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THE LEGAL RIGHTS AND DUTIES OF EMPLOYERS AND EMPLOYED, AS AFFECTING THE INTERESTS OF THE PUBLIC.<sup>1</sup>

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THE words used in stating the question suggested by the title are unfortunate. They are adopted to avoid using words which are of the very essence of the questions involved—master and servant; apparently because of there being something derogatory to dignity to recognize the relation of master or the position as servant. Yet the whole of the doctrine of liability of the one for the acts of the other, as well as all the doctrine as to control, and of the effect of possession or occupation, depends on the relation of master and servant, and has no place whatever in that of employed and employer.

<sup>1</sup> The substance of this paper was delivered in the form of an address before the Law School of the University of Pennsylvania, in February, 1893. In its present form the paper is published at the request of the Editors, who consider the topic as peculiarly timely.

A reference to this, as matter of taste, would be out of place. But is it not well to mark the subtle effect on reasoning of the misuse of a word?

Is it surprising that those who are unaware of the real essential distinction between master and employer, servant and employed, or the more common employee, should fail to observe the distinctions in rights and duties growing out of the relations?

All lawyers are very keenly alive to the distinction between the independent contractor and the mere servant. While there is nothing servile imported by the word servant, it does mean that there is a right in one man to direct the conduct of another, and consequently there is a liability for that conduct; the conduct or acts of the one are the conduct and acts of the other. Whenever the right of direction exists, there is the relation of master and servant, and whenever this relation exists, the consequences stated must follow.

This is not a rule of universal jurisprudence; it certainly was not a rule in that nation which has given to the world jurisprudence as a science, from whom all Europe has derived its system of law as administered by lawyers—not the statutory or merely arbitrary rules, but all that there is of law created by reasoning. But for us it is the same thing as if this rule was one of the necessary conclusions of the human mind. There is not, as far as I can ascertain, a trace of any other rule in the common law at any period. I think I have seen evidence of the consciousness that there is something defective in the reasoning on which this stands; in two of the greatest of our lawyers, Lord WENSLEYDALE and Lord HOLT.

There is a well-settled rule, applied in a large and important class of cases, which it may be proper to mention to illustrate the vital importance of this distinction between servant and employed. The master of a ship is the servant of the owner, and the latter is liable for the negligence of the former, while himself totally unable to form a judgment on the subject, or to give a direction, or even to

tender rational advice. The passenger may be the employer of the master, but there is not the faintest resemblance to the relations of master and servant between them, or only so far as to make the employed the master of the employer. But then master assumes a new meaning.

Evidently, the question for discussion is the relations of those species of the employed that, in the legal aspect, are servants of the employer.

Apparently, this relation is simple, and free from all those things that are stigmatized as technicalities; and this is true, but it is not everyone that has noticed the existence of some very technical rules, nor that it is the purest of technicalities that alone excluded domestic slavery before there was any legislation made necessary by the existence of that institution among us. I mention this because it is the cause of the most difficult question for solution in the whole subject, and this is effected solely by the law for the enforcement of contracts.

The relation of master and servant (laying apprenticeship and the contracts on behalf of infants out of the case) arises by contract, and cannot possibly arise otherwise. Even when the contract is implied, or not expressed, it is difficult to suggest a case where the fact of the contract, and its terms, are not really as distinctly understood, as when everything on each side is clearly expressed. As a general rule, the only sanction for such contracts is an action for the breach. Damages may be recovered for non-performance; performance cannot be compelled. Indeed, the common law furnishes no other redress, either on contracts or for property, since the real actions were abolished, saving that of ejectment. It is the equity courts that devised the remedy of specific performance, and these have never allowed the grounds for this remedy,—the worthlessness of the legal remedy—to sustain a claim to this kind of redress where personal service of any continuance would be necessary. It is a thing the Courts *have never dreamed of enforcing*.<sup>1</sup> The fact that a man must

<sup>1</sup> Jessel, M. R., 14 Ch., Div. 487, *Rigby v. Connol*.

personally do some act is of no moment. It is not any ridiculous regard for human dignity that excludes the jurisdiction; the execution of a deed is as personal an act as the forging of a horseshoe. The latter is incapable of being compelled, the former is compelled every day.

The single instance where the remedy, as a matter of propriety, might be applied, is the case of an opera singer; and it will be recollected how this was dealt with.

What is the reason for this rule? Precisely the same that makes it impossible to pass the *title* to future earnings; it belongs to the region of politics. If equity permitted this to come within its modification of the common-law rule as to the assignability of choses in action, human slavery would at once be established. Still more obvious is it, that if contracts for labor could be specifically enforced, human slavery would be sanctioned, even though it was confined to cases of consent.<sup>1</sup>

I do not think one can fail to see the important bearing on the problem, that I hope to discuss, that this fact has. Since the abolishment of imprisonment for debt, the legal remedy for non-performance of a contract to *serve* is so utterly futile that probably no one ever heard of such an action. Suits on contracts to employ are quite common. What an element it is in the discussion of rights created by contracts that there is a remedy for one party only!

The relation we are considering is one created by contract incapable of compulsory performance, and with no real remedy for the failure of performance by the servant furnished by the law, while none is more dreaded by the master than the one that the common law impartially affords to both. His case must be clear, or he pays full wages, even for no services rendered. It is not very important, therefore, whether time contracts are actually made or not, for there are probably no time contracts—none in which the servant may not leave the employment, or in which the master cannot discharge on ceasing to be

<sup>1</sup>See Lord MANSFIELD'S remark during the argument of *Chippen-dale v. Tomlinson*, 4 Doug., 321.

able to furnish work. This sort of contract, whether by the day or for a term, ought to give rise to no vexed questions, and as an abstraction it does not. It is a contract at will, from moment to moment, not even involving the term of one working day. How can there arise any questions of law about it? Yet there have arisen questions so grave that in their solution there have been homicide and mutilation, and numberless acts of minor violence; whether these were criminal or praiseworthy, I have not the means of forming an opinion, and will not discuss hypothetical cases, even though they bear the marks of authority and certainty of a printed and published statement.

There has been one authoritative and authentic statement of the grounds on which these acts of violence are justified in resistance of the right of the master to employ others. I may allude to it hereafter. At present I desire to deal with the questions, as far as possible, free from any particular instance. It is desirable, if possible, to generalize before considering particular cases.

What difference is there between the purchaser of labor, whether skilled or not, and any other person seeking to bargain for something he is to get?

We are dealing with the legal aspect, not with the sentimental nor with the moral questions. As far as I am aware, there is no distinction between the employers of labor and any other species of employment other than the duty of obedience to the command of the employer. This is involved in the relation with which we are dealing. But this is not a subject any one has ever disputed. No one has ever supposed that the class of persons we are speaking of has the right to insist on doing their work in their own way, regardless of the command of the employer. The rate of wages has been the constant subject of differences. Hours of labor many years since were also the grounds of serious disputes, and there is a general movement looking to the regulation of this by statute. This belongs to political economy, not law. But, so far as the law is concerned, all rights and duties are regulated by contracts, including,

of course, custom in defining the meaning of the words used. The contract when made is on the footing of all other contracts of purchase, the sanction of which is only damages for the breach. Anything like duty to continue the contract, or to give the preference to those who have been employed over strangers, has never existed; it could not well be without a correlative duty to serve, and no one has suggested the existence of such a duty. That would be temporary slavery. There is, however, in most States, a legislative license affecting a particular class of the employed which deserves special attention. I need scarcely say I disclaim all right and all intention to discuss the prudence or the wisdom of such statutes. It is impossible to doubt that there are very strong reasons for sanctioning combinations of the employed to regulate the terms of their employment. Without it there can be no real fairness in respect of capacity to discuss the terms of the bargain. We will take Pennsylvania as an example.

The Act of Assembly in that commonwealth provides: (1) That a refusal to work by a laborer, workingman or journeyman, for any one, when in his opinion the wages are insufficient, or the treatment of the laborer, etc., is brutal or offensive, shall not be punishable. There is no meaning in this. The act never was punishable. (2) But coupled with this is the same provision in the plural, and the right is extended to the laborer, etc., as the member of any club, society or association; and then the refusal to work is justifiable, if the continued labor would be contrary to the rules, regulations or by-laws of any club, etc., to which the laborer, etc., belongs. Then comes two provisos: one, that the Act shall not apply to a member of any club, etc., the constitution, by-laws, rules and regulations of which are in strict conformity to the Constitution of this State and of the United States; the other, that retains the liability to prosecution for hindering *any one* who desires to labor for *their* employer, and "their" refers to the combined persons who hinder.

This certainly makes a vast change in the legal rela-

tions of master and servant. But it is only the relation as it affects the State. The rights and liabilities of the parties between themselves are not changed. In this respect the law is precisely as it is in reference to the violent enforcing of the right of possession. The statute of forcible entry and detainer does not affect the rights of property unless indirectly by the judgment of restitution, when possession has been obtained contrary to the provisions of the statute.

It is impossible to dispute the importance of this enactment. The whole law of conspiracy, and the whole law in relation to riots and unlawful assemblies, is involved. Their chief support rests on the notorious dangers resulting from large gatherings of men with no supervision by government, and the almost boundless consequences of combination. Whether the inevitable consequences were foreseen, and are sufficiently guarded against, is, perhaps, useless to discuss. Steps like this are certainly advances, and cannot be easily retracted.

It is difficult to suppose that the first branch of the legislation could have been supposed to be necessary. Unless the breach of a contract was intended to be sanctioned, there never was a doubt as to the existence of the right to decline to work because the wages were insufficient or because of ill treatment. But one cannot but be surprised that the clause that imposed the obligation to withdraw from work at the dictate of a secret society should have been permitted. True, it adds nothing to the license already conferred, but it appears to sanction, and does sanction, as far as it can, the surrender of one's liberty to the dictate of a club or society. Whether it is wise to do this, or whether it would have been wise to attempt to battle with this evil of a voluntary surrender of one's right to labor, may well be questioned. But the suffering that has and must ensue until the evils are eliminated is enormous. It is curious to note the changes of a century in this respect. The power to license workmen—the control of the capacity to use one's skill in a trade during the last century—was a tyranny of the most oppressive kind,

but it was in the masters. It is now transferred to the men. But it is the power to contract that is thus affected, not the contract when made.

Therefore, it is plain that there is no *law* affecting the rights of master and servant, as such, other than the law of the contract; its sanction being abundant to compel adherence by the master, and utterly worthless as affecting the servant, unless he is possessed of property which he cannot persuade a jury is worth less than three hundred dollars.

I do not think any reasonable man will assert that it was the intention of the legislature to tack on to every contract a condition that it is to cease to be binding whenever a club or society votes that it shall not be performed. I think it means that the people who, by a vote, prevent men from contracting to work cannot be indicted, and that this is all that it does mean.

There are two points in the relation of master and servant that may be supposed to be the natural outcome of this legislation. Singularly enough, the more unreasonable and extravagant of the two is expressly sanctioned by the legislation, unless the capacity of the club to legislate has been restricted by the Act itself.

Everyone who has watched the papers must have noticed the frequency of the issue of a command to withdraw from work, because material to be used has been made or worked upon by persons not belonging to a particular club or society. Those who are not concerned in the actual operations of builders find it difficult to conceive how any one can be bold enough to contract when the performance depends on the capacity of anybody to deprive him of the power of performance in this way. Obviously, there is some way of escaping, or all building, indeed, all work, would stop. A reference to the statute shows that this is sanctioned unless there is something in the Constitution that prevents. I am aware of nothing that can be tortured into this unless it be the platitude of the inalienable rights, which unfortunately works for the by-

law as well as against it. There is no reference to the laws of the State in the proviso. There is no requirement that the by-law shall conform to the existing laws of the State regulating conspiracy; quite the reverse. There is not even the vague clause requiring that the regulations shall be reasonable. The laborer may not only contract to abstain from work to remedy any grievance, but to bring about consequences as remote as the quarrying of stone in a foreign State, to compel submission by the masters there to their workmen; and we must admit that this, which appears to shock every sense of justice, is expressly sanctioned as the right of all laborers, workingmen and journeymen; but the injustice is in the servant, not in the law. All that the law has done is to relieve the servant from the penalty attached to a combination. But for the combination there never was any legal objection to these acts. But as we would all feel that a master who agreed to dismiss a servant for no other cause than to gratify the malice of a friend was utterly contemptible, so one cannot fail to observe the degradation of the moral character which can consent to abandon the master in his hour of need at the dictate of another, and for no cause whatever affecting himself. I myself cannot doubt that no such consequences as these were foreseen. If we look at the statute we find the grounds on which the men may combine to refuse to work are perfectly reasonable—insufficiency of wages and brutal treatment. Could any reasonable man have supposed that such a power as now exists and is exercised was covered by the license to plead the rule of the club? This is certainly a part of the law regulating the relation of master and servant, though it is not possible to state it without seeming to trench upon the province of the legislature in forecasting the consequences of its conduct.

There are, however, two things that cannot be omitted from the present discussion. One is a remedy that appears to commend itself to a great number of persons—*arbitration*; the other is the rights of the workmen resulting from actual occupation of the premises on which the employment is exercised.

As to the first. Everything depends on correct definitions in these matters. If by arbitration is meant the right to advise, and the duty to listen and comprehend the advice, I will say but little. If any one supposes that benefits can result from calling in third persons to advise, by all means let it be tried. Only we must not deceive ourselves by calling this arbitration. It has not one feature of arbitration. That means, not advice, but command. It relates to existing rights and duties. It is a determination by a tribunal other than the ordinary courts of the country, as to what are the rights of disputants, and what must be done by one or both. These are fixed. Arbitration to determine what shall be right is not arbitration. The difficulty here is, there are no rights and no duties. No one can possibly say he has a right to the labor of another unless there is a contract that binds, and probably no instance can be produced of any difference existing on that subject. On the other hand, there cannot be conceived a right to be employed unless there is a contract, and the meaning of such a contract has probably never led to a strike. The grounds for striking have been hours, wages, the persons to be employed, for whom the work may be done, and what materials may be used. BURNS' pathetic lines are caricatured. The beggar for employment is a fellow-servant or laborer; and the fellow-laborer is one who refuses him permission to toil. The master is now the beggar for permission to employ. Arbitration *ex vi termini* means a sentence which is as binding and enforceable as a judgment of a court. Obviously, there is no power anywhere adequate to this. I do not dispute, as an abstraction, the power of the legislature, though I think it extremely doubtful whether compulsion to perform a contract of the kind we are discussing is within the powers of the legislature. It actually involves the power to subject one to domestic slavery. But assuming all that can be asked, that the power is limited to what all will agree are usual and proper contracts, of what practical value is compulsory labor with a thousand intelligent minds bent on evasion?

The master's duties are definite, and can be readily enforced; the servant's, never. What are the guaranties of all labor other than a conscientious sense of duty? Will any one exist in the case of compulsory labor? What reliance is there on the sense of duty in one who feels he is under unjust compulsion? Who would entrust the safety of a mill to operatives thus coerced to work?

To my mind, the notion of settling such matters by arbitration, or anything of that nature, however modified, is utterly absurd, for the evil has no relation to the remedy. The power to control one's business, and the power to determine what obligations will be assumed, cannot be the subject of arbitration; that would make the arbitrator the manager of the business on the one side and the owner of the men on the other. Anything short of this is not *arbitration*, though it may be the wisest of schemes, and though it may solve all difficulties.

The right of the employed to property entrusted to them in the performance of their work, their right to the houses they are furnished with, and to the mills or buildings they occupy when at work, is a most important branch of this subject. There has been some confusion and one mistake in this matter. It has even been supposed to depend on the sacredness of the home; we have even seen the old maxim quoted, "a man's house is his castle." It would be better to rest it on the rule in *Taltarum's* case, for that could not mislead, and this misleads even those who ought to know better.

The basis of the rule governing the relation is this—the possession of the servant is the possession of the master. It extends to the possession of all kinds of property. There is no distinction between the character of the possession of a body-servant of his master's clothes and watch and the possession of a house or mill by one employed by the owner, if the possession is in the character of servant, even if it be that of one employed to hold the possession. This doctrine is based on another, that, so far as I know, is a universal proposition. It extends beyond the relation of

master and servant. One who receives anything for a particular purpose holds for that purpose only, and as the agent of the depositor, and can set up no antagonistic claim.<sup>1</sup> We see this in cases of remittances, coupled with a direction to apply the proceeds—the direction must be obeyed, or the remittance returned; it cannot be retained on any other pretence. A tenant cannot set up even his own title as against his lessor. So the person entrusted as a servant, whether it be with one's food, clothing, household goods, the key of the safe, or with a habitation, is not a possessor or in possession—he holds for and as the master.

The rule is stated by the great authority, Lord COKE, in a case occurring in the Star Chamber, reported in Moore. The chiefs of the three courts united in the judgment. Could the owner of a house be indicted for forcible entry, or for a riot, for violently entering the house and ousting the person who held it as care-taker for the owner? The parties were considerable persons. A countess, who was the owner, and Dame Russell, who was the caretaker, and the house was a castle. The ruling was, there was no forcible entry, because the person who entered, entered on himself, and there was no riot, because the violence was upon the person at whose request it was employed. Possibly, we might state the reasons differently to-day. Every generation has its own mode of reasoning, at least among lawyers. We might explain it as Chief Justice GIBSON did, that the statute was not intended to protect the wrong-doer, but to prevent violence, and that it was not improper to use the force necessary to repossess one's self of property confessedly entrusted to another as one's servant or caretaker, and the riot, if there was one, was that of the man who undertook to resist, by violence, the performance of his duty to surrender possession. This is but a modern paraphrase of Lord COKE's reasoning, which, to the ignorant, may seem absurd. In fact, there is no sort of difference between a servant and any intruder, saving that the servant, having

<sup>1</sup>Delany v. Fox, 2 C. B. N. S., 768; Williams v. Williams, 3 Merri-  
vale, 159.

been invited to enter, must be given an opportunity to retire, without suffering violence, unless he refuses to comply with the request to leave. In Massachusetts, I notice that within a year the knocking down a man who has entered after being asked to leave, is not recognized as a breach even of the public peace.

It must be obvious that if actual occupancy, of itself, gives the right to insist on the use of that form of redress, which is assured to persons claiming title, it would be impossible to furnish accommodations to any servant; for who could possibly assign a chamber to a domestic if ejection was the only remedy to obtain possession of the room when the relation of servant ceased? Nor is there any possible ground for making a distinction between separate dwellings, furnished as part of the wages, and the room within the master's dwelling. It would be strange, indeed, if the law were otherwise. Whatever else we may say of the common law, it is a practical system. And can anything be more utterly incapable of being applied to human affairs than a rule that a servant, if furnished with a house or room by the master, cannot be removed from it otherwise than by a process intended to determine the legal right of possession to land?

It will, therefore, be found that there is not any variation or hesitation in applying the principle that the possession of the servant is the possession of the master, and this, whether it is necessary to secure the right of the master or not. It is applied to cases in which the relations of master and servant are absolutely excluded from consideration. I will give you some examples, for there are some elementary propositions for which it is difficult to find express authority. I think it will be admitted that one who, as tenant, had the right of possession, has, after his tenancy expires, as much of right to possession as any one can possibly have whose only right is that he was originally invited to enter, or placed in possession by the owner. What is the right of such a person is exactly defined by GIBSON, C. J.<sup>1</sup> It is that the

<sup>1</sup> *Overseer v. Lewis*, 1 W. & S., 90.

owner can forcibly dispossess him on the instant, by day or by night, and for motives of mere caprice; the only qualification is that he may not use any *greater force than may be necessary, and do no wanton damage*. Is it necessary to say this is the legal right? Probably no man ever acted in such a spirit, but it is essential that the law shall clearly define legal rights, and not qualify them by any reference to laws of courtesy, propriety, or even humanity, and for this plain reason that any qualification is one of law, and, therefore, universal, and introduces elements of uncertainty in the application that render these plain rules for plain people utterly incapable of being used. A servant occupies the position of all persons who are on the premises at the request of the owner. The request being withdrawn, all are mere intruders, except possibly for the space of time that is required for them to remove their persons.

The books are full of this, but generally by implication, for I am aware of but one who ever disputed it. Indirectly it has been disputed in a multitude of cases, but the question has always been, What are the relations? Are they that of master and servant? That being ascertained, the consequences follow. *Hughes v. Derry*,<sup>1</sup> before PARKE, B., the defendant had been put in possession of a house on the farm of which he was the manager, under a written agreement *allowing him and his family to have the use of the dwelling free of rent*. Was this a lease? No. Was he entitled to notice to quit? No; because the *service* (employment, we would call it) had ended, and the occupation was a mode of remunerating the bailiff. The other cases are collected in Smith's "Master and Servant." He says, page 80: "Where a servant occupies premises belonging to his master, and has, on that account, less wages, his occupation is that of the master."

He illustrates this by a coachman having rooms over a stable, a gamekeeper with a lodge in the park, a gardener living in an out-house, a porter at a lodge at the park gate, and he adds, and such servants, when dismissed from the

<sup>1</sup> 9 C. & P., 494.

service, have no right to continue in the occupancy of these houses as tenants, nor are they entitled to notice to quit. Some cases that he cites deserve attention.<sup>1</sup> A person was put into possession of a building to carry on trade, and there was a stipulation for a notice to quit. But as the occupation was for the master, and as his servant, it was held that he could be ejected summarily and without notice. Such a person is not *de jure* even entitled to a reasonable time to remove his furniture.<sup>2</sup> The judgment is that of Lord TENTERDEN, the gentlest of men. The rule does not apply if the servant hires the house, though the master pays the rent. An occupation as a servant does not give a settlement, nor make the servant liable to be rated, nor qualify him for office, as being a substantial housekeeper, and what is meant by *servant* is shown by the decisions. A Wesleyan minister is such in respect of the house furnished him by his employers. The manager of book society, officers of government if compelled to reside, preachers at Canterbury Cathedral, and the hall-keeper for a borough—these are servants. The occupation is that of the master, not of the actual occupant, in an action for disturbance of a way,<sup>3</sup> and in an indictment for burglary, there stated by ELLENBOROUGH, C. J., and decided in 2 Taunton, 339, where MANSFIELD, C. J., asks, as the test, Could he (the owner) not have turned him (the servant) out when he would?

I may here quote, in justification for what may seem so plain, the remark of ERLE, C. J.,<sup>4</sup> in *White v. Bailey*, that this distinction is of extreme importance, for it is what makes the difference between an estate and no estate, which is where one is put in possession by another to perform a duty he is employed to do.<sup>5</sup>

The result of all this is, that there are no other rela-

<sup>1</sup> *Mahew v. Suttle*, 4 E. & Bl., 347.

<sup>2</sup> *Nicholl v. McKaig*, 10 B. & Cr., 721.

<sup>3</sup> *Berlie v. Beaumont*, 16 East., 33.

<sup>4</sup> 31 L. J., C. P., 253.

<sup>5</sup> The cases is cited in Smith's "Master and Servant," 83.

tions between the employed and the employer recognized by law except those that arise by contract, and there is no mode of enforcing that contract that differs from the remedies for all contracts of hire or purchase.

There is no possession or occupancy of land of the employer saving at the will of and for the employed, and this right and duty terminates at the employer's mere will, and that instantly, and his motive cannot be inquired into—a rule common to all matters of property.

I have ventured to criticize the remedy of arbitration, which, to my mind, is absolutely misleading, because it appears to contain a remedy which it certainly does not. What it is supposed to contain is something that, if correctly defined, no one has ever, or probably ever will, propose.

If the foregoing contention is true, even substantially, it is obvious that the burning question of the day has no possible beginning of a solution in anything furnished by the law, any more or further than those affecting the relation of buyer and seller, which are not varied because a famine has occurred. I have listened to all and read much. Singularly enough, the most affecting of all arguments and appeals on the side of labor that I have seen comes from the pen of a British peer.<sup>1</sup> But he offers no solution, unless he intends to shadow forth a form of protection by the legislative exclusion of the right to employ and to be employed in favor of a class to the exclusion of another class.

The arguments, or justifications, or manifestoes, whatever they may be, from the men or their leaders at Homestead, where the language is not mere vituperation, has consisted in the suppression of the one and only difficulty that even tends to affect the employers' side. I do not propose to consider these, which are questions of political

<sup>1</sup> Earl of Dunraven in the *Nineteenth Century* for June. At the meeting of the State Federation of Labor at Chester, August 19, Mr. McVay proposed the same remedy. It was opposed by Mr. Boyle, but whether there was anything more than a discussion the newspaper report does not say.