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HOW FAR IS A PERSON PROTECTED BY THE COURTS IN THE EXERCISE OF HIS VOCATION OTHERWISE THAN BY REMEDIES FOR ACTUAL OR THREATENED BREACH OF CONTRACT OR VIOLENCE?*

Within the last hundred years, perhaps no other branch of the law has brought forth a greater number of important and interesting

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decisions by the courts than that dealing with labor organizations and labor issues. The mass of litigation and the perplexity of the questions that have arisen on this subject are undoubtedly due to the miraculous changes that have taken place in the industrial world within the last century. But a comparatively short time ago, the bulk of the country's business was done with crude machines in small shops, where the master worked in close communion with his few journeymen and apprentices. Under these conditions no great injustice was likely to result either to employer or employee. Today, however, the advent of the steam engine and other wonder-working machinery has revolutionized methods of manufacturing, and has led to the growth of factories undreamed of in size and capacity for production, employing thousands of workmen, where the employer seldom gets to know who his employees are, much less learns to know or appreciate their grievances.

The bitter struggle between capital and labor is but one of the eternal conflicts of which life is made up. It is but one of the results of the attempt of each man to get as much as he can of the good of the world. The law of self-preservation plays its part in this as in other phases of life, and, when the laboring class saw their interest jeopardized by the powerful combinations of capital arrayed against them, it was but natural and proper that they, too, should combine in order that the battle might be waged in a fair and equal way. The transition from the old to the new is not yet over, for it is a radical one. Capital and labor are not yet sure of their positions. This uncertainty and the doubtfulness of their respective rights has led to the mass of litigation between employer and employee on this and kindred topics.

On the subject chosen for this article, if an exhaustive treatment were attempted, volumes might be written. It is my plan, therefore, to devote some few words to what I understand to be embraced within the subject, and then treat more or less in detail of one phase of that subject.

"How far is a person protected by the courts in the exercise of his vocation otherwise than by remedies for actual or threatened breaches of contract or violence?" The first word that requires any discussion at all is the word "vocation." It seems to me that "vocation" implies "occupation" or "employment" rather than "business" or "employing," and necessarily, then, the subject is meant to refer to injuries to employees, and it will be so treated. All cases involving

contract rights are expressly excluded; so discussion will be limited to those employments which are terminable at the will of either party. Every form of violence, actual or threatened, including intimidation, I take it, are also outside the scope of this article. This, it seems to me, leaves as proper topic to be considered under this subject, slander, libel, boycott and inducing an employer to discharge a workman by threats to quit or actually quitting their employment by one or more workmen. The law relating to the subjects of slander and libel is virtually the same with reference to this topic as it is to other branches of the law, and I do not mean to treat of it here. Boycotts of laborers are rarely resorted to; so I shall not consider them. This leaves as my subject, "How far is a person protected in the exercise of his vocation by the courts by remedies for the action of a workman or combination of workmen in procuring his discharge or preventing his employment by threatening to leave their employer's service unless such person is discharged or refused employment?"

On this question there are a great many decisions, and they are by no means in harmony. A moment's reflection will show that courts in rendering decisions not only strive to do justice between the particular litigants, but, realizing that their findings form part of the law governing the future conduct of the community at large, allow themselves to be guided in their decisions by certain general and fundamental principles which law and tradition have evolved as being most conducive to the welfare and happiness of the public in common. These principles comprise what is usually known as "public policy," which might be said to be synonymous with the term, "the greater good for the greater number." If the conflicting decisions pertaining to our subject are closely scrutinized, it will be seen that all are rendered with these policies, or, to speak more accurately, these phases of public policy in mind. So in one case we see the court zealously guarding the rights of the individual, while in another the right of free competition is given first importance and any injuries suffered by its exercise held to be justified. In other cases, the judge gives first thought to freedom of will, holding that any action which enthralls the will is unlawful *per se*. In numerous instances, the presence in the mind of the judge of these principles seems not to be so evident, but he seems to be endeavoring to reconcile the decisions and follow the weight of authority. On analysis of the conflict, however, it appears that the difference is more apparent than real. It is a

difference of degree only—a diversity of opinion as to the relative importance of the various considerations named above. These principles will be again referred to throughout the course of this article.

The administration of law might be said to be a determination of rights and a redress of the violation of those rights, and it is obvious that the greater part of the time of the courts is devoted to determining the rights of the litigants; for, once the rights are settled, the remedy generally is granted as of course. Once we have settled upon the rights of the parties involved, the answer to our question will be readily found. So this article is of rights.

Bouvier defines rights as "well-founded claims of moral beings upon one another." He classifies rights as "absolute" and "qualified." Absolute rights are also known as "natural" or "inherent" rights; and qualified rights are sometimes called "relative," "correlative," or "common" rights. Absolute rights are those which inhere in our frame of government and are expressly guaranteed by our constitution, such as the right to liberty of motion, the right of contract and the incidents of ownership of material property. Because our social and business relations are so complicated, it follows that by far the greater number of our rights are relative—are those which can only be exercised in relations with other people, and which must, therefore, necessarily be exercised with due regard to similar and equal rights in others. It is evident, however, that it is inevitable that these equal rights should frequently clash, and it is here that the considerations of the above mentioned principles of public policy come into play in determining which of the two equal rights shall prevail.

When we speak of a right or wrong we generally think of the person possessing such right or suffering such wrong, rather than of the person having the correlative duty or committing the correlative wrongful act. Is there any difference from the standpoint of damage suffered by the injured person, whether such wrong be done in pursuance of a legitimate or a malicious purpose?[1] It seems to me that any violation of a right, no matter what the circumstances, is a wrong. This does not mean, however, that every such wrong is actionable, for in many cases other considerations are present which excuse or justify the infliction of damage. Any damage resulting from the exercise of an absolute right is always held justified on the theory that it is more essential to the public weal that such right be unlimited than

[1] Allen v. Flood, A. C. 1898, 1.

that the injuries inflicted in rare cases be redressed. It is in relation to the exercise of qualified rights that justification is generally spoken of. Among these qualified rights is now generally recognized the right of which we are treating—the right to the exercise of one's trade or calling.[2]

The courts quite unanimously hold that a single individual may procure the discharge of a fellow workman without incurring liability, no matter what the actor's motive, and whether he is carrying out a threat or simply leaving without informing his employer of the reasons for his conduct.[3] The right to leave is equal to the right to stay. If there is a detriment to one individual, there is a corresponding benefit to trade in general in allowing uncurbed, legitimate competition. If there is a wrong, there is a justification. The importance of free competition is considered as of controlling weight and the decisions rendered in accordance therewith.

We come next in our plan as set forth in the appended outline to a consideration of the legality of a combination of employes to procure the discharge of a fellow-workman.. This is generally done by a threat to quit work in a body, or, if this does not prove successful, then by an actual suspension of service—what is commonaly called a "strike." A strike may be said to be a refusal on the part of employees to work for their employer unless some demand is complied with. It was thought in England at one time that all combinations were unlawful. But it was early recognized in this country that workmen had the right to combine to use all legitimate means for their moral, social, educational, and vocational advancement. And it has been said that what one may legally do, a number may combine to do.[4] This has been settled by statute as the law of England. This proposition is undoubtedly true so long as the result produced is simply the sum total of the individual acts of the members. But, it is submitted, not only does the strength of the organization increase in multiple proportion to the members, but an entirely new element is present to be dealt with.

When a single worker threatens to quit, the employer may be forced to choose between two evils, but whichever course he pursues, it is plain that he has considered such course to be to the best of his

[2] Gray v. Bldg. Trades Council, 63 L. R. A. 753.

[3] Pickett v. Walsh, 192 Mass. 572, 6 L. R. A. (N. S.) 1067; Kemp v. Division No. 241, 255 Ill. 213; Carter v. Oster, 134 Mo. App. 146.

[4] Bohn Mfg. Co. v. Lbr. Assn., 21 L. R. A. 337.

interests. His mind has been free. But when a large number of his workmen combine and threaten to leave or actually leave his service, his realization of the financial and business loss that will be entailed upon such action is enough to deprive him of his will in the matter and to practically force him to submit to the will of others, when the will of such others is contrary to his own. This is the plainest kind of duress in fact, and here is a result in direct violation of the policy of the courts to preserve liberty of mind as of body. Which shall prevail, the policy of prohibiting the enthralling of the will or the policy of encouraging free competition?

When two such leading policies clashed, the courts looked about them to find, so to speak, some rules of the game. In what other cases had constraint of the mind or body been permitted or practiced by the law. Why, clearly in those cases where the general benefit resulting to the public at large had been enough to outweigh the detriment suffered to a particular individual or group of individuals; as the restraint of physical liberty when such physical liberty is a menace to society, or constraint of the will in cases where courts decree specific performance or issue restraining orders. And so in this way arose the doctrine of justification as applied in considering the legality of strikes. It is not a new doctrine. It pervades the whole theory of the law. As was intimated above, the courts often apply it without recognizing it as such. In some particular subjects, such as slander, libel, self-defense, and others, it is given special attention. The courts, pursuing this principle to its logical conclusion, evolved the doctrine that a labor union might call a strike of all its members working for a certain employer or in a certain shop, so long as the primary purpose was to benefit the strikers by strengthening the union so that it might be better able to cope with the combinations of capital in its struggle for better working conditions, increased pay, and shorter hours. And so it has been held that, if the primary purpose is to benefit the members, then it matters not that there be present the secondary intent to injure by their action; and if the primary consideration be the malicious injury to another, then no expectation of gain or benefit will excuse or justify their action.

But the gain, the struggle for which will furnish sufficient justification, must not be a trivial, frivolous, or fancied gain, but a substantial gain, such a one as the law will recognize. In the leading case

of *DeMinico v. Craig,*[5] it was held that a strike is not justified which seeks to procure the discharge of a foreman who has made himself obnoxious solely by his efforts to enforce the rules of the shop. In that case, Judge Loring, in delivering the opinion of the court, said, "One who betters his condition only by escaping from what he merely dislikes, and by securing what he likes, does not better his condition within the meaning of those words in the rule that employees can strike to better their condition."

However, it has been quite universally held that ends which may legitimately be sought by strikes are the employing of only skilled workmen, the discharge of incompetent and careless workmen, the shortening of hours of labor, and the bettering of sanitary or working conditions. Not only must the primary purpose of the strike be to benefit the members, but the benefit must be such as will flow directly and immediately from their action. On these grounds, a strike where there was no dispute between employer and employees, but which was simply a "sympathetic" strike, was declared unjustified, the court holding that the benefit expected (the final strengthening of the organization), was too remote and indirect to excuse the injury inflicted.[6]

On the question of whether or not a strike is justified, which has as its sole purpose the discharge of a non-union employee in order that the organization may be strengthened, there is a conflict of authorities, and, I believe, this is the only subject upon which there is such a conflict. However, here again, I think it is rather a difference of opinion as to the relative importance of the rights involved than as to what those rights are. In the leading Massachusetts case of *Berry v Donovan,*[7] it was held that the purpose of strengthening itself in future contests with the employer would not justify a labor union in striking to procure the discharge of a non-union workman. However, in this case, the non-union employee was under contract. In *Plant v. Woods,*[8] another leading case from Massachusetts, the same decision was given, but the authority of this case is weakened by the vigorous dissent of Chief Justice Holmes, and by the fact that there was intimidation and force involved.

The New York Court of Appeals, in a very lucid opinion by

[5] De Minico v. Craig, 217 Mass. 593; 42 L. R. A. (N. S.) 1048.
[6] Pickett v. Walsh, *supra.*
[7] 88 Mass. 353; 5 L. R. A. (N. S.) 899.
[8] 176 Mass. 492; 51 L. R. A. 339.

Chief Justice Parker held, in the case of *National Protective Association of Steam Fitters and Helpers v. Cumming*,[9] that it was essential to the interests of the working class to declare a strike lawful which had for its purpose the discharge of an employee who was not a member of the union. This decision seems to be supported not only by the weight of authority, but by the better reasoning. For it is mere mockery to grant to laborers the right to combine for the purpose of bettering their condition and then deny them the use of their principal weapon of offense. Without the right to refuse to work with non-union men, organized labor is helpless before the encroachments or combination and capital.

Before closing this article, I feel it is necessary to say a few words on the subject of "threats." A good many of the decisions infer that the right of the employee to quit whenever he wishes becomes actionable when exercised in the form of a threat to leave unless another employee is discharged. Under the theory of the law as set down in this treatise, this distinction is clearly both erroneous and useless. What it is lawful to do, it surely is lawful to threaten to do.[10] The doctrine of justification should furnish the sole basis for determining the lawfulness of such actions, for it is an eminently fair one. It furnishes an incentive to free competition, generous impulses, and fair play, and tends to discourage malice and ill-will between employer and employee, and between fellow-employees.

In order to get a clearer conception of the subject as a whole, it may perhaps be well to add a brief summary. I have thought it more advisable to set down what, it seemed to me, the leading decisions have settled as the law, rather than a detailed account of those decisions themselves. It seems to be firmly established that a person, acting singly, is never liable for procuring the discharge of another not under contract. Unions are universally considered lawful, and are allowed to strike when their primary purpose is to secure to themselves a substantial benefit. This benefit must be the natural and direct result of their action. The better authority holds that the strengthening of the union resulting from refusing to work with non-union men is a justifiable, lawful purpose.

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[9] 170 N. Y. 315; 58 L. R. A. 135.
[10] Longshore Prntg. & Pub. Co. v. Howell, 26 Ore. 527, 28 L. R. A. 464.