persons to conspire to injure another party by boycott, picketing, advertising, or otherwise, because of any action taken before the Industrial Court or because of any order by the Industrial Court.[38]

The philosophy of the Kansas Court of Industrial Relations was based upon the principle "that the government should have the same power to protect society against the ruthless offenses of an industrial strife as it has always had to protect society against recognized crime."[39] Governor Allen stated that the law had the following objectives:

> 1. To make strikes, lockouts, boycotts, and blacklists unnecessary and impossible, by giving labor as well as capital an able and just tribunal in which to litigate all controversies.
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> 2. To insure to the people of this state, at all times, an adequate supply of those products which are absolutely necessary to the life of civilized people.
>
> 3. That by stabilizing production of these necessaries we will also, to a great extent, stabilize the price to the producer as well as to the consumer.
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> 4. That we will insure to labor steadier employment, at a fairer wage, under better working conditions.
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> 5. That we will prevent the colossal economic waste which always attends industrial disputes.
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> 6. That we will make the law respected, and discourage and ultimately abolish intimidation and violence as a means for the settlement of industrial disputes.[40]

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[38] Duffus, op. cit., pp. 409-410.

[39] Henry J. Allen, "How Kansas Broke a Strike and Would Solve the Labor Problem," Current Opinion, April 1920, p. 472.

[40] Allen, The Party of the Third Part, pp. 213-214.

THE COURT'S EXPERIENCES

The chief purpose of the Kansas Court of Industrial Relations was to protect "the party of the third part--the public" from deprivation and undue hardship.[41] This was to be achieved by insuring to the public reasonable continuity and efficiency of production in the declared essential industries and utilities.

The Industrial Court had the power to prevent or settle disputes by determining wages, hours, and conditions of employment; to prevent the cessation and limiting of operations when the objective was to violate the law; to bring to the workers and employers the protective features of the law; and, if necessary, to take over and temporarily operate the industry concerned.

Strikes were called at times because the parties did not want to or care to use the facilities of the Industrial Court. All of the work stoppages resulting from opposition to the Act occurred in the coal mining industry in Southeastern Kansas. These were called by Howat for the purpose of defying the law or were protests by the miners against the action taken by the Industrial Court against Howat for having violated the law. These strikes were limited to a few mines with one exception and, therefore, the production of coal was scarcely affected. In each strike, the Court was not successful in forcing the mine workers to resume their work.[42]

The most serious strikes that took place in Kansas during this era were

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[41] State v. Howat, 109 Kansas 376, 414 (1921).

[42] Gagliardo, op. cit., p. 133.

not called in opposition to the Industrial Relations Act, but were incident to nation-wide disputes. Both the national and local strikes resulted in litigation which tested the validity and constitutionality of the Kansas Industrial Relations Act of 1920 and the whole concept of compulsory arbitration.

In all proceedings before the Kansas Supreme Court, the law was upheld, but in several rulings the United States Supreme Court drastically curtailed the power of the Industrial Court. The Kansas Industrial Court Law was one of the most intensely litigated pieces of American labor legislation prior to the enactment of the National Labor-Relations Act of 1935.[43]

Labor and capital greeted the enactment of the law with a spirit of hostility. The law became effective on Saturday, January 24, 1920 and on the following Monday 450 miners struck in protest. The Governor immediately promised vigorous state action and said the Industrial Court would assist the local authorities "in a vigorous prosecution under the criminal remedies provided by the law."[44] However, the workers returned to work on their own accord, declaring that they had not gone to work simply because it was a "blue Monday" and that they did not feel like working.[45]

Dorchy and Howat Cases

The first formal protest by the unions to test the Industrial Court's

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[43] Earl E. Cummins, The Labor Problem in the United States (New York: D. Van Nostrand Company, 1932), pp. 659-660.

[44] New York Times, January 27, 1920.

[45] New York Times, January 28, 1920.

authority was made on March 20, 1920 by Alexander Howat. In a speech delivered before the district convention, he said in part:

> But come what will and whether or not my bones rot in a prison cell I am going to fight this law with the force of 12,000 miners in Kansas and regardless of the consequences of Governor Allen cause to remember that organized labor must and will have the right to cease work at its will... Be the consequences what they may, there is no power on earth, injunction or otherwise, that will make me call off the strike.[46]

The state was prepared to meet Howat's challenge to defy the Industrial Court. His threat of a strike failed to materialize. Instead of waiting for a strike to be called and thus making a test case, the state secured from the district court in Crawford County a temporary order on March 30, 1920 restraining Howat and other union officials from ordering a strike to embarrass the Industrial Court.[47]

The first clash between the Industrial Court and the miners came in April of 1920. It involved the Court's power of investigation. The Court undertook to investigate the conditions in the coal mining industry and had summoned Howat and several other union officials to appear and give testimony. The union officials deliberately refused to acknowledge the court order. Howat and several union officials were cited for contempt of court. They pleaded guilty to the charge, but later they changed the plea to not guilty. Their answer to the accusation was that the Industrial Court was not a legal entity and therefore had no jurisdiction or authority over the union or any of its officials. The union officials were found guilty of contempt of court and fined and sentenced to jail, only to be released

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[46] Kansas City Star, March 21, 1920.

[47] Howat v. Kansas, 258 U. S. 181 (1921).

later.[48]

To further insult the Industrial Court, the injunction against interfering with the operation of the mines was deliberately violated by Alexander Howat and August Dorchy, the union vice-president. This occurred when they called the "Mishmash strike" to ostensibly collect back pay which they thought had accrued to Mishmash, a union mine worker, after he became elgible for a higher wage scale. According to the Industrial Court's investigation it was found that the strike was called only to defy the Industrial Court's injunction and not for the real purpose of imposing a demand upon the mine owner. The union officials were again cited for contempt of court and committed to jail.[49]

In an appeal to the state Supreme Court, the lower court's decision was affirmed. It was held that the state's power of investigation and authority over labor and capital was constitutional.[50] The case was taken to the United States Supreme Court where the decision of the Kansas Supreme Court was reversed. The United States Supreme Court based its decision on the Wolff case which shall be discussed later. The United States Supreme Court decided the Wolff case after the state Supreme Court decided the case involving Dorchy and Howat. In the Dorchy and Howat case, the question was whether the penal provisions of the law were separable or whether they fell as an inseparable part of the system of compulsory arbitration due to the Wolff decision. The state Supreme Court's decision had affirmed conviction

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[48] Pittsburg Sun, April 8, 1920.

[49] Huggins, op. cit., p. 116.

[50] State v. Dorchy, 112 Kansas 235, 210 pac. 352 (1922).

before the Federal decision referred to had been rendered. The state's decision was therefore reversed in order to permit the state Supreme Court to judge whether or not the penal provisions were separable.[51]

When the case was returned, the Kansas Supreme Court ruled that provisions were separable and therefore reaffirmed the lower court's decision. The Kansas Supreme Court based its decision on Section 28 of the Act which said: "should any part of this Act be found unconstitutional, it was to be conclusively presumed that the Act would have passed without that section or provision."[52]

Howat again appealed to the United States Supreme Court where the case was decided against him. In arriving at its decision, the highest court of the land side-stepped the constitutionality of a general prohibition of strikes and confined itself to the particular demands of the strike involved. The United States Supreme Court held that the strike which had been called "to collect a stale claim due to a fellow member of the union who was formerly employed in the business" was distinctly coercive and that the legislature could make such action punishable as extortion.[53] The Court said that neither the common law nor the 14th Amendment confers to the workers the absolute right to strike. The Court stated in its decision:

> The right to carry on business--be it called liberty or property--has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner

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[51] Dorchy v. Kansas, 264 U. S. 286 (1923).

[52] State v. Howat, 116 Kansas 412 (1924).

[53] Dorchy v. Kansas, 272 U. S. 306 (1926).

> in which it is conducted. To collect a stale claim due to a member of the union formerly employed in the business is not a permissible purpose....to enforce payment by a strike is clearly coercion. The legislature may make such action punishable as extortion or otherwise.[54]

The United States Supreme Court in the Dorchy and Howat cases did not rule that the Act itself was invalid. The Howat case was referred back to the state court for reexamination in the light of the decision that the high court had made in the Wolff case. In the Dorchy case the Court sidestepped the constitutionality of the Act and instead based its decision on the purpose of the strike.

Wolff Cases

The series of cases which did declare most of the important provisions of the Industrial Relations Act unconstitutional arose out of a controversy between the Wolff Packing Company of Topeka, Kansas, and its employees concerning wages, hours, and conditions of employment. A meeting was held by the workers of this company to vote on the possibility of calling a strike to secure their demands. Instead of striking the workers decided to bring their disagreements to the Industrial Court for adjudication.[55]

After a thorough investigation, the Industrial Court prescribed a scale of wages and hours to be used by the company. The company refused to observe the new scale. This was the first case outside of the public utilities in which the Industrial Court attempted to order a change in the

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[54] Ibid., pp. 309-311.

[55] Court of Industrial Relations v. Wolff Packing Company, 109 Kansas 629 (1921).

scale of wages for a business. The Industrial Court initiated mandamus proceedings to compel the company to observe the order. The Wolff Company refuted the order and contended that the Act deprived it of its property without due process of the law, that it denied them the equal protection of the law, and consequently violated the Fourteenth Amendment to the Federal Constitution. The company argued that the Act compelled it to operate its business under the conditions imposed, but allowed the worker the right to quit at any time. Furthermore, the defense contended that wages of packing-house employees were not so affected with a public interest as to be subject to state control and regulation and that the employees and employer were deprived of the freedom to set their own wages. The company contended that the classification of essential industries under the Act was unjust and arbitrary.

The contentions of the defense were quickly disposed of. The state Supreme Court pointed out that the packing company "is not ...compelled to operate its plant at a loss, nor is it prohibited from changing its business, nor from quitting the business if it desires to do either of these things in good faith, not intending thereby to violate any provisions of the Act."[56] The company argued that their freedom of contract was abridged and that the Act's classification of industries was unjust and arbitrary. These arguments were met with the statement that almost every law restricts freedom of contract to a certain degree, that such restrictions were essential to enable governments to carry out their intended function, and that the classification was in fact reasonable and just because the successful

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[56] Ibid., p. 638.

operation of the industries included under the Act was essential to the peace, health, and welfare of all people.

The company claimed that the wages in this industry were not subject to regulation because this industry was not one affected with public interest. The Court stated that the legislature had decided that the packing industry affected the public interest and therefore could be regulated.

The state Supreme Court in upholding the constitutionality of the Act based its decision upon the case of Wilson v. New (1917). This case upheld the Adamson Act (1916) which regulated the hours of labor on the railways. The Court stated that both the Adamson Act and the Industrial Court Act were born of immediate necessity and emergency and said:

> If under the commerce clause of the Federal constitution Congress can regulate wages and hours of labor of those working on the railroads, the state, under the police power, should be able to regulate the wages and hours of labor of those working in a packing plant operating wholly within the state. The powers of Congress under the commerce clause of the constitution are no greater than the authority of the state under the police power.[57]

The case was again brought before the State Supreme Court and the packing company attempted to prove that no emergency justifying interference by the Industrial Court existed. The company also maintained that the portions of the order that related to changes in working conditions were not valid because no notice of proposed changes in such conditions had been given to it. They pointed out that the plant was operating at a loss and the company could not afford to grant a wage increase.

The Kansas Supreme Court passed lightly over the company's contentions and put a very broad interpretation upon the word "emergency."

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[57] Ibid., p. 644.

> The defendant's plant is a small one, and it may be admitted that, if it should cease to operate, the effect on the supply of meat and food in this state would not greatly inconvenience the people of Kansas; yet the plant manufactures food products and supplies meat to a part of the people of this state, and, if it should cease to operate, that source of supply would be cut off.[58]

In the dissenting opinion, Justice Birch contended that the Industrial Relations Act was only an emergency measure similar to the Adamson Act and that the Industrial Court had no right to interfere until there was a clear danger of a "discomforting shortage" in the supply of the product. He stated that there was no such danger because there were adequate meat supplies readily available.[59]

In an appeal to the Federal Supreme Court, the Wolff Company's contentions were upheld. The underlying assumption of the Act, that the preparation of food and other essential items were industries clothed with a public interest, was quickly disposed of. The Court classified only the following to be clothed with a sufficient public interest to justify some public regulation:

> (1) Those which are carried on under the authority of a public grant of privileges which either expressly or implicitly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are railroads, other common carriers, and public utilities.
>
> (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of inns, cabs, and grist mills...

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[58] Court of Industrial Relations v. Wolff Packing Company, 111 Kansas 501 (1922).

[59] Ibid., p. 509.

> (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public uses, in effect grants the public an interest in that use and subjects himself to the public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly.[60]

It was not a matter of mere legislative declaration which could declare a business to be impressed with a public interest. This was rather a matter to be determined solely by judicial inquiry, not legislative action. The Court stated that for a business to be so affected with a public interest, there must exist "a peculiarly close relationship between the public and those engaged in that business" and "implications of an affirmative obligation" by that business "to be reasonable in dealing with the public" must exist. The judiciary said that a business is not so affected merely because it "makes commodities for, and sells to, the public in ...common callings." To reason otherwise would run "the public interest argument into the ground," and involve a "revolution in the relation of government to general business."[61] The feature which usually distinguishes a private from a quasi-public occupation is the right to sell or not to sell goods on the owner's own will.

The United States Supreme Court could find no peculiarly close relation between the preparation of food by the Wolff Company and the public, no definite obligation to sell, and no real danger of unreasonable prices through monopoly. "Given uninterruption in interstate commerce, the sources

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[60] Wolff Packing Company v. Industrial Court, 262 U. S. 522 (1922).

[61] Ibid., pp. 536, 537, and 539.

of the food supply in Kansas are countrywide, a short supply is not likely, and the danger from local monopolistic control less than ever."[62]

The United States Supreme Court did not find it necessary to decide whether the preparation of food should be classified as a quasi-public industry. The Court said: "to say that a business is clothed with a public interest is not to impart that the public may take over its entire management and run it at the expense of the owner."[63]

The Kansas Supreme Court ruled that the Adamson Act and the Industrial Court Act were similar and based their decision on Wilson v. New. But the Federal Supreme Court pointed out the following differences between the two: "(1) the Adamson Act was passed to meet a national emergency; there was no such emergency in the case at hand, (2) Congress itself recognized the railway emergency while the Industrial Court, a subordinate body, was empowered to decide what constituted an emergency situation, (3) the Adamson Act applied to an industry, the railroads, over which Congress has long had regulatory powers; no such power has existed before in the case of packing plants, (4) railroads perform a continuous service to the public; packing plants do not, and (5) the Adamson Act was required to protect the rights of the public; the Industrial Court's order to the Wolff Company did not apply to the general public." They felt that the case of Wilson v. New "went to the borderline, although it concerned an interstate common carrier in the presence of a nation wide emergency."[64]

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[62] Ibid., p. 538.

[63] Ibid., p. 538.

[64] Ibid., p. 544.

The section of the Kansas Industrial Relations Act which gave the Industrial Court the power to fix wages in the Wolff Company and in the whole food industry was declared unconstitutional because it deprived the employer of his property and the employer and employee of the liberty to contract without the due process of the law. The Act violated the Fourteenth Amendment to the Constitution.

The United States Supreme Court ordered the Kansas Supreme Court to modify its decision accordingly. But in its opinion, the United States Supreme Court spoke only of wages. The state of Kansas had dropped the order concerning conditions of employment because the Wolff Company had not been notified of this in the Industrial Court's order. In accordance with the mandate from the United States Supreme Court, the Kansas Supreme Court ordered the section of its decision concerning wages be striken out, but that part pertaining to hours be retained. The Industrial Court contended that the provision for time and one-half for overtime should be retained because it was a regulation of working conditions and not a wage-fixing provision. On a rehearing the Kansas Supreme Court allowed this provision and included it in its judgment.[65]

Both of these decisions were immediately appealed by the Wolff Company to the United States Supreme Court on grounds of writs of error. The United States Supreme Court pointed out that the purpose of the Kansas Industrial Relations Court Act was not to regulate wages and hours generally or in a particular class of business, but only to authorize the Industrial Court to fix them in a controversy which threatens the continuity of production. The

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[65] Court of Industrial Relations v. Wolff Packing Company, 114 Kansas 304 (1923).

authority granted under the Act was "merely a part of the system of compulsory arbitration and to be exerted in attaining its object, which is the continuity of operation and production."[66] Since the whole system of compulsory arbitration in the food industry was previously held invalid, this part was also held invalid. If the regulations concerning hours had been based on a separate law, concerned with social problems, a different question would have been presented.[67]

A change in the political leadership in Kansas made the Court of Industrial Relations inactive more than a year before this last decision was made by the United States Supreme Court. The Industrial Court was abolished in 1925 by taking away necessary funds for its administration. The powers of the body were transferred to the Public Service Commission and later conferred on the Commission of Labor and Industry.[68]

Present Status of Compulsory Arbitration in Kansas

The Act still remains on the law books. No attempt has been made in recent years to enforce it. Strikes are prohibited in all the industries orginally named. The constitutionality of that provision remains unchallenged and undetermined. The Commission of Labor and Industry has all the powers of its predecessors to exercise compulsory arbitration of disputes in transportation, mining, and public utilities, and to enforce the law

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[66] Court of Industrial Relations v. Wolff Packing Company, 114 Kansas 487 (1923).

[67] Gagliardo, op. cit., p. 193.

[68] Ibid., pp. 220-229.

relative to strikes, lockouts, picketing, and boycotts since the courts have not ruled that portion of the Act unconstitutional.[69] It is probable that the old measure of 1920 will continue to remain dormant unless an industrial conflict demanding drastic action should again arise, or the type of leadership which first launched the experiment should again gain political control over the state. However, both of these possiblities appear very unlikely.

EVALUATION OF THE ACT

When the Industrial Court was created, its supporters and many other serious students of labor problems expected far-reaching and beneficial results from its operations. Their hopes were well expressed in Allen's message to the legislature which was enumerated in a preceding section.[70] The Kansas Court of Industrial Relations was designed to carve out a "new province of law and order" for capital, labor, and the public.

To what extent were these hopes and aspirations of the Industrial Court realized? Various inherent weaknesses of the Court contributed to its decline and final death--these being political, economic, and legal. The Court settled only a few cases. Most of these disputes were disposed of during the first two years of the Court's life. There are a total of 166 dockets listed on the Industrial Court's Order Book. Of this number, 28 were filed in 1920; 125 in 1921; 10 in 1922; 2 in 1923; and 1 in 1924.[71]

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[69] Laws of Kansas, Sections 44-603, 44-608, and 44-617.

[70] Supra, p. 16.

[71] Order Book of the Kansas Court of Industrial Relations, Records in the Commissioner of Labor's Office, Topeka, Kansas.

This decline, however, seems to coincide to a certain degree with the general decline of labor disputes in Kansas and elsewhere. The expenses of the Court continued even though the number of cases declined. It was inevitable that the taxpayers should complain as they did that such a useless agency should be eliminated from the state governmental machinery.

The Industrial Court was very expensive to operate as compared to other agencies. The operation costs of the Court were $300,218.50 during its five years of actual existence. This figure represents about twenty-one per cent of all money spent in administering all labor laws of Kansas for the years between 1884 and 1930.[72] If this experiment had been tried in a more highly industrialized state with more industrial disputes to be settled, this problem of high costs in operating the Court may not have been so serious.[73]

The Industrial Court became to a great extent a political football. Various members of the Court were appointed because of their political beliefs rather than because of their labor relations experience and ability. Constant meddling of politics so interfered with the work of the Court that its results do not actually represent a true and fair test of the practicality of the compulsory settlement of labor disputes.[74] However, factors other than partisan politics delivered the death blow to the Court.

With various changes in court personnel, new and different concepts

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[72] Rowena Snyder, "The Cost of Administering The Labor Laws of Kansas" (unpublished Master's Thesis, University of Kansas, 1933), p. 87.

[73] Gagliardo, op. cit., p. 245.

[74] Ibid., p. 238.

concerning the philosophy, scope, and nature of the Court were introduced. Because of this, the development of a continuous uniform court policy was impossible.

Another weakness, more fundamental than the problem of politics, was the hostility of organized labor and the lack of support by management for the Court. Despite the fact that unions and their functions were explicitly recognized in the Act, the unions were reduced to a state of impotency. They were deprived of their most effective weapons--strikes, boycotts, and pickets. The Act provided for the worker a state agency which was thought to be more effective and economical than conventional union tactics in promoting worker interests and settling their problems.

State political leaders and court officials disregarded the traditional economic forces. The Court not only failed to get the confidence of labor and its leaders, but it did not attempt to try to do so. There appears to be little doubt that any scheme for compulsory arbitration or adjudication to be successful on a large scale must be built on and around organized labor and management. The labor organizations must be of the standard bona fide business type, organized and operated to a large extent on a national scale, not of the company or independent type. Failure to recognize the role of labor was certainly a vital defect in the law which could not be easily repaired.

Did the Court abolish the need for strikes and therefore eliminate them during the time it existed? Certainly it did not eliminate their complete occurrence. Did it reduce their frequency and severity? Opinions differ as to whether it did or did not. Most of this controversy, however, centers around the defining of strikes that should be included in determining

the number of strikes which occurred. The opponents of the Court have asserted that it fermented strikes rather than diminished them. On the other hand the supporters and spokesmen of the Court have maintained that there were considerably fewer strikes and that their length and severity was actually less during the Court's existence than before its origination or after its abolishment. Each side's contentions are based on its own statistics. Therefore, it is rather difficult to come to an objective conclusion with these differing figures, since each side used its own definition of a strike to compile its figures to support its own arguments and position.

However, a more realistic picture of the strikes that did occur in Kansas can be found by looking at data published by the United States Department of Labor.

TABLE 1

Number of Labor Disputes Beginning in Specified Areas from 1919 to 1927[a]

Year	Kans.	Okla.	Colo.	Nebr.	Mo.	West of Miss.	U.S.
1919	45	32	31	17	69	594	3,571
1920	14	24	22	12	63	623	3,291
1921	21	24	27	11	54	569	2,381
1922	4	9	7	3	26	155	1,088
1923	5	2	3	1	27	210	1,553
1924	6	6	5	2	35	163	1,240
1925	12	10	10	2	11	146	1,300
1926	2	2	5	1	9	89	1,032
1927	1	3	5	2	14	92	734

[a] "Strikes and Lockouts in the United States, 1916 to 1929," Monthly Labor Review, June, 1930, p. 50.

These figures include all major work stoppages that resulted from labor conflicts. The figures show the number of strikes in Kansas, the surrounding states, the area west of the Mississippi River, and for the entire United States during the five years of the Court's existence and also a year previous plus three years after the Court ceased to exist.

From this table, a general conclusion can be made that the movement of disputes in Kansas was, in general, the same as in the other areas with which Kansas is compared. With small differences, the movements were uniform previous to the Act, during the years of its existence, and during the years immediately following its dissolution. The number of strikes in Kansas decreased more rapidly in 1920, the year the Court was inaugurated, than in the surrounding areas, they increased more rapidly in 1921, and in 1925.

From these statistics it would appear that the Kansas Court of Industrial Relations had no appreciable effect on reducing the number of industrial disputes in Kansas or that it fermented numerous strikes as some have maintained. However, some strikes and demonstrations did occur in protest to the Act and the Court, but these were sporadic and relatively insignificant disturbances. The frequency of strikes was not drastically affected. The length and outcome of some strikes could have been affected by the Court's presence.

It was hoped the Industrial Court would stabilize production, returns to the producer, and prices to the consumer. It was not long before the Court found that in most cases stability of production, returns, and prices were dependent upon outside forces over which it had relatively little control, such as; the weather, the market, and the general attitude of the

public.

The Industrial Court never confronted a situation similar to the national coal strike of 1919 which resulted in the enactment of the Court. Therefore, its ability to insure an adequate supply of such a commodity during an emergency was never actually tested. Nevertheless, it would seem reasonable to suppose that if an Industrial Court existed, the machinery for emergency operations and production could be more easily and quickly set in motion. By having plans carefully prepared beforehand, such a body would be able to take over an industry more quickly.

The Industrial Court reviewed and decided only a few wage problems. The Court was never confronted with any serious and intricate aspects of wage adjustments. The Wolff case was the most complex of these. And here the problem was more of a matter of an overall decrease, rather than an adjustment between existing scales of remuneration. Most increases and decreases that were made were moderate and usually showed appreciation to labor's claims. No real systematic set of guidelines were followed in making wage changes and adjustments. The Court said that it had "no chart or compass" to follow, but Justice Higgins of the Australian Arbitration Court had previously formulated some procedures and precedents which were available.[75] The Kansas Court never attempted, it seems, to look to the experience of other arbitration courts. No doubt the Court's success suffered greatly from this.

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[75] Kansas Court of Industrial Relations, First Annual Report, 1920, p. 7.

Huggins, Labor and Democracy, pp. 116-117.

G. V. Portus, "The Development of Wage Fixation in Australia," American Economic Review, XIX (March, 1929), p. 59.

In reviewing the history of the Kansas Court of Industrial Relations, it can be safely said that it did not bring industrial peace and harmony and that this experience was to a great extent a complete failure in obtaining the desired objectives. The death blow was dealt by the United States Supreme Court in the Wolff cases. However, do the decisions handed down in the Wolff cases warrant the conclusion that the United States Supreme Court has ruled against arbitration in general? The Court clearly stated that compulsory arbitration of industrial disputes in fuel mining and production and food processing industries was unconstitutional but it ruled in the Wolff decision that public utilities and common carriers could be regulated.[76] In these areas compulsory arbitration could probably be justified on the general principle that underlies the interpretation of the Fourteenth Amendment to the Constitution, that of public interest and welfare. Both are public monopolies and of vital importance to the public.[77] In deciding any future cases involving compulsory arbitration, the main test of constitutionality would probably center around whether the concerned industry was a business clothed with a sufficient public interest that its interruption of operations "would leave the public helpless, the whole people ruined, and all the homes of the land submitted to a danger of the most serious character."[78]

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[76] Albion Guilford Taylor, Labor and the Supreme Court (Ann Arbor: Braum-Brumfield, Inc., 1961), p. 121.

[77] Gagliardo, op. cit., p. 195.

[78] Wilson v. New, 243 U. S. 332, 351 (1917).

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THE KANSAS INDUSTRIAL ACT OF 1920

by

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States have from time to time attempted to create industrial courts to arbitrate labor and management differences. The most notable example of such an experiment was made by the state of Kansas in 1920 following the serious nation-wide coal strike of 1919. A Court of Industrial Relations was established to intervene in the event of a threatened interruption of services in certain declared public interest industries. These industries were: production or mining of fuel, manufacturing of food and clothing, transportation, and public utilities. Strikes, lockouts, and picketing were prohibited. The Industrial Court had the power to fix wages, hours, and working conditions in the declared essential industries.

The law did not bring industrial peace to Kansas. Strikes continued to occur. In the coal mining industry union officials challenged the Industrial Court's authority. Action was taken against the union officials for violating the strike provisions of the Act. They were convicted for contempt of court. The Kansas Supreme Court upheld these convictions. In an appeal to the United States Supreme Court the convictions were again upheld. The plaintiffs argued that the Act was in violation of the Fourteenth Amendment of the Federal constitution. The United States Supreme Court did not rule on the constitutionality of the Act, but based its decision on the purpose of the strike which was to collect a "stale claim." It said that a strike may be illegal because of its purposes.

The series of cases which finally resulted in declaring most of the important provisions of the Industrial Court Act unconstitutional arose out of a controversy between the Wolff Packing Company of Topeka, Kansas and its employees. The Industrial Court fixed a new wage and hour scale for the Wolff Company. The employer challenged the authority of the Industrial

Court to fix wages and hours. The Kansas Supreme Court upheld the Kansas Act and the award of the Industrial Court. The case was appealed to the United States Supreme Court. It ruled that the Act was unconstitutional. The Court stated that compulsory arbitration of industrial disputes in fuel mining and production and food processing industries was unconstitutional but public utilities and common carriers could be regulated. In these latter areas compulsory arbitration could probably be justified on the general principle that underlies the interpretation of the Fourteenth Amendment to the constitution, that of public interest and welfare. In deciding any future cases involving compulsory arbitration, the main test of constitutionality would probably center around whether the concerned industry was a business clothed with a sufficient degree of public interest to justify state interference.

In reviewing the history of the Kansas Court of Industrial Relations, it can be safely said that it did not bring industrial peace and harmony. Various inherent weaknesses of the Court contributed to its decline and final death--these being political, economic, and legal. The Court settled only a few cases. Most of these disputes were disposed of during the first two years of the Court's life.