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When Picketing May Become Unlawful

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NOTES AND COMMENT

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WHEN PICKETING MAY BECOME UNLAWFUL.

In a recent New York case, the plaintiff sued the defendant labor union for an injunction restraining it from picketing plaintiff's premises. The theory of the plaintiff was that it was obligated by contract to employ members of a rival *bona fide* union, and hence any picketing on the part of the defendant would be unlawful as tending to induce a breach of contract. The defendant contended that peaceful picketing may not be enjoined on the ground that the purpose thereof was to induce a breach of contract between the plaintiff and a rival union, and that furthermore to state to the public that the conduct of an employer is socially objectionable to a labor union does not in itself constitute a justification for the issuance of an injunction. The Court of Appeals sustained the contentions of the defendant and reversed an order of the Appellate Division which affirmed a judgment of Special Term granting the injunction.[1]

It has oft been held[2] that correlative to the right of the laborer to work at whatever trade or calling he may desire to work at, at such time and places as he may wish, and to obtain the best price for his service, is the right of the employer to conduct his business in a lawful manner without obstruction, dictation or interference from anyone. That the right to be employed is a property right,[3] is a universally recognized rule for the wrongful interference with which there is a right of action.[4] From this proposition there is no dissent, the difference of opinion disclosed by the decisions being upon the question as to what amounts to wrongful interference. In order to constitute such unlawful interference there must be present an intention to bring about the particular result, the use of unlawful means and an absence of justification.[5]

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[1] Stilwell Theatre, Inc. v. Sam Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932).

[2] Haverhill Strand Theatre v. Gillen, 229 Mass. 413, 118 N. E. 671 (1918); Carlson v. Carpenters Contractors Association, 224 Ill. App. 430, *aff'd*, 305 Ill. 331, 137 N. E. 222 (1922).

[3] Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97 (1919); Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327 (1905); Jones v. Leslie, 61 Wash. 107, 112 Pac. 81 (1910); Bacon v. St. Paul Union Stockyards Co., 161 Minn. 522, 201 N. W. 326 (1924).

[4] Connell v. Stalker, 20 Misc. 423, 45 N. Y. Supp. 1048 (1897); Davis v. United Portable Hoisting Engineers, 28 App. Div. 396, 51 N. Y. Supp. 180 (1st Dept. 1898); Brennan v. United Hatters, 73 N. J. L. 749, 65 Atl. 165 (1906); Wyeman v. Deady, 79 Conn. 414, 65 Atl. 129 (1906); Tennessee Coal and Iron Co. v. Kelly, 163 Ala. 348, 50 So. 1008 (1909); Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 205 N. W. 630 (1925).

[5] OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) p. 767.

Where the right invaded rests in contract it has been held by the court of last resort of this State that in order for an action to lie, the employer must have a right to the employees' services pursuant to contract, the defendant must have had knowledge of the contract and of its value to the employer, and the defendant must have been possessed of a wilful and malicious intent to injure the employer.[6]

The Federal Courts and the courts of other jurisdictions have been more liberal in their zealous desire to protect the sanctity of contracts and have held that it is unlawful to persuade an employee to quit his employment knowing that in so doing he will violate his contract.[7] To combine to induce others to quit during the day, when they are hired for the day, and to induce workmen under contract not to quit except upon seven days' notice, to quit without such notice, has been held unlawful.[8]

Some courts distinguish between *causing* another to breach his contract and *procuring* or *inducing* another to breach his contract. In England it has been held that merely to persuade a person to breach his contract may not be wrongful in law or in fact, but if the persuasion be used for the indirect purpose of injuring the plaintiff it is a malicious act which is in law and in fact a wrong act and hence an actionable act if injury ensues from it.[9] The final test seems to be whether the mind of the persuader is bent upon the direct breach of the contract or upon some entirely different object, even though his action incidently may cause the breach of the contract.[10] If his aim be the former, an action will undoubtedly lie; if it be the latter, there is a sharp conflict of opinion with the New York Court of Appeals standing practically by itself holding that the action will not lie.[11]

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[6] Posner Co. v. Jackson, 223 N. Y. 325, 119 N. E. 573 (1918).

[7] United States—Arthur v. Oakes, 63 Fed. 310 (C. C. A. 7th, 1894); Knudsen v. Benn, 123 Fed. 636 (C. C. D. Minn. 1903); A. R. Barnes & Co. v. Berry, 156 Fed. 72 (C. C. S. D. Ohio 1907); Delaware, L. & W. R. Co. v. Switchmen's Union, 158 Fed. 541 (C. C. W. D. N. Y. 1907); Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908).

Alabama—Hardie-Tynes Mfg. Co. v. Cruse, 189 Ala. 66, 66 So. 657 (1914).

California—Patterson Glass Co. v. Thomas, 41 Cal. App. 559, 183 Pac. 190 (1919).

Massachusetts—Folsom v. Lewis, 208 Mass. 336, 94 N. E. 316 (1911); Rice, B. & F. Mach. & Iron Foundry Co. v. Whillard, 242 Mass. 566, 136 N. E. 629 (1922).

New Jersey—George Jonas Glass Co. v. Glass Bottle Blowers' Association, 77 N. J. Eq. 219, 79 Atl. 262 (1911), *aff'g*, 72 N. J. Eq. 653, 66 Atl. 953 (1907).

Canada—Colter v. Osborne, 16 Manitoba L. R. 397 (1906).

[8] U. S. v. Stevens, 2 Haskell 164 (U. S. 1877); Patterson Glass Co. v. Thomas, *ibid.*

[9] Bowen v. Hall, 6 Q. B. D. 333 (1881); Flood v. Jackson, 2 Q. B. 21 (1895).

[10] Note (1923) 66 HARV. L. REV. 663.

[11] *Supra* note 6.

The damage being irreparable to the plaintiff and he consequently having no adequate remedy at law, injunction is the proper remedy.[12] The courts of England have gone to the extent of holding that a conspiracy to induce workmen to violate their contracts is indictable though no threats or intimidation be proved.[13]

The United States Supreme Court in a case[14] which has been much criticized by organized labor and its supporters, and which the Court of Appeals of this state has definitely refused to follow,[15] has recognized the right of action for persuading an employee to leave his employer, restricting such right of action only if the plaintiff's interest in the protection of his contract rights against individuals by outsiders outweighs the social and individual interests which come into conflict with it.[16]

It is the opinion of the reviewer that the doctrine above enunciated is sound both in law and in practice; that the true issue involved in the case of *Stillwell* v. *Kaplan*[17] called for an application of that doctrine in order that the rights of the plaintiff be properly protected; and that if the court had applied that doctrine as enunciated by Associate Justice Pitney of the United States Supreme Court in the *Hitchman*[18] case and had carefully weighed the rights of the parties and the exigencies of the situation at hand, it might have seen fit to protect the plaintiff's contract with the rival union of the defendant as against the defendant's right to picket and have affirmed the order granting the injunction instead of reversing it.

The trial Court made the following finding of fact:

> "That the sole purpose of Local 306 in picketing the Stilwell Theatre was to induce the public not to patronize said theatre; to injure and destroy the plaintiff's business and by pressure and coercion to compel the plaintiff to breach the contract

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[12] Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (1917); Tosh v. West Kentucky Coal Co., 252 Fed. 44 (C. C. A. 6th, 1918); International Organization v. Leevale Coal Co., 285 Fed. 32 (C. C. A. 4th, 1922); Montgomery v. Pacific Electric R. Co., 293 Fed. 680 (C. C. A. 9th, 1923); *certiorari denied,* 264 U. S. 586, 44 Sup. Ct. 334 (1924); Charleston Dry Dock & Machine Co. v. O'Rourke, 274 Fed. 811 (E. D. S. C. 1921); Central Metal Products Corp. v. O'Brien, 278 Fed. 827 (N. D. Ohio 1922); Third Ave. R. Co. v. Shea, 109 Misc. 18, 179 N. Y. Supp. 43 (1919), *aff'd,* 191 App. Div. 949, 181 N. Y. Supp. 956 (1st Dept. 1920); Floersheimer v. Schlesinger, 115 Misc. 9, 187 N. Y. Supp. 891 (1921); Schwartz & Jaffe v. Hillman, 115 Misc. 61, 189 N. Y. Supp. 21 (1921); Vail Ballon Press v. Casey, 125 Misc. 689, 212 N. Y. Supp. 113 (1925); Thomson Machine Co. v. Brown, 89 N. J. Eq. 329, 104 Atl. 129 (1918); McMichael v. Atlantic Envelope Co., 151 Ga. 776, 108 S. W. 226 (1921).

[13] Reg. v. Duffield, 5 Cox C. C. 404 (1851).

[14] Hitchman Coal & Coke Co. v. Mitchell, *supra* note 12.

[15] Stillwell Theatre, Inc. v. Sam Kaplan, *supra* note 1.

[16] Hitchman Coal & Coke Co. v. Mitchell, *supra* note 12.

[17] *Supra* note 1.

[18] *Supra* note 12.

aforesaid between it and said Empire State Motion Picture Operators Union, Inc., which will not expire until August 31, 1931."

The Appellate Division *unanimously* affirmed the judgment of the trial Court.[19]

Chief Judge Pound of the Court of Appeals in writing the prevailing opinion definitely sidesteps the issue and adheres to the point of view that the only purpose of the union in picketing the plaintiff's theatres was to appeal to the public not to patronize these theatres and that the collateral result thereof might make it unprofitable for the employer to abide by his contract, and hence cause him to breach it.

The writer respectfully but vehemently disagrees. What the defendant wanted was to be employed by the plaintiff. It was no concern of theirs if no one patronized the plaintiff's theatre. Its prime object was to get the plaintiff to employ members of its union and not of the rival union.

At one time the plaintiff did employ members of the defendant's union under a contract whereby the defendant supplied four operators and two assistants at an aggregate weekly wage of $350.00. That contract expired and plaintiff declined to renew it. Instead it contracted with another union, the Empire State Motion Picture Operators Union, whereby this union agreed through collective bargaining to supply and had supplied to plaintiff's satisfaction three operators, at an aggregate weekly wage of $155.00. Each operator averaged 31½ hours per week of six working days. Within a few days after the signing of this contract, the defendant began to picket the theatre of the plaintiff.

The right to picket is not a constitutional right and hence a statute or ordinance which operates to prohibit peaceful picketing is not unconstitutional as infringing upon the inalienable right to life, liberty and the pursuit of happiness.[20] Picketing is lawful only when its object is lawful and hence will be restrained where there is no social or economic advantage to be gained.[21]

It is true that the agreement between the plaintiff and the defendant called for the engaging of more men on the part of the plaintiff than the present agreement; however, it has been held[22] that picketing for the sole purpose of compelling an employer to

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[19] 235 App. Div. 738, 255 N. Y. Supp. 715 (2d Dept. 1931).

[20] Hardie-Tynes Mfg. Co. v. Cruse, *supra* note 7; Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550 (1924).

[21] Schwarcz v. International Ladies Garment Workers Union, 68 Misc. 528, 124 N. Y. Supp. 968 (1910); Stuyvesant Lunch & Bakery Corp. v. Reiner, 110 Misc. 357, 181 N. Y. Supp. 212 (1920), *aff'd*, 192 App. Div. 951, 182 N. Y. Supp. 953 (1st Dept. 1920); Jaeckel v. Kaufman, 187 N. Y. Supp. 889 (1921); Benito Rovira Co. v. Yampolsky, 187 N. Y. Supp. 894 (1921).

[22] Benito Rovira Co. v. Yampolsky, *ibid.*; Jaeckel v. Kaufman, *ibid.*

engage more men when he has no employment for them is unreasonable and will be restrained.

The scale of wages and the hours of labor provided for in the agreement between the plaintiff and the Empire State Union are almost identical with the terms of the contract that existed between the plaintiff and the defendant. Therefore, it is evident that the contract now in existence will not offend a reasonable sense of social justice.

It has been held [23] that the question of whether the act of interference in any particular case with the employer's contract with his employees was carried out in the exercise of a right, or in the performance of a duty, is not a question of law but one of fact. What rights then are to be considered as equal or superior to the right to be employed? Surely, the will to interfere for one's own gratification does not constitute such a superior right.[24]

It is submitted that the contract between the plaintiff and the rival union of the defendant was as fair and equitable to organized labor as the contract between the plaintiff and the defendant which had expired. The defendant was not motivated to picket plaintiff's place of business in order to better working conditions, to obtain better wages for the employees or shorten their hours of labor. The defendant worked under the same conditions itself. It is further submitted that the only motive of the defendant in picketing plaintiff's theatre was to compel the plaintiff to breach its contract with the Empire State Union and to reenter into a contract with the defendant union and employ its members. Picketing with such an object in mind is unlawful and should be restrained.

It has been written [25] that in cases similar to the one at bar, courts ought to decide only the case before them and remain open to all the wisdom the future may hold. The reviewer is heartily in accord with this opinion. Let us gaze for a moment at the practical result of the decision. It unqualifiedly gives one union the right to picket in front of theatres where members of another *bona fide* union are employed. For what purpose and to what avail? We repeat that there can be no intention to better the position of the employee for he is being paid union wages and working under union conditions. Peaceful picketing of all theatres surely will not persuade the public to refrain from attending moving picture houses, and even if it should, no benefit will accrue to these unions. If there are no patrons theatre owners will close down their theatres, and neither of the two unions will have any work for its members. Picketing ordinarily is a powerful weapon and has a persuasive effect on the buying public, but when it becomes universal it loses its

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[23] Order of Railway Conductors v. Jones, 78 Colo. 80, 239 Pac. 882 (1925); Carnes v. St. Paul Union Stockyards Co., *supra* note 4.

[24] Berry v. Donovan, 188 Mass. 353, 74 N. E. 603 (1905).

[25] FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) p. 42.

effect as long as it remains peaceful and becomes unlawful as soon as it turns towards violence.[26]

The author does not condemn combinations which have as their objective interference with the free flow of labor, but he does feel that before such interference is allowed the equities of the parties should be carefully weighed, the sanctity of the contract on the one hand, and the social and economic advantages to be gained on the other.

PHILIP ADELMAN.

LIABILITY OF A LANDLORD FOR NEGLIGENTLY MAKING REPAIRS WHEN NOT OBLIGATED TO DO SO.

In a recent New York case [1] the Court of Appeals laid down a doctrine for determining the liability of a landlord for damage resulting from gratuitous repairs. The facts in that case, as related to this discussion, were briefly these: The plaintiff, a tenant in the premises of the defendant Chapman, had entered into a lease exempting the latter "from all liability to the former for any injury to person or property * * *, whether the said damage or injury shall be caused by or be due to the negligence of the landlord, the landlord's agent, servant, employee or not." [2] Thereafter the roof began to leak and, at the request of the tenant, the landlord sent men down who repaired the roof and departed. They told the tenant that these repairs were not permanent, and would not prevent the roof from leaking. The roof leaked again and the landlord's agents again came to the premises, this time disclosing to the tenant the condition of the roof which permitted the leaking. They also made some temporary repairs, and again departed after repeating the statements they had made the first time. Upon an examination it was revealed that the same condition still existed after their departure. Thereafter, great quantities of water leaked in, which damaged the goods of the tenant, who thereupon brought this action. The Court of Appeals, in dismissing the plaintiff's complaint, predicated its decision on this formula:

The landlord in a gratuitous undertaking is liable for damage to the tenant if he misrepresents the nature and extent of the repairs

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[26] National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902) Typothetae v. Typographical Union No. 6, 132 App. Div. 921, 117 N. Y. Supp. 70 (1st Dept. 1909), *aff'd* without opinion, 196 N. Y. 571, 90 N. E. 1161 (1909); Albro J. Newton Co. v. Erickson, 70 Misc. 291, 126 N. Y. Supp. 949, *aff'd* without opinion, 144 App. Div. 939, 129 N. Y. Supp. 1111 (2nd Dept. 1911).

[1] Kirshenbaum v. General Outdoor Advertising Co., 258 N. Y. 489, 180 N. E. 245 (1932).

[2] *Id.* at 493.