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Note and Comment

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NOTE AND COMMENT

INDUCING BREACH OF CONTRACT—LUMLEY v. GYE.—In the recent case of *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239, 74 L. J. K. B. 525, the House of Lords has removed the doubt cast upon the case of *Lumley* v. *Gye*, 2 E. & B. 216, 22 L. J. Q. B. 463 (1853), by the statements of LORD HERSCHELL, LORD MACNAGHTEN, and LORD SHAND, in *Allen* v. *Flood* [1898], A. C. 1 (1 MICH. LAW REV. 28, on p. 39), by unanimously affirming the decision rendered in the *Glamorgan Coal Co.* case in the Court of Appeal, 72 L. J. K. B. 893, [1903] 2 K. B. 545, (2 MICH. LAW REV. 305), and holding, in the language of the syllabus, "It is unlawful, in the absence of legal justification, for persons to combine in procuring a breach of contract by others, and the absence of malice or sinister or indirect motive, and the desire, in discharge of a supposed duty, to benefit the persons induced to break their contracts, constitute no defence to an action based on such procurement." LORD CHANCELLOR HALSBURY, and LORDS MACNAGHTON, JAMES OF HEREFORD, and LINDLEY, delivered opinions, each taking substantially the same view.

The plaintiffs were mine owners; the defendants were the Miners' Federation and individual members of it; contracts for a definite term of service existed between certain members of the Federation and the mine owners; the Federation directed its members to observe certain "stop days," in order to decrease the output of coal, increase the price thereof, and indirectly

increase their own wages; the defendants knew of the existence of the contracts of service. Plaintiffs alleged defendants, well knowing the terms and conditions of the contracts, *wrongfully* and *maliciously procured* and induced the workmen to break their contracts. The defendants denied this and alleged that they acted in the *bona fide* belief that the course of action *advised* by them would greatly benefit both the plaintiffs and defendants, and that the latter had reasonable justification and excuse for their acts. (For fuller statement of facts see 2 MICH. LAW REVIEW 305). It was found that there was a combination to procure a number of persons to break the contract, that this was done, and serious damage resulted.

On the question of *advice*, LORD HALSBURY says: "The facts in this case shew nothing in the nature of advice." LORD JAMES says: "Can it be lawful to advise the unlawfully breaking of a contract of service. * * * They [the defendants] initiated, they directed, and they gave orders, * * * they induced and procured the workmen to break their contracts. * * * The commission of an unlawful act places them in a very different position from that occupied by a person whose duty it is to offer advice to one who needs to be guided or protected." LORD LINDLEY said: "That there are cases in which it is not actionable to exhort a person to break a contract may be admitted. * * * But the so-called advice here was much more than counsel; it was accompanied by orders to stop, which could not be disobeyed with impunity." This shows a hesitancy to state a rule of liability as broadly as does JUDGE COOLEY, for the "active wrong," where he says the wrong doer "is always responsible for the conduct which he counsels, advises, or directs, and for whatever naturally results from his counsels" (TORTS, 2nd Ed. p. 65). So, too, it perhaps hardly goes as far as *Read* v. *Friendly Society, etc.* [1902] 2 K. B. 732 or HOLMES, C. J., in *Moran* v. *Dunphy*, 177 Mass. 485, 487, where *persuading by malevolent advice*, is equivalent to force or fraud. See also *May* v. *Wood*, 172 Mass. 11, 14.

As to the word *wrongfully*, LORD LINDLEY said: "To break a contract is an unlawful act. * * * Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. * * * Non-lawyers are apt to think that everything is lawful which is not criminally punishable, but this is an entire misconception."

The Federation claimed there was a duty upon it to advise the workmen so as to protect their interests, and that it did so in good faith. To this LORD JAMES replied: "The fact that their motives were good in the interests of those they moved to action does not form any answer to those who have suffered from the unlawful act;" and LORD LINDLEY says: "A legal duty to do what is illegal, and known to be so, is a contradiction in terms."

As to "maliciously," it was admitted there was no hatred or ill will exercised or existing between the defendants and plaintiffs, and LORD JAMES says it "may be treated either as an unnecessary averment, or as being proved by inference drawn from the proof of the act being wrongfully committed;" and LORD LINDLEY says: "When all that is meant by malice is an intention to commit an unlawful act and to exclude all spite or ill feeling, it is better to drop the word and so avoid all misunderstanding."

LORD LINDLEY also makes some pertinent and sensible remarks on the

subject of combination: "It is useless to try and conceal the fact that an organized body of men working together can produce results very different from those which can be produced by an individual without assistance. Moreover, laws adapted to individuals not acting in concert with others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and justified by this undeniable truth." This, perhaps, was implied in *Quinn* v. *Leathem* [1901], A. C. 495, but has been considered inconsistent with *Allen* v. *Flood* [1898], A. C. 1. In the United States, it is often said that what one person may lawfully do, two or more may agree to do jointly without liability, but the cases are not entirely consistent with one another. See *Bohn Manufacturing Co.* v. *Hollis,* 54 Minn. 223, 40 Am. St. R. 319, 55 N. W. 1119, 21 L. R. A. 337 (1893); *Jackson* v. *Stanfield,* 137 Ind. 592, 615, 36 N. E. 345, 37 N. E. 14 (1893); *Ertz* v. *Produce Exchange,* 79 Minn. 140, 48 L. R. A. 90, 79 Am. St. R. 433 (1900); *Howard* v. *Youghiogheny etc. Coal Co.,* 11 Wis. 545, 55 L. R. A. 828 (1901); *National Protective Association* v. *Cumming,* 170 N. Y. 314, 88 Am. St. R. 648 (1902); *West Virginia Transportation Co.* v. *Standard Oil Co.,* 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591 (1902); *State* v. *Van Pelt,* 136 N. C. 633, 49 S. E., 177 (1904); *Martell* v. *White,* 185 Mass. 255, 102 Am. St. Rep. 341, 69 N. E. 1085 (1904).

H. L. W.

VOTE BY MACHINE IS A CONSTITUTIONAL BALLOT.—What little doubt has existed as to the constitutionality of a statute providing for the casting of votes by the aid of voting machines, in a state whose constitution requires that "all votes shall be by ballot," is fast being resolved in favor of the constitutionality of such laws. The Supreme Court of Massachusetts has declared such a statute is not violative of a constitutional requirement that officers "shall be chosen by *written votes*" (*Opinion of the Justices,* 178 Mass. 605, 60 N. E. Rep. 129, 54 L. R. A. 430); and the same opinion was declared in Rhode Island, whose constitution requires that voting be "by ballot" (*In re Voting Machine,* 19 R. I. 729, 36 Atl. Rep. 716, 36 L. R. A. 547). A similar decision by the Michigan Supreme Court, *People ex rel. City of Detroit* v. *Board of Inspectors of Election* (1905), — Mich. —, 102 N. W. Rep. 1029, has already been commented upon in 3 MICH. LAW REV. 648. And still more recently (June, 1905,) a similar statute in Illinois has been declared by the Supreme Court of that state to be not violative of § 2 of Art. 7, Constitution of 1870. *Lynch* v. *Malley,* — Ill. —, 74 N. E. 723. The court, in this case cites, and follows the reasoning of the three cases above referred to, which are believed to be the only decisions in courts of last resort upon this subject, and all of which dwell upon the argument that the purpose of constitutional requirements like those involved is to preserve the secrecy of the ballot, that with changing conditions new and more comprehensive meaning has been read into the words "ballot" and "vote," and that secrecy of voting is secured by the use of the voting machine, with quite as much certainty as by the use of "written or printed slips of paper."

H. M. B.

Administration Upon Estates of Absentees.—A recent case, *Cunnius* v. *Reading School District* (1905), 198 U. S. 458, 25 Sup. Ct. Rep. 721, in the United States Supreme Court throws considerable light upon the much vexed question of whether or not it is possible for a state to provide for the administration of the estates of absentees without violating the "due process of law" clause of the Fourteenth Amendment. The court, in an opinion written by Mr. Justice White, holds that if such administration is based primarily upon the absence of the person for whose estate administration is sought, and not upon his death, it is valid, and does not constitute a taking of property "without due process" of law within the meaning of the amendment.

The facts in brief were these: Margaret Cunnius, prior to the year 1888, was domiciled in Pennsylvania and was entitled to receive from the trustees of the Reading School District annual interest on the sum of $569.61. In 1888 she disappeared, and had never been heard from up to 1897, when her son took out letters of administration upon her estate under the statute, and obtained payment of the accrued interest. In 1899, Margaret Cunnius, now Mrs. Smith, returned and sued the trustees for the money thus paid over; and, upon their pleading the statute in defence, attacked its constitutionality on the ground that it violated the Fourteenth Amendment by depriving her of her property without due process of law. From a decision of the Supreme Court of Pennsylvania (206 Pa. St. 469, 98 Am. St. Rep. 790, 56 Atl. Rep. 16) affirming the constitutionality of the statute, she took the case to the Supreme Court of the United States on writ of error.

The statute in question (Laws Pa. 1885, p. 155, Brightly's Purdon's Dig. Supp. 1885, p. 2184), is entitled "An act relating to the granting of letters of administration upon the estates of persons presumed to be dead from their long absence from their former domicile" and provides, in substance, that, upon application made to the register of wills under the circumstances set out in the title, the register shall certify the same to the Orphan's Court, which, after a hearing, if satisfied that the legal presumption of death is made out, shall so decree, and cause to be published for two weeks a notice requiring the absentee within three months to prove his continuance in life; that, if such proof is made, the letters shall not issue, otherwise they shall issue, and, together with all acts done thereunder, shall be valid until revoked. The property rights of the absentee are safeguarded, in the event of his return, by requiring that, before any distribution of his estate shall be made, each beneficiary thereunder shall furnish "personal real security" conditioned to reimburse the returning absentee for any property so received from his estate; and, if such security cannot be furnished, the money involved is to be placed at interest until the court shall decree its payment. A further provision makes invalid as against the absentee title to any property distributed during his absence.

The plaintiff set up three grounds of unconstitutionality: (1) that no government has inherent power to administer the estate of a living person, upon the presumption that he is dead; (2) that, even if such power exists at common law, it is expressly prohibited in this country by the Fourteenth Amendment; and (3) that the statute in question, in not providing for due notice to the absentee, in effect deprives him of property without due process

of law. None of these arguments found favor with the court. As to the first, it held, citing and reviewing the "absentee" provisions of the Roman Law, the Code Napoléon and the Louisiana Code, that such legislation is a legitimate and recognized exercise of the police power, provided, however, that it be based upon the fact of absence rather than the presumption of death; and, as to the third, it followed the ruling of the Supreme Court of Pennsylvania in holding the notice provided for to be reasonable.

The crux of the case lay in plaintiff's second contention that any administration upon the estate of an absentee violates the Fourteenth Amendment, if, as a matter of fact, the person was alive at the time the administration was instituted. This is the doctrine laid down in *Scott* v. *McNeal,* 154 U. S. 34, 14 Sup. Ct. Rep. 1108, and generally followed since that decision. The court, however, distinguishes the McNeal case from the one at bar, and holds it to be authority only for the proposition that a court, depending for its jurisdiction upon the death of a person, was without such jurisdiction until death occurs.

The distinction drawn by the court between the administration of the absentee as such and a deceased person seems to be logical and simple, but the reasons advanced for holding the Pennsylvania statute to belong to the former class do not appear to be conclusive. It is said without discussion that the statute is, in substance, a provision for a special proceeding for the administration of the estates of absentees, distinct from the general law of that state providing for the settlement of the estates of deceased persons. Granting this to be true, the question still remains, upon what theory the statute is based. Apparently it was upon the presumption of death, for it provides that letters shall not issue until after a judicial decree that the absentee is dead; and proof of his continuance in life is a complete bar to the issue. Furthermore, any such letters are revocable upon proof that the absentee is alive. It would seem, therefore, that the essential element of the proceeding is not the absence of the person for whom administration is sought, but his death. If this were purely an "absentee" proceeding, similar to those of the Louisiana Code (Revised Civil Code 1900, Art. 47-86), or the Code Napoléon, it must follow that the letters would issue upon proof of absence only; but this is negatived by the statute itself. Practically the only difference between the Pennsylvania statute and those of Vermont (St. 1894, § 2387) and Texas (Sayles Civ. Stat., Art. 1842), for instance, is that, in the latter, death is presumed from the absence, without a judicial decree, while the former requires a proceeding in court.

Viewing the statutes in other states in the light of the present case, it must be admitted that very few will stand the test therein laid down. The two statutes above cited, *i. e.,* Texas and Vermont, do not call for a special proceeding, although otherwise they seem to afford equal protection to the absentee. The same is true of the statutes of Arkansas (Dig. Stat. 1904, §§ 3081 and 235) and New Jersey. In Missouri (Rev. Stat. 1899, §§ 265 and 3144), Indiana (Burns' Ind. Stat. Rev. 1901, § 2385), Rhode Island (Gen. Laws 1896, p. 710), and Massachusetts (Rev. Laws 1902, p. 1304, et seq.); the statutes bar the absentee's right to recover either all, or a

portion, of his estate, and so deprive him of property without due process of law.

After all, the decision seems to have been based upon the broad ground of public policy, rather than upon a strict application of logical principles. It presents a simple and easy solution of one of the most difficult problems connected with the interpretation of the Fourteenth Amendment and will, undoubtedly, be of great benefit in the framing of future legislation upon this subject. C. H. L'H.

A Labor Union's Right to Declare and Carry Out a Boycott.—What may or may not be done by a labor union to further the purposes of its organization is a much disputed question. The right of individuals to combine for the purpose of improving their position in the industrial world, and more specifically to secure an advance in wages, is now universally conceded, whatever the law may formerly have been on the subject. A strike, as such, is also quite generally held not to be unlawful. In the case of *Farmers' Loan and Trust Co.* v. *Northern Pac. R. Co. et al.*, 60 Fed. Rep. 805, the court took the view that a strike was necessarily illegal. "It has well been said that the wit of man could not devise a legal strike because compulsion is the leading idea of it." However, it is believed that a legal strike is altogether possible. In *Arthur et al.* v. *Oakes et al.*, 63 Fed. Rep. 310, Mr. Justice Harlan said: "We are not prepared, in the absence of evidence, to hold, as a matter of law, that a combination among employés having for its object their orderly withdrawal, in large numbers or in a body, from the service of their employers, on account simply of a reduction in their wages, is not a 'strike,' within the meaning of the word as commonly used. Such a withdrawal although amounting to a strike, is not, as we have already said, either illegal or criminal."

When we come to consider the right of a labor union to organize and carry out a boycott against an employer, we are confronted with a very different question.

As typical of a very numerous class of late cases that have arisen out of the struggle for supremacy that is being waged between the powerful organizations of capital on the one hand and the equally powerful organizations of labor on the other, may be mentioned the case of *Loewe et al.* v. *California State Federation of Labor* (1905), 139 Fed. Rep. 71. This case grew out of the following circumstances:

The complainants, domiciled in Connecticut, are engaged in the manufacture and sale of hats. The defendants, California State Federation of Labor, San Francisco Labor Council, and Building Trades Council of San Francisco, are unincorporated Labor Unions affiliated with the American Federation of Labor.

The complainants operate an "open shop." The defendants sought to aid the scheme of the United Hatters of North America to force all manufacturers of hats in the United States to unionize their shops. The means used was a boycott instituted against complainants, their customers, and all persons selling or wearing hats made by them. Circular letters were sent out, pickets established, and many other questionable practices resorted to, but no actual

force was used. It was contended on the part of the defendants that they had done nothing else than urge upon the friends of labor to use their patronage for the benefit of labor; that no force, threat, or intimidation had been used by defendants to enforce the alleged boycott; that they were, therefore, within their rights. An injunction pendente lite was prayed. The injunction was granted.

The commission in the Anthracite Coal Strike case, in speaking of boycott, says: "A word of evil omen and unhappy origin, * * * a form of coercion by which a combination of many persons seeks to work their will upon a single person, or upon a few persons, by compelling others to abstain from social or beneficial business intercourse with such person or persons * * * Carried to the extent sometimes practiced in aid of a strike, * * * it is a cruel weapon of aggression, and its use immoral and anti-social."

State v. *Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23, a leading case, was a criminal prosecution for conspiracy. The purpose of the conspiracy was to compel a certain publishing house to unionize its shop. The means to be used was a boycott. The case then, apart from the form of proceeding, is very similar to the *Loewe Case*. The court characterizes the attitude of the defendants towards the publishing company in this way: "You shall discharge men you have in your employ, and you shall hereafter employ only such men as we shall name. It is true, we have no interest in your business; we have no capital invested therein; we are in no wise responsible for its losses or failure; we are not directly benefited by its successes, and we do not participate in its profits; yet we have a right to control its management and compel you to submit to our dictation."

Boycotts have been enjoined in the following cases: *Casey* v. *Typographical Union, No. 3*, 45 Fed. 135, 12 L. R. A. 193; *Barr* v. *The Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *My Maryland Lodge, No. 186, I. A. of M.* v. *Adt.* (Md.), 59 Atl. 721; *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am St. Rep. 421.

In the following cases the form of action was not for an injunction, but was either a criminal prosecution for conspiracy or an action for damages, but the same principles are involved and the same view of boycotting is taken as in *Loewe* v. *California State Federation of Labor; State* v. *Glidden* (above); *Crump* v. *Commonwealth*, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; *State* v. *Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *State* v. *Donaldson et al.*, 32 N. J. Law 151, 90 Am. Dec. 649; *Thomas* v. *Cincinnati, N. O. & T. P. Ry. Co.* (C. C.), 62 Fed. Rep. 803.

The very recent case of *Barnes et al.* v. *Typographical Union, No. 16, et al.* (Sup. Ct. Cook Co. Ill.), 38 CHICAGO LEGAL NEWS, p. 73 (October 21, 1905), also involves substantially the same principles. A preliminary injunction having been granted, the defendants moved to have it dissolved. The motion was denied. The primary contention of the defendants in this case was that the means resorted to, *i. e.*, boycotting, etc., was a species of lawful competition. The defense is by no means a new one; nor can it be said that it possesses any considerable degree of merit. Certainly it cannot be successfully maintained that the defandants were engaged in competition with their employers, since competition of necessity implies a similarity of occupation

or business; again, the object of the union cannot be said to be the securing of free competition between the union and the non-union man, since the fundamental aim of unionism is to secure the very opposite of free competition, in a word, to create a monopoly of labor. It is interesting to note in passing that certain of the defendants in this case are reported to have declared their intentions of disregarding the injunction.

Perhaps the most common line of defence in suits of this kind is, that the acts are lawful, that one person could have done them with impunity, that therefore to make the actors liable, either in equity or at law, is to make motive (or as it is often termed, malice,) and combination elements of liability.

It has been very often asserted that "what one man may do lawfully, acting alone, several may do in combination." This is far from being true as an unqualified statement. On this point, the famous CHIEF JUSTICE GIBSON has said, in *Commonwealth* v. *Carlisle,* Brightly N. P. Pa. 36-41: "There is, between the different parts of the body politic, a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and condition, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest, or that of any other individual, beyond the limit of fair competition. But, the increase of power by combination of means being in geometrical proportion to the number concerned, an association may be able to give it impulse, not only to the oppression of individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least, in a legal view, when done by an individual."

In *Arthur et al.* v. *Oakes et al.,* 63 Fed. Rep. 310, 11 C. C. A. 209, 25 L. R. A. 414, Mr. JUSTICE HARLAN draws the distinction between the right of an individual, acting as such, and his rights when acting in combination with others. His views coincide in this respect with those of JUSTICE GIBSON. See also *Mogul Steamship Co.* v. *McGregor,* 23 Q. B. D. 598.

The celebrated case of *Allen* v. *Flood,* [1898] A. C. 1, is widely cited in support of the proposition that "an act which is not in itself actionable does not become so because the motive is malicious or bad." On this point there is much confusion in the cases and among law writers in general both in England and in this country. In England, it must be observed, that the case of *Quinn* v. *Leathem* [1901] A. C. 495, considerably modifies the doctrine of *Allen* v. *Flood.* In the United States, the cases of *Bohn Manuf'g Co.* v. *Hollis,* 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, and *Transportation Co.* v. *Standard Oil Co.,* 50 W. Va. 611, 40 S. E. 591, adhere literally to the doctrine of *Allen* v. *Flood.* On the other hand, the cases are very numerous in this country holding directly against *Allen* v. *Flood,* or at least, modifying the rule as to malice there laid down. As an example of the more radical variety of American cases may be mentioned *Thomas* v. *Cincinnati, N. O. &* T. P. Ry. Co., 62 Fed. Rep. 803. The court in this case says: "It is the *motive* for quitting, and the end sought thereby, that make the injury inflicted unlawful and the combination by which it is affected an unlawful conspiracy."

It is believed that much of the confusion in the cases is due to an indiscriminate and altogether too frequent use of the term malice in this connection. In *Aikens* v. *Wisconsin,* 195 U. S. 194, 25 Sup. Ct. 3, 49 L. Ed. 154, Mr. JUSTICE HOLMES, in discussing the question of malice, says: "When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied, because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts."

It would seem that the ultimate test, which should move the court to grant relief as against a labor union or its members, should be the same as in all other cases of actionable torts: Has the complainant been deprived of any privilege or property right, and if so, has the one depriving him a legal justification. M. C. McG.