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THE HAGUE INJUNCTION PROCEEDINGS

"As long as I am Mayor of this city the great industries of the city are secure. We hear about constitutional rights, free speech and the free press. Every time I hear these words I say to myself 'that man is a Red, that man is a communist.' You never heard a real American talk in that manner."

—Mayor Frank Hague*

WITH the apparent design of preserving open shop conditions¹ for its "great industries," the Jersey City administration has attempted systematically to insulate employees from outside influences and to stifle any self-expression which might be directed against employers or municipal authorities. Mayor Hague's specific tactics have achieved nation-wide notoriety. At first they were directed particularly against labor organizers and sympathizers. Some

*From an address by Mayor Hague before the Jersey City Chamber of Commerce, January 12, 1938. *Jersey Observer* (Hoboken, N. J.), Jan. 13, 1938, p. 1, col. 1.

1. The Chamber of Commerce of Jersey City advertised that "the industries of this city are more than 80% open shop." Wittel, *Mayor Hague*, N. Y. Post, Feb. 10, 1938, p. 1, col. 1-2. For a discussion of Hague's control over Jersey City labor unions, see Wittel, *Mayor Hague*, N. Y. Post, Feb. 7, 1938, p. 1, col. 1-2.

were deported outright; others who remained were effectively silenced by interference with holding of meetings, distribution of circulars, carrying of placards, and picketing.² When practically every shade of public opinion³ became outraged at what appeared to be a blatant denial of fundamental rights, emphasis shifted from specific attempts by one group at raising abnormally low Jersey City working conditions⁴ to the more basic issue of whether constitutional guaranties of free speech, free press, and free assembly apply to union sympathizers as well as to other citizens. But protestants venturing within the confines of Jersey City fell victim to the same mistreatment against which they had come to protest.⁵ After fruitless negotiations with city officials,⁶ many aggrieved organizations and individuals instituted proceedings

2. The evidence will be considered *infra*.

3. The following are typical examples of editorial comment:

"When Mayor Hague, in contempt of all constitutional principles, drove a group of C.I.O. organizers from Jersey City we pointed not only to the immorality but to the folly of the procedure. . . . Mayor Hague should be applauded for his determination to save Jersey City from the conditions for which the C.I.O. was responsible in Detroit, Akron and other industrial centers. His heart in this respect is in the right place; it is his head that needs examination." Editorial, N. Y. Herald-Tribune, Dec. 23, 1937, p. 18, col. 2.

"The fight [C.I.O.'s campaign against existing working conditions in Jersey City] is in its first stages. Hague still has the power and plenty of reactionary support. Yet his crusade against the Bill of Rights is not running smoothly. His hysteria has overtones of desperation. Hague's defeat will be a major victory for trade unions, a major advance for the peoples' front in America." New Masses, Dec. 28, 1937, p. 13, col. 3.

"He [Mayor Hague] has no use for either practical or philosophical subterfuges. If you don't want union organizers in your city, you tell them to keep out. If they come in, you have the police arrest them or kick them out. If they come on foot, you physically force them back into the tubes or on board the ferries. If they come by car, you have policemen meet them and ask them to drive back the way they came. You prohibit the distribution of leaflets. You don't allow picketing when you don't want it. You intimidate the owners of assembly halls so that they will not rent to the C.I.O. . . . When Mayor Hague said, 'I am the law,' he unconsciously recalled Louis XIV. Some genuinely devoted friend ought to emulate another prominent figure in French History and warn the Mayor that his suppression of civil liberties is worse than a crime; it is a blunder." Editorial, N. Y. Times, Dec. 17, 1937, p. 24, col. 2.

4. Jersey City was known as the sweatshop center for runaway shops fleeing union contracts in other cities. Many concerns paid wages of from \$5 to \$12 a week for long hours. Wittel, *Mayor Hague*, N. Y. Post, Feb. 10, 1938, p. 1, col. 1-2. However, Hague advertised that "Jersey City is free of labor troubles." Wittel, *Mayor Hague*, N. Y. Post, Feb. 12, 1938, p. 1, col. 1-2, at p. 4, col. 4. See also Coleman, *New Jersey—The Tory Test-Tube*, New Republic, Feb. 9, 1938, p. 7.

5. Among the more well-known figures who were ousted from Jersey City were Norman Thomas (N. Y. Herald-Tribune, May 1, 1938, p. 1, col. 5) and Congressman Jerry O'Connell (N. Y. Times, May 28, 1938, p. 1, col. 2-3).

6. In their attempt to hold public meetings, the plaintiffs applied for permits. Record, Hague Injunction Proceedings, pp. 756-79, 1340, 1992-9; *Mimeographed Findings of Fact and Conclusions of Law*, Hague Injunction Proceedings (hereinafter referred to as *Mimeographed Findings and Conclusions*, Hague Injunction Proceedings) pp. 6-7.

before Judge Clark of the Federal District Court of New Jersey for an omnibus injunction against Mayor Hague and his subordinates.⁷

In a bitterly contested⁸ and widely publicized trial,⁹ plaintiffs' uncontroverted¹⁰ evidence revealed the broad extent of the defendants' activities. Three months later, Judge Clark handed down a 15,000 word opinion¹¹ analyzing, rather haphazardly, the concept of civil liberties and indicating, with considerable ambiguity, the scope of the injunction he intended to grant. Recently the formal injunctive decree was issued.¹² It differs in many respects from the opinion. The defendants are permanently enjoined from interfering with the plaintiffs' right of free movement in Jersey City; from hindering the distribution of circulars and the carrying of placards; from preventing the plaintiffs from speaking in the parks, or on any streets where other groups are permitted to meet; and from making illegal searches and seizures. The court did not enjoin the defendants from frustrating the plaintiffs' attempts to secure private halls for meetings, or from interfering with picketing.¹³

7. Committee for Industrial Organization, Steel Workers Organizing Committee of the Committee for Industrial Organization, United Electrical Radio and Machine Workers of America, United Rubber Workers of America, Carney, Traynor, McGinn, Macri, Sweeney, Foley and American Civil Liberties Union v. Hague, individually and as Mayor of Jersey City, Casey, individually and as Director of Public Safety of Jersey City, Walsh, individually and as Chief of Police of Jersey City, and the Board of Commissioners of Jersey City. This case is referred to throughout as Hague Injunction Proceedings.

8. This acrimonious attitude also pervaded parts of the briefs. See, *c.g.*, Brief for Defendants, Hague Injunction Proceedings, p. 13:

"Shades of the Founding Fathers! What a travesty upon historical truth and the memories of American heroes, to liken them to these invaders of a decent, law abiding community. Indeed it might not be amiss to suggest an American course in American history for these agitators and their advocate."

9. Many newspapers featured the case. See, *c.g.*, the N. Y. Times, June 2 through July 1, 1938.

10. The defendants rested without introducing any evidence. Defendants Hague, Commissioner of Safety Casey and Police Chief Walsh were called as witnesses by the plaintiffs. See *Mimeographed Opinion*, Hague Injunction Proceedings, p. 4: "It has not been necessary to seek for proof of that [Jersey City's] policy in the usual unsatisfactory process of weighing the conflicting testimony of witnesses or in the even more unsatisfactory study of counsel's conflicting interpretations of that testimony. In fact, the only exception to this pleasant posture of the litigation lies in the rather unsuccessful attempts of counsel to cut the cloth of some of that testimony to their conception of the law. We say this with a full appreciation of the difficulty inherent in reconciling the views of a positive city official with the pronouncements of a powerful Supreme Court."

11. The opinion was rendered October 27, 1938. See N. Y. Times, Oct. 28, 1938, p. 1, col. 1-2. The first thirty-five pages of the opinion consist chiefly of excerpts from various legal and non-legal sources ranging in point of time from Socrates to Mussolini. *Mimeographed Opinion*, Hague Injunction Proceedings, pp. 1-35.

12. The final judgment and decree was filed on November 7, 1938. See N. Y. Times, Nov. 8, 1938, p. 48, col. 1.

13. *Mimeographed Decree*, Hague Injunction Proceedings.

In view of the divergent factual and legal problems involved in the injunction proceedings, the various phases of the case will be discussed separately. Furthermore, the discrepancies between the opinion and the actual decree make it necessary, in many instances, to consider both in some detail.¹⁴

Jurisdiction. The defendants contested the jurisdiction of the Federal Court on the ground that the amount in controversy did not equal the required \$3,000. This objection was overruled *sub silentio* in the opinion by the court's assumption of jurisdiction. The decree, however, is more articulate; it expressly bases jurisdiction on several grounds.¹⁵

Since the rights asserted by the plaintiffs involve issues under the United States Constitution, diversity of citizenship, admittedly a confused concept in cases involving unincorporated associations,¹⁶ is not essential in the instant suit.¹⁷ The financial requirement may be disposed of in a number of ways. There is some precedent for holding that interference with these constitutional rights can be valued at an amount equal to or greater than the necessary \$3,000.¹⁸ Alternative grounds for sustaining a finding of jurisdiction are contained in two sections of the Judicial Code, one eliminating the usual monetary prerequisite to federal jurisdiction where there is a conspiracy to deprive individuals of their civil liberties;¹⁹ the other, and by far the most convincing, disposing of the \$3,000 requirement where there is an alleged deprivation of civil rights under color of an ordinance.²⁰ Since the wording of these statutes

14. The Federal Supplement will print the opinion alone, and not the formal decree. Communication from West Publishing Co., Nov. 30, 1938.

15. *Mimeographed Findings and Conclusions*, Hague Injunction Proceedings, pp. 7-8.

16. See (1933) 33 COL. L. REV. 363; (1929) 78 U. OF PA. L. REV. 102.

17. 36 STAT. 1091 (1911), 28 U. S. C. § 41 (1934), giving the district court original jurisdiction where the matter in controversy exceeds the sum of \$3,000 ". . . and (a) arises under the constitution or laws of the United States . . ."

18. *Wiley v. Sinkler*, 179 U. S. 58 (1900) (damages resulting from depriving plaintiff of his vote held sufficient to support jurisdiction of the court); *Swafford v. Templeton*, 185 U. S. 487 (1902); see *Giles v. Harris*, 189 U. S. 475, 485 (1903); cf. court's statement in *Nixon v. Herndon*, 273 U. S. 536 (1927) at p. 540.

19. 36 STAT. 1092 (1911), 28 U. S. C. § 41(12) (1934) providing for jurisdiction "of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8." [The section referred to creates an action to recover damages for a conspiracy to deprive citizens of their rights or privileges. 17 STAT. 13 (1871), 8 U. S. C. § 47(3) (1934)]. While it might be argued that this section applies only to actions at law, it would seem that where damages are inadequate, as in the instant case, the court should give equitable relief. Cf. *Pennsylvania R. R. System v. Pennsylvania R. R. Co.*, 267 U. S. 203, 210, 217 (1925).

20. 36 STAT. 1092 (1911), 28 U. S. C. § 41(14) (1934). Jurisdiction is given "over all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

is unambiguous, the problem of federal jurisdiction calls for no further discussion.

Deportations. Jersey City police, acting on their own discretion in each individual case,²¹ but in conformance with the general policy of the city administration,²² had on occasion physically transported beyond the city limits certain residents of sister states, and even a resident of Jersey City.²³ This practice was defended on the ground that the policemen were, in some cases, preventing "undesirable" persons from committing "unlawful acts"²⁴ and, in others, protecting the individual from the wrath of the citizenry of Jersey City.²⁵ By denying the plaintiffs an opportunity to be arrested for their activities within the city, the police effectively prevented the plaintiffs from attacking the validity of objectionable policies by the ordinary legal method of contesting or appealing a conviction in court.

Since no other city has ever been brazen enough to claim a legal right summarily to deport "undesirables",²⁶ there is a paucity of legal precedent on the exact point. Nevertheless, the court was unquestionably correct in enjoining this vicious practice. The Supreme Court has long recognized the

The statute was applied, *inter alia*, in *Raich v. Truax*, 219 Fed. 273 (D. Ariz. 1915) *aff'd*, 239 U. S. 33 (1915). For a recent brief discussion of this section of the Judicial Code see *Lawless v. Duval County*, 6 F. Supp. 303, 304 (S. D. Fla. 1934) (denying applicability of statute in case not involving rights protected by Fourteenth Amendment).

21. Record, Hague Injunction Proceedings, pp. 870-871, 1234-1235.

22. Record, Hague Injunction Proceedings, pp. 822, 827-830, 841-2, 855 (Commissioner Casey testifying), pp. 1227, 1233-4, 1295, 1359-1359a (Mayor Hague testifying). *Mimeographed Findings and Conclusions*, Hague Injunction Proceedings, pp. 3, 4.

Mayor Hague also stated that persons believing in the doctrines of Stalin, Hitler, and Mussolini "should be driven back, not go back, driven back," to their countries. And if the individuals were born in America, they should be driven out of this country and placed in a concentration camp in Alaska. Record, Hague Injunction Proceedings, pp. 1295, 1359-1359a.

23. Among numerous others, Norman Thomas of New York and Carrick of Jersey City were deported. Record, Hague Injunction Proceedings, pp. 343, 400-401.

24. Record, Hague Injunction Proceedings, pp. 512, 830, 871, 905.

25. Record, Hague Injunction Proceedings, pp. 827-9. Mayor Hague emphasized the view by stating that "when a police officer puts them in a car and takes them somewhere not the police station," "I think he is doing them a favor." Record, Hague Injunction Proceedings, p. 1227. Furthermore, Hague complained that this was the only possible procedure, since the "radicals" wanted to be arrested. "Now, to arrest him would only mean what they desire. Their whole stock in trade is to appear in police courts for publicity purposes." Record, Hague Injunction Proceedings, p. 1281.

26. The closest analogy is to be found in the *Bisbee I. W. W.* Deportation cases, arising out of forceable deportation of I. W. W. strikers and sympathizers by the local citizenry in Arizona. Criminal prosecutions were brought against those involved in the "wholesale deportation," and, based on the charge of the judge, the jury returned a verdict of not guilty. The case is discussed in (1920) 6 A. B. A. J. 99. However, as Judge Clark points out, the Arizona case admits the limitations on the power of the police. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 38.

privilege of free movement to and from any state;²⁷ and the principle is obviously applicable to a subdivision of a state. Moreover, the power of a police officer, as the court points out, extends only to making an arrest and conveying the person to a "reasonably convenient trier."²⁸ The police could presumably request the prospective victim to leave the city; upon refusal to comply, the police must either leave him unmolested or arrest him for the commission of some offense. The flimsy excuse that some individuals were deported for their own protection²⁹ indicates the type of solicitude that characterizes "protective custody" in concentration camps.

The inadequacy of damage suits as a method of ending removals left an injunction as the only practical remedy.³⁰ By enjoining the defendants from deporting the plaintiffs,³¹ Judge Clark has done much to terminate a practice which was as dangerous and unjustifiable as it was unique.³²

27. *Crandall v. State of Nevada*, 6 Wall. 35 (U. S. 1867); see *Twining v. New Jersey*, 211 U. S. 78, 97 (1908); *Colgate v. Harvey*, 296 U. S. 404, 429 (1935).

As the instant opinion states, even an alien is entitled to a hearing before being deported. See Oppenheimer, *Recent Developments in the Deportation Process* (1938) 36 MICH. L. REV. 355. While the state can prevent convicts, idiots, paupers, rioters and diseased persons from entering the state, the power of exclusion would seem to be limited to these special types of cases. *In re Ah Fong*, 1 Fed. Cas. No. 102 (C. C. D. Cal. 1874). And, in the words of Judge Clark: "Ideas are not Japanese beetles." *Mimeographed Opinion*, Hague Injunction Proceedings, p. 40.

28. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 38. *Bryan v. Comstock*, 143 Ark. 394, 220 S. W. 475 (1920) (duty of officer to convey arrested person to most convenient magistrate). See in general Ethridge, *The Law of Arrest* (1930) 3 MISS. L. J. 79, 91.

29. Removals were not from the particular seat of danger, but from the entire city. In fact, Commissioner Casey inferred that the police have the right to escort an individual out of town even though places of safety existed within the city limits. Record, Hague Injunction Proceedings, pp. 827-829. Since Jersey City is said to spend "more per capita on policing and handling of crime than any other city in this country" [Wittel, *Mayor Hague*, N. Y. Post, Feb. 3, 1938, p. 1, col. 1-2, at p. 6, col. 3.] there should be little difficulty in providing places of safety within the city.

30. The use of damage suits is unsatisfactory because they take too long, there is an unlikelihood of collection, and they may not prevent a repetition of similar actions in the future. Cf. WOOD, DON'T TREAD ON ME (1928) c. V (principal advantage to be gained by false arrest suits is cumulative effect in deterring unwarranted police action, rather than actual recovery obtained).

31. *Mimeographed Decree*, Hague Injunction Proceedings, p. 1, 2. The decree also enjoins the defendants from interfering with the plaintiffs in their right "to communicate their thoughts to other persons in and about the public streets, highways, thoroughfares, parks and places of the city of Jersey City except in so far as such interference is in accordance with any right of search and seizure and any right of arrest and removal as speedily as is reasonably possible before a judicial officer under existing law . . ." This paragraph of the decree expressly excepts the question of public meetings, which is dealt with later. See *infra*, 265 *et seq.*

32. Because of the effectiveness of police deportations, forceful ejection by vigilantes has not yet become a major problem in Jersey City. The decree indirectly covers the possibility of vigilantes in two respects: one, by enjoining deportations by agents of the

Distribution of Leaflets. The common practice of distributing leaflets and circulars affords an inexpensive method of communicating ideas.³³ But this medium of expression was closed to the plaintiffs pursuant to a sweeping ordinance providing that "No person shall distribute or cause to be distributed, or strewn upon any street or public place any newspaper, paper, periodical, book, magazine, circular, card or pamphlet".³⁴ In the light of the Supreme Court's opinion in the *Griffin* case,³⁵ the Jersey City ordinance was clearly unconstitutional, especially since it lacked even the license provisions which the *Griffin* ordinance contained.³⁶ The defendants conceded that the decision automatically invalidated the ordinance,³⁷ but claimed that after that ruling they had terminated their practice of interfering with circular distribution.³⁸ Uncontradicted evidence, however, revealed that the practice continued up to the very time of the trial before Judge Clark.³⁹ Hence the court had no alternative but to enjoin any further obstruction of circularization by the defendants. In answer to the oft-made excuse that such ordinances are justifiable because they forestall littering of the streets, the court's opinion makes the commendable suggestion that the city might make use of a street cleaning department or refuse receptacles.⁴⁰ The decree itself, however, enjoins further interference, provided that the distribution does not involve "the misuse or littering of the streets."⁴¹

The court's opinion at first gave cause for considerable concern because it expressed an intention to saddle the injunctive order with a vague qualifying clause. The defendants were to be enjoined from interfering with the plain-

police; two, by enjoining the withholding of adequate police protection to public assemblies held by the plaintiffs. *Mimeographed Decree*, Hague Injunction Proceedings, pp. 1, 4.

33. See *Lovell v. City of Griffin*, 303 U. S. 444, 452 (1938); *People v. Banks*, 6 N. Y. S. (2d) 41 (N. Y. City Magis. Ct. 1938) (holding unconstitutional a statute creating a penal offense for selling literature on a city street without having paid an annual license fee).

34. Jersey City Ordinance, January 22, 1924. Copy of ordinance secured from Corporation Counsel of Jersey City. Communication to the YALE LAW JOURNAL from Corporation Counsel of Jersey City, November 16, 1938.

35. *Lovell v. City of Griffin*, 303 U. S. 444 (1938), (1938) 6 I. J. A. BULL. 129, (1938) 5 U. OF CHI. L. REV. 675, (1938) 25 VA. L. REV. 96.

36. For an excellent discussion of the constitutionality of the various types of leaflet circulation ordinances, see (1937) 5 I. J. A. BULL. 147.

37. Brief for Defendants, Hague Injunction Proceedings, p. 65.

38. Brief for Defendants, Hague Injunction Proceedings, pp. 54, 55, 65.

39. Record, Hague Injunction Proceedings, pp. 344, 344a, 355, 359-361, 404, 405, 424-426, 439, 440, 446, 448, 450, 1001, 1527, 1529.

40. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 43. For a discussion of the case holdings on this point, see (1938) 5 U. OF CHI. L. REV. 675; (1937) 5 I. J. A. BULL. 147.

41. *Mimeographed Decree*, Hague Injunction Proceedings, p. 3. Other conditions attached to the injunction are that the circulars are not obscene, offensive to public morals or do not advocate unlawful conduct, and that the distribution does not involve disorderly conduct or molestation of the inhabitants. *Ibid.*

tiff's right "to distribute leaflets and circulars of a character similar to those being distributed at the time of the institution of this suit or of a substantially similar character."⁴² If by this qualification the court intended to imply that the distribution of other types of circulars could be prevented, that part of the order would have sanctioned a previous restraint of publication in complete disregard of well-established decisions of the Supreme Court.⁴³ And even if the court had not intended the modifying clause to convey that meaning, as an imprudent surplusage the clause would have necessitated a delicate legal operation to refute a possible claim that it entitled the defendants to block the distribution of any circulars, whatever their character. Fortunately, the court's final decree, in contrast to the opinion, effectually clarified the ambiguity by enjoining "the defendants from interfering directly or indirectly with circular distribution of any written or printed matter whatsoever . . ."⁴⁴

Carrying of Placards. The plaintiffs alleged,⁴⁵ and the court found,⁴⁶ that the defendants had prohibited some of the plaintiffs from carrying any placards or signs, thereby seriously crippling the effectiveness of picketing.⁴⁷ The defendants claimed to derive authorization for this policy from a city ordinance which placed a blanket restriction on the carrying or exhibiting of any "show-board, placard, banner or sign" on any sidewalk or roadway.⁴⁸ By granting the injunction, the decision correctly sustains the plaintiff's contention that under the broad language of the *Griffin* case,⁴⁹ the placard ordinance was

42. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 63a.

43. *Near v. Minnesota*, 283 U. S. 697 (1931), Comment (1931) 41 YALE L. J. 262; *Grosjean v. American Press Co.*, 297 U. S. 233 (1936), (1936) 20 MINN. L. REV. 671. See also *Dearborn Publishing Co. v. Fitzgerald*, 271 Fed. 479 (N. D. Ohio 1921).

44. *Mimeographed Decree*, Hague Injunction Proceedings, p. 3. For the qualifying clauses to the injunction, see note 41, *supra*. These clauses may open the way for unwarranted police discretion against the plaintiffs' circulars. However, since the language comes from the *Griffin* case (at p. 451) it is not likely that the court intended to allow any such action.

45. Brief for Plaintiffs, Hague Injunction Proceedings, pp. 42 ff.

46. *Mimeographed Findings and Conclusions*, Hague Injunction Proceedings, pp. 5, 6. (The court refers to "distribution" of placards. Obviously it means "displaying" of placards. Cf. note 47, *infra*.)

47. The attempts of Mayor Hague to defend this practice resulted in some ludicrous distinctions. The Mayor claimed that the ordinance gave him power to distinguish between placards being carried on a parade, and placards held aloft on the picket line.

He also testified that the *Griffin* case could not be interpreted as laying down a restriction against confiscation of placards. The witness was then compelled to take the position that placards could be carried parallel to the ground and distributed, but not perpendicular to the ground and displayed. Record, Hague Injunction Proceedings, pp. 869-870, 1578.

48. Jersey City Ordinance, May 18, 1937. Copy of ordinance procured from Corporation Counsel of Jersey City. Communication to the YALE LAW JOURNAL from Corporation Counsel of Jersey City, November 16, 1938.

49. *Lovell v. City of Griffin*, 303 U. S. 444, 451, 452 (1938). *Mimeographed Decree*, Hague Injunction Proceedings, p. 3. For discussion of the qualifying clauses, see notes 41 and 44, *supra*.

unconstitutional. The court, however, again encumbered its opinion with unfortunate *dictum* suggestions which are cured only by the actual decree. Not only is the same qualification appearing in the discussion of leaflet distribution suggested again,⁵⁰ but an ambiguous aphorism is coined to the effect that "a placard coming from the pen is easier of confiscation than words coming from the tongue."⁵¹ The inference would seem to be that while city officials cannot prevent the exhibition of placards in the first instance, confiscation is permissible after a brief display. While confiscation may not result in a previous restraint on publication as to wayfarers who have had the opportunity to see the placard, it is an unwarranted censorship in the sense that it deprives the placard-bearer from communicating with other persons who have not, as yet, observed the message.⁵² In either case, it is doubtful whether a summary confiscation without any further proceedings would be valid.⁵³

Public Assembly. The various aspects of the right of public assembly were accorded the greatest amount of attention at the trial, in the briefs, and in the opinion. Despite the constitutional guarantee of the right of assembly, commentators have recurrently lamented the practical inability of disfavored groups to obtain a place at which that right could be exercised.⁵⁴ The constitutionality of municipal ordinances requiring permits for public assemblies has almost uniformly been sustained in recent years, even when the ordinance bestowed upon officials broad discretionary powers in determining whether to grant or refuse the permit.⁵⁵ In the instant case, the defendants consistently denied the plaintiffs and other associations an opportunity to speak in Jersey City,⁵⁶ under an ordinance which required a permit for the holding of public meetings, and authorized the Commissioner of Public Safety to refuse such permits where he believes riot, disorder or disturbance will result.⁵⁷ The incongruities of the various rationalizations given at the trial in support of

50. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 63a.

51. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 63.

52. See note 43, *supra*. Pending a decision by the C. C. A. on defendants' application for a stay, Jersey City police continued to prevent picketers from carrying placards. N. Y. Times, Nov. 20, 1938, p. 22, col. 1.

53. U. S. CONST. Amend. IV; N. J. CONST. Art. 1, §6. See Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 MINN. L. REV. 1, 15.

54. See Jarrett and Mund, *The Right of Assembly*, (1931) 9 N. Y. U. L. Q. REV. 1; Comment (1938) 47 YALE L. J. 404, at 412.

55. See cases cited in Comment (1938) 47 YALE L. J. 404, n. 59. This Comment contains a detailed discussion of public order and the right of assembly.

56. *Mimeographed Findings and Conclusions*, Hague Injunction Proceedings, pp. 6, 7. See Brief for Plaintiffs, Hague Injunction Proceedings, pp. 87-88, for a listing of the various denials of permits to the plaintiffs and the meetings permitted to other groups during the same period of time.

57. Jersey City Ordinance, April 21, 1930. Copy of ordinance procured from Corporation Counsel of Jersey City. Communication to the YALE LAW JOURNAL from Corporation Counsel of Jersey City, November 16, 1938. A lower New Jersey court has recently upheld the constitutionality of this ordinance. *Thomas v. Casey*, 1 A. (2d) 866 (N. J. Sup. Ct. 1938).

these refusals⁵⁸ compel the conclusion that the plaintiffs were excluded because of their aims and social beliefs rather than because of any sincere apprehension of resulting riot and disorder.⁵⁹

In discussing the propriety of defendants' allegedly discriminatory refusals, the court in its opinion sustained the constitutionality of the Jersey City ordinance⁶⁰ but ruled that the invocation of the ordinance against the plaintiff applicants was in violation of the right of free assembly as guaranteed by the constitution,⁶¹ and should be restrained.⁶² In an analysis of the cases sustaining the constitutionality of similar ordinances, the court points out that the decisions go too far when they establish the broad rule that since a city may deny altogether the right to hold an assembly in its streets or parks, the granting or refusing of permits may be left to the uncontrolled discretion of the city officials.⁶³ After indicating that this line of cases was based only upon a *dictum*,⁶⁴ the court reverts to the minority rule that while a city may

58. The criteria were variously enumerated as the name of speaker, the nature of sponsoring organization, the protests made by other groups and individuals. Record, Hague Injunction Proceedings, pp. 534, 539-540, 601, 661-662, 664, 665, 733, 734, 924-926. The protests were considered in force until revoked. Record, Hague Injunction Proceedings, pp. 1692-1693.

Mayor Hague asserted that "Reds have no right to express their views in Jersey City." Record, Hague Injunction Proceedings, pp. 1359-1359a. And his list of Reds included members of every political party. Record, Hague Injunction Proceedings, pp. 1239, 1280, 1342, 1379, 1514, 1545a-1549, 1550, 1564-1568, 1682ff.

Perhaps Mayor Hague's fears will be allayed by Judge Clark's statement: ". . . there is no competent proof that the plaintiffs or any of them incited or advocated the overthrow of the government of the United States or the State of New Jersey by force or violence or incited or advocated the commission of any other acts in violation of the laws of the United States or the State of New Jersey." *Mimeographed Findings and Conclusions*, Hague Injunction Proceedings, p. 3.

59. Mayor Hague testified, as to one of the occasions on which a permit had been refused, that he "never anticipated any disorder." Record, Hague Injunction Proceedings, p. 1302.

60. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 49. Though the ordinance appears to be unconstitutional as imposing a censorship on freedom of speech by enjoining the defendants from imposing any previous restraint [See note 43, *supra*] the decree accomplishes the same result as would be obtained by declaring it unconstitutional. *Mimeographed Decree*, Hague Injunction Proceedings, p. 4.

61. The court erroneously states that this right in the instant case is protected by the "free assembly guaranteed by the First Amendment of the Constitution . . ." *Mimeographed Opinion*, Hague Injunction Proceedings, p. 50. Obviously the court meant the Fourteenth Amendment.

62. *Mimeographed Findings and Conclusions*, Hague Injunction Proceedings, p. 9.

63. *Mimeographed Opinion*, Hague Injunction Proceedings, pp. 60-63.

64. The leading case on which this rule is based is *Commonwealth v. Davis*, 162 Mass. 510, 39 N. E. 113 (1895), *aff'd*, 167 U. S. 43 (1897). The ordinance in this case provided: "No person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares or merchandise, erect or maintain any booth, stand, tent or apparatus for the purposes of public amusement or show, except in accordance with a permit from the mayor." Davis did not

require a permit before the privilege of holding an assembly may be exercised, any refusals to grant a permit must be based on reasonable grounds.⁶⁵ But the court seems to deviate in its opinion from this rule by drawing an apparently unprecedented distinction between street meetings and meetings in public parks.⁶⁶ The purpose of public parks, the court reasons, is to furnish recreation, mental as well as physical. Since assemblies afford mental stimulation, they are properly within this purpose and must therefore be permitted as long as parks are offered for recreational purposes,⁶⁷ except where they are expressly dedicated to a specific purpose.⁶⁸ On the other hand, the opinion contends, the city has an absolute power of refusal with regard to street meetings and may therefore regulate as it pleases.⁶⁹ This power is deduced from the court's doubt whether "the easement of passage includes the quite inconsistent right to obstruct passage."⁷⁰ Without quarreling with this somewhat legalistic premise, it seems reasonable to argue that a refusal would be warranted only where an actual obstruction will result. In cases where

apply to the mayor for a permit, therefore it was not necessary for the court to discuss the absolute power of a municipal officer to forbid speaking in public places and the rule established was only a *dictum*.

Also, as Judge Clark indicates in his opinion, at the time of the decision the Supreme Court felt that free speech was not protected against action by states. Opinion, pp. 61-62. See *Gitlow v. New York*, 268 U. S. 652 (1925); Warren, *The New Liberty Under the Fourteenth Amendment* (1926) 39 HARV. L. REV. 431.

65. *State v. Coleman*, 96 Conn. 190, 113 Atl. 385 (1921) (ordinance unconstitutional because it granted absolute and uncontrolled discretion to Chief of Police.); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886) ["Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (at p. 373)]. Cf. *Frazee's Case*, 63 Mich. 396, 30 N. W. 72 (1886) (same rule applied to similar ordinance pertaining to parades. However, majority of cases on parade ordinances would seem to follow this rule. For discussion of different treatment accorded parade ordinances as compared to assembly ordinances, see Comment (1938) 47 YALE L. J. 404 at 429.)

66. The court admits that the distinction has not been made by the American cases. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 47. While Judge Clark infers that such a distinction is made in the English case law, the cases do not seem to support this contention. See Goodhart, *Public Meetings and Processions* (1937) 6 CAMB. L. J. 161.

67. "We include in that word recreation an easement of assemblage. We believe it is not limited to physical recreation (fresh air, sunshine and exercise) but includes mental recreation and therefore the opportunity to impart and receive instruction." *Mimeographed Opinion*, Hague Injunction Proceedings, pp. 47-48.

68. Cf. *Coughlin v. Chicago Park Dist.* 364 Ill. 90, 4 N. E. (2d) 1 (1936) (Soldiers Field in Chicago, devoted to athletics); *Fox v. Allchurch*, 80 So. Australia S. R. (1926) 384 (sustaining by-law prohibiting meetings within boundaries of Botanic Gardens). The court cites these cases to indicate the limitation expressed in the opinion. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 48.

69. Cf. cases cited in Comment (1938) 47 YALE L. J. 404, n. 55.

70. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 47. See Goodhart, *Public Meetings and Processions* (1937) 6 CAMB. L. J. 161.

the obstruction is merely technical, as where a street meeting is held at a time when the street is not being otherwise used, denial of a permit would seem unjustified.⁷¹ This category would also seem to include open squares where meetings can be staged without material obstruction.⁷² Furthermore, even if it be assumed that the court's opinion was correct in its intimation that there is no constitutional right to have street meetings, as long as there is no general policy against such meetings, there should be an equal opportunity to all groups. The terms of the decree⁷³ reveal that the court realized the logical necessity of making the latter qualification to its general rule.

Following out this distinction between parks and streets, the decree enjoins the defendants from imposing any previous restraint on the plaintiffs⁷⁴ in respect "to the holding of meetings or assemblies in the open air and in parks dedicated for the purposes of the general recreation of the public . . ."⁷⁵ A proviso is appended requiring plaintiffs to apply for a permit three days in advance of a projected meeting. In order to forestall discriminatory tactics, the decree further provides that the permit can be refused only if the "particular time or place designated in the application is in reasonable conflict with the public recreational purposes of said parks." The court deftly evades the confused problem of street meetings by enjoining defendants from denying a permit to plaintiffs for this purpose as long as other groups are permitted similar privileges. The possibility of interference from objecting auditors is covered by the commendable provision enjoining defendants from withholding reasonable police protection when the circumstances may require it.⁷⁶

The court in its opinion advanced the proposal that whenever the city authorities have reasonably substantial proof that riots have followed previous speeches by the applicant, they may either require a copy of his proposed speech in order to delete those parts believed to be inducive to disorder, or

71. Cf. dissent in *People v. Pierce*, 85 App. Div. 125, 129, 83 N. Y. Supp. 79, 82 (3d Dep't 1903). See Comment (1938) 47 YALE L. J. 404, 413.

72. A familiar example is Columbus Circle in New York City.

73. *Mimeographed Decree*, Hague Injunction Proceedings, p. 5.

74. The decree specifically provides that permits must be granted to Congressman Maverick, Congressman O'Connell, Congressman Allen, Morris L. Ernst, Roger Baldwin, William J. Carney, Al Barkin, Sam Macri and John Kiesler. *Mimeographed Decree*, Hague Injunction Proceedings, p. 4. In the Findings of Fact it is stated that there was no proof that any breach of peace had occurred at previous meetings at which the plaintiffs had spoken. *Mimeographed Findings and Conclusions*, Hague Injunction Proceedings, p. 7.

75. *Mimeographed Decree*, Hague Injunction Proceedings, p. 4.

"There is no competent proof that the parks of Jersey City . . . are dedicated for purposes other than the general recreation of the public." *Mimeographed Findings and Conclusions*, Hague Injunction Proceedings, p. 7. However, since counsel could not foresee the distinction drawn by Judge Clark, the question never arose during the trial.

76. *Mimeographed Decree*, Hague Injunction Proceedings, pp. 4-5.

bind over the speaker to keep the peace.⁷⁷ This ingenious but dangerous idea was, fortunately, abandoned in the final decree.⁷⁸ But since the reporters will still print the court's opinion in full—including, of course, *dictum* suggestions—the value of the proposed supervision should be examined carefully.

Both alternatives deserve to be interred in the legal grave prepared by Supreme Court decisions prohibiting previous restraints on freedom of speech.⁷⁹ The first is admittedly a direct form of censorship;⁸⁰ the second opens the way for an equally odious indirect censorship by requiring a large bond from the speakers. Furthermore, by affording the officials so broad a discretion the suggestions would seem to violate the standards already adopted in the opinion.⁸¹ Nor is it likely that the suggested procedure would be confined to an infinitesimal number of prospective speakers. Since the court's plan does not include a determination of who provoked the riot, it is not hard to imagine, in view of the evidence presented at the hearing, that enough disturbances could be manufactured during the initial talk of a speaker untainted by a previous riot-history to warrant a future censorship.⁸² Public order and the right of free speech may better be insured by recognizing that

77. *Mimeographed Opinion*, Hague Injunction Proceedings, p. 50 ff. The opinion fails to discuss the numerous problems that follow from such a proposal. Thus, what would be the actual test of forfeiture of the bond—a mere occurrence of disorder through no fault of the speaker, or severe occurrence of disorder as a result of an inflammatory remark? Would the bond automatically have to be forfeited on the fiat of Jersey City officials, or would there be a regular trial for some specific offense?

78. In fact, the decree specifically forbids any previous restraint. See note 60, *supra*.

79. See note 43, *supra*.

80. With engaging frankness, Judge Clark admits that he is "aware of the fact that this is censorship," but continues to approve the plan, citing *KFKB Broadcasting Ass'n v. Federal Radio Comm.*, 47 F. (2d) 670 (App. D. C. 1931) (refusal of Commission to license a station because purposes held to be against public interest); *United States v. Burleson*, 255 U. S. 407 (1921) (revocation of second class mail privileges to newspaper). *Mimeographed Opinion*, Hague Injunction Proceedings, p. 53 ff. That these are exceptional cases, not regarded as imposing an actual censorship, see Willis, *Freedom of Speech and of the Press* (1929) 4 *IND. L. J.* 445, 446; Comment (1933) 46 *HARV. L. REV.* 987. See also Comment (1931) 40 *YALE L. J.* 967.

In concluding this part of the discussion, Judge Clark makes the facetious remark that the speeches "might suffer in spontaneity but there are those who think the listening public would welcome the compensating gain in thoughtfulness." *Mimeographed Opinion*, Hague Injunction Proceedings, p. 55.

81. See note 65, *supra*.

82. A veterans' protest meeting of December 28 was encouraged by Mayor Hague. The card announcing the meeting concluded with the words, "Message from the Mayor's Office." The Mayor explained that the Veterans put this on the card because "they wanted to impress upon the veterans, and thousands of them are my personal friends, that I was interested and that this was approved by the Mayor and my associates, which we did, we approved of everything now; we are not shirking any of that." Record, Hague Injunction Proceedings, p. 1257.

Mayor Hague also testified that although he could have prevailed upon the veterans to be less aggressive, he was not desirous of doing so. Record, Hague Injunction Proceedings, pp. 1252, 1339.

when auditors feel privileged to express their disapproval through riot, it is they, not the speaker, who are pursuing the unlawful course of conduct. The remedy is police protection, not police censorship.⁸³

Meetings in Private Halls. Jersey City officials were charged by the plaintiffs with using an ingenious device to prevent certain meetings in private halls. A "most peculiar" ordinance⁸⁴ requires hall owners to secure a permit before renting their premises to a meeting at which overthrow, abolition, or change in the government is to be advocated. The ordinance does not authorize a refusal of the permit, nor does it require permits for any but the specified types. It does, however, impose a penal fine on hall owners in case a permit has not been requested, and such advocacy subsequently occurs.⁸⁵ Evidence was offered to show that the practical result is to create a "state of apprehension" in the minds of the owners whenever any group hostile to the city administration attempts to rent the halls.⁸⁶ In such cases, the owners could protect themselves from the penal fine by requesting, and compelling if necessary, the issuance of a permit. But as a practical matter, it was alleged, the city made use of a wide variety of effective sanctions to coerce owners to refrain from pressing applications for a permit.⁸⁷

While the record is replete with testimony concerning the inability of the plaintiffs to secure private halls for their meetings,⁸⁸ the court held the evidence insufficient to sustain a finding that the city officials actually brought pressure to bear on the owners.⁸⁹ Avoiding the difficult task of eliciting from hostile witnesses direct proof of these alleged subtleties, the plaintiffs had succeeded only in obtaining statements by Mayor Hague that the proprietors, being fully aware of the fact that they have "little minor (business) affairs" to be attended to at City Hall, would not lease their auditoriums to persons deemed offensive to the municipal authorities.⁹⁰ Had the court found this evidence

83. Cf. note 76, *supra*.

84. The phrase is that of Vice-Chancellor Fielder in *Hudson County Committee v. Hague*, N. J. Chan., # 117-203, Jan. 19, 1937.

85. The terms of the ordinance are set out in Brief for Plaintiffs, *Hague Injunction Proceedings*, p. 45.

86. See Brief for Plaintiffs, *Hague Injunction Proceedings*, pp. 45 ff.

87. Brief for Plaintiffs, *Hague Injunction Proceedings*, pp. 45 ff. "We are skeptical enough to realize that municipal authorities (like other authorities) are possessed of indirect means of coercion." *Mimeographed Opinion*, *Hague Injunction Proceedings*, p. 44.

88. Record, *Hague Injunction Proceedings*, pp. 124-136, 136-137, 229-233, 373-380, 456-457, 1046-1047, 1049-1051, 1069-1070, 1073, 1074. The plaintiffs were able to obtain only two halls, both of which were alleged to be inappropriate for a meeting. Record, *Hague Injunction Proceedings*, pp. 254, 459.

89. *Mimeographed Opinion*, *Hague Injunction Proceedings*, pp. 44-45.

90. Record, *Hague Injunction Proceedings*, pp. 1275-1277. ". . . A mere expression from me, counselor, is sufficient to men who has been associated with me, men who has lived in the city all their lives and who on numerous occasions have [sic.] had talks and association with me, that is sufficient for them to feel that they are not working within the proper scope, if they encourage groups of that kind, when they

sufficient,⁹¹ or had the plaintiffs managed to obtain further direct proof of the control exercised by the officials over the hall owners, the court would have been amply justified in granting an injunction against continuance of this procedure. A close analogy is afforded by the case of *Truax v. Raich*. There, on behalf of an alien *employee*, the Supreme Court invalidated a statute which penalized *employers* of over five persons who did not see to it that four-fifths of their employees were citizens of the United States. The court stated that although the statute was not directed against the employee, its effect was to deprive him of his right to earn a livelihood.⁹² Similarly, even if the conduct of city officials is directed against hall owners, it may be successfully challenged by plaintiffs in the instant case if its actual effect was to deny them an opportunity to exercise their right of free speech.

Illegal Searches. The defendants freely admitted at the trial that Jersey City police often indulged in the practice of subjecting "suspicious-looking" out-of-town cars and their occupants to a search without a warrant.⁹³ There appeared to be no general policy to guide the policeman on the beat in his determination of what factors should constitute a reasonable basis for being suspicious;⁹⁴ but it was apparent that a suspected connection with the C. I. O. was considered sufficient to justify a search.⁹⁵ So patent is the illegality of this practice under both state and Federal constitutions that further discussion is unnecessary.⁹⁶ By enjoining the defendants from illegal searches and seizures, the court has removed an annoying obstruction to union organization in Jersey City.⁹⁷

Picketing. The picketing issues raised by the instant case were *sui generis*. The Jersey City police claimed for themselves the right to prevent picketing whenever, in the exercise of their own judgment, they found that no strike

know that the officials of Jersey City are distasteful to that type of gatherings [sic] forming in Jersey City."

91. The Court refused to allow testimony by witnesses other than the hall owners as to what the owners had given as their grounds for refusing to lease the halls. Record, Hague Injunction Proceedings, p. 1070. The plaintiffs did not call as witnesses any of the hall owners involved.

92. *Truax v. Raich*, 239 U. S. 33 (1915), (1915) 14 MICH. L. REV. 152.

93. Record, Hague Injunction Proceedings, pp. 483, 796.

94. Thus Commissioner Casey testified that the "cop on the beat" has the power to use his own judgment about stopping a car that he thinks is suspicious, but that it is entirely up to the judgment of the man in charge—the car must "look suspicious." Record, Hague Injunction Proceedings, pp. 796-801.

95. Record, pp. 256-258, 478-480, 1044-1046, 1109. As supporting his contention that the searches were not directed against the C. I. O., the defendant, Commissioner Casey, testified to a none too recent search of another car, revealing the presence of arms, and resulting in the apprehension of four criminals. Record, Hague Injunction Proceedings, pp. 941-945.

96. U. S. CONST. Amend. IV; N. J. CONST. Art. I, § 6. See Waite, *Reasonable Search and Research* (1938) 86 U. OF PA. L. REV. 623.

97. *Mimeographed Decree*, Hague Injunction Proceedings, p. 2.

existed,⁹⁸ or that picketing was for an "illegal" purpose⁹⁹ or was conducted in an "illegal" manner.¹⁰⁰ The fact that the picketing was peaceful and not in violation of any legislation or court decree was dismissed as immaterial.¹⁰¹ The obvious illegality of this course of conduct was indicated by the court in a remark from the bench during the trial that in the absence of a court order the law required police to confine their interference to cases of disorderly conduct.¹⁰² Whether or not the constitutional right of free speech is a restriction upon legislation or court decrees directed against picketing,¹⁰³ arbitrary police action without the sanction of either clearly constitutes a denial of due process.

Unfortunately neither the opinion nor the decree discusses the issue of picketing. Judge Clark felt himself obligated to abstain from any ruling on this question until the Third Circuit had passed upon an injunction issued by him in a similar factual situation early in 1937.¹⁰⁴ The seriousness of the defendants' encroachments and the unlikelihood of an immediate review of the former decision would undoubtedly have made it excusable to have granted the injunction and omitted the graceful curtsy to the appellate court.¹⁰⁵

Conclusion. Any accurate appraisal of the injunction proceedings must first take into account some of the uncomfortable implications of the opinion. The qualifications upon distribution of leaflets and carrying of placards; the censorship procedure for meetings in public parks; the uncertain status of street meetings—all unnecessarily restricted the scope of an otherwise praiseworthy decision. Had these limitations, wrapped as they were in vague verbosity, found a place in the decree, the outcome of the case would have been inconclusive indeed. But fortunately the sweeping terms of the decree have in most instances "overruled" the unsupportable doctrines of the opinion. If the decree is enforced as written, the decision will undoubtedly become a landmark in the long struggle to restore to areas such as Jersey City the constitutional rights of freedom of speech, press, and assembly.

98. Record, Hague Injunction Proceedings, pp. 857, 1593.

99. These illegal purposes were (1) to persuade workers to join a union; (2) to protest against a runaway shop; (3) to obtain a closed shop; (4) picketing without a labor dispute. Record, Hague Injunction Proceedings, pp. 857, 863-864, 1594, 1605, 1615.

100. Illegal means were said to exist where (1) people on the picket line are not employed in the shop; (2) there is mass picketing. Record, Hague Injunction Proceedings, pp. 971, 1591-1593.

101. For a discussion of anti-picketing legislation, see (1938) 48 YALE L. J. 308.

102. Record, Hague Injunction Proceedings, pp. 2221-2222.

103. Cf. *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 478 (1936). See, in general, Hellerstein, *Picketing Legislation and the Courts* (1932) 10 N. C. L. REV. 158.

104. *American Civil Liberties Union v. Casey*, March 15, 1937 (unreported).

105. *Mimeographed Opinion*, Hague Injunction Proceedings, pp. 63-A, 64. In his letter to counsel, Judge Clark wrote that he is not enjoining the defendants from interfering with picketing since the former case "is now on appeal to the Circuit Court of Appeals for this Circuit and although their decision may not be technically *res judicata*, clearly the comity that should obtain between all courts and most certainly between an inferior and a superior court requires us to await the instructions of their views." Letter to counsel from Judge Clark, Nov. 7, 1938.