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THE LEGAL SIDE OF THE STRIKE QUESTION.

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The strike is one of the most prominent elements in the problem of the relation of capital to labor—especially prominent in view of the occurrences of the past few months—and therefore one of the most important phenomena of our present social condition. A state of affairs that permits a few men to dictate whether or not the business of a whole section of country shall continue or cease, and that renders a presumably intelligent body of men the slaves of the dictators, is surely of no ordinary consequence in a theoretically free country, to say nothing of the disastrous results to the individual inhabitants of the region affected. And when to this is added the wanton trampling on the rights of others, the reckless destruction of property, and the criminal disregard and violation of the sacredness of human life, that have characterized the more recent strikes in a higher degree than any preceding, it is clear that the problem demands most earnest attention from every patriotic citizen, and that our national existence depends in no small measure upon its satisfactory solution. As a broad question, this belongs to the domain of the student of political economy; but in view of the fact that the rampant growth of the evil has been due in large degree to a misapprehension of its legal bearings, as well as to criminal negligence on the

part of the constituted authorities, a survey of the legal questions involved would seem to be both timely and profitable.

In its simplest form, a strike is the mere refusal of an employé, or rather, of a body of employés, to work for the employer for whom they have contracted to work. In that case there is nothing criminal. Every man has a right to work for whom he pleases, and to refuse to work if he pleases; subject, however, to damages for breach of contract. The morality of a strike, however, depends entirely upon its cause. If for any breach of contract on the part of the employer, or because the contract is an unfair one, it is perfectly justifiable; but if on the other hand, the contract was fair, and the employer has performed his part of it in good faith, a breach by the laborer is equally unjustifiable. For instance, if the employer has taken advantage of the necessity of the employé to hire him at a price too low to afford him a fair subsistence, or if he refuse to pay him wages due, a strike with the object of forcing him to fair terms, or to pay those wages, would be proper. But if the terms of employment are fair, and the wages are duly paid, a strike for the purpose of obtaining higher wages, less hours of work, the employment of only a certain class of laborers, and the like, is wholly inexcusable, even if not within any legal prohibition.

But there is another phase of the question. A mere strike is not the most efficient means of bringing an employer to terms. He can, as a general rule, hire other laborers, and go on with little or no inconvenience. Accordingly, what is known as the boycott has been devised, which consists in preventing the use or sale of the goods manufactured or produced by the employer; and is frequently enforced by causing a strike among the employés of those who use or buy his goods. This carries the matter a step farther; and is a naked interference with the personal rights of the employers, without the shadow of an excuse on the part of the strikers, except that the end justifies the means. This, in so far as those concerned may be considered as conspiring together, is open to the animadversion of the law. Such acts

are not, as was very forcibly said by Justice Beach of New York, in a recent case, as yet unreported, "indicative of strife between capital and labor, but of one between order and disorder, or between right and wrong. They impair and seriously affect the constitutional privilege to pursue lawful business without hindrance or molestation, and that privilege must be fully protected and firmly upheld."

Finally, there is another form of strike that has not yet had time to reach a complete development and show its full possibilities; but fortunately for the welfare of the nation, it probably never will until the insane portion of the population outnumbers the sane. This is the so-called "sympathetic" strike, which appears to consist in a cessation of work, for no other reason than that thereby the interests of the people at large may be so imperilled that they will rise on their dignity and compel some employer, between whom and his employés a difference exists, to accede to the demands of the latter. It supposes no grievance on the part of the striker, no dispute between him and his employer; but is utterly causeless and irrational. It is difficult to bring it within the purview of the law, as it is so senseless a proceeding as to have never entered the mind of legislator or judge until the labor leaders sprung it upon their attention; but its instigators, if not the strikers themselves, are guilty of criminal conspiracy.

The recent Chicago strike passed through all these stages, and its history shows very clearly their nature and operation. It began with a strike pure and simple. Some employés of the Pullman Car Company were not satisfied with their wages, and stopped work. Then, in order to render that strike successful, the leaders of the American Railway Union endeavored to prevent the use of Pullman cars, by ordering its members to strike on all roads using them. That was a boycott. Then, that not having the desired effect, the members of the union on roads not using Pullman cars were ordered to strike. That was a sympathetic strike. Then all the labor unions in Chicago were ordered to strike, under the silly impression that the people would be so injured

thereby that they would demand a settlement of all these other strikes. That was a sympathetic strike in the second degree of anti-climax, in purpose and results. And then, in one last pyrotechnic fizzle, it was attempted to order a general strike of all labor unions throughout the country, which would have been the superlative degree of folly and wickedness. But by that time the moon was past the full, and Jack being unable to find the priest all shaven and shorn, his pasteboard house came tumbling about his ears.

So much for the general nature of strikes. It is evident from what has been already said that the striker exposes himself, under varying conditions, to both a civil and a criminal liability. The civil liability is two-fold: in the first place, to the master for breach of contract; and in the second place, to any third person who may be injured in person or property by his refusal to perform that contract.

For the breach of contract he is liable in damages to the extent of the injury directly due to the breach. That, of course, depends on the nature of the contract, and the facts of the case. If the employer has already broken his part of the contract, as by a reduction of wages, increase of hours, or any other change in the terms of employment, the contract is at an end, and there is no breach, and consequently no damages. But if the breach is all on the side of the employé the only question is as to the amount of damage. Here the law wholly fails to afford adequate relief. In a strike the damage is due not so much to the individual refusal to work, as to the concerted action of the strikers. The place of one man could be easily filled; but the places of a whole body of employés, especially if skilled workmen, are not so quickly supplied. In consequence of this, contracts may be forfeited, and the money already expended in wages and the purchase of material lost, machinery and furnaces rendered useless, and many other injuries and losses caused. Yet, in such a case, the body of strikers cannot be held liable jointly, nor can each man be held liable for the damage due to the action of all. All for which he can be held responsible is for the loss caused by his refusal alone. That, of course, if susceptible of proof

at all, is very slight compared with the actual damage suffered, and is not worth the expense of collection by suit; while in many, if not the great majority of cases, the laborers could not be forced to pay, even if a judgment were recovered against them. And even if the damages recoverable were in some degree responsive, and the judgments available, the multiplicity of suits rendered necessary in many cases would be in the highest degree oppressive and vexatious, both to the employer and to the courts.

Furthermore, there are many items of damage that it is wholly impossible to estimate, arising from the loss of prospective business and profits, the injury done to third persons who are dependent upon the employer or his products, and the like. One very obvious instance is that of a strike of a body of workmen in a large establishment, the product of whose labor is necessary to keep others employed, as is the case in the present strike at Fall River. When they cease work, the others, willing or unwilling, are forced to do the same. If the butchers in a packing establishment strike, as they did in Chicago in July, all the packers, shippers, teamsters, and so on, must stop likewise. And the same is true of every large manufacturing establishment where the departments of labor are specialized.

Even a better instance of such damage is afforded by a railroad strike. In such case the first element of damage is the injury that the stoppage of work may do to the works and apparatus of the company; then the loss from perishable freight, and from failure to deliver freight and passengers at their destination in time, all of which are capable of calculation. But then comes the loss on the business which would have been done during the time of idleness, which the law cannot estimate; the loss to expecting passengers unable to travel; the loss to shippers unable to send their goods; the loss to tradesmen unable to secure needed merchandise; the losses consequent on the general paralysis of business in the region supplied by the road; the loss to creditors unable to collect debts on account of the inability of others to pay, due to the stoppage of that trade; and so on through endless ramifica-

tions, until it is safe to say that there is not a person in the whole district but suffers loss, directly or indirectly.

For some of these losses there are remedies; but a dead loss always falls somewhere. The owner of freight destroyed or detained has his remedy against the railroad; but the railroad has no remedy except that against the striker. The railroad can recover damages for property destroyed from the county in many cases; but the county has no remedy except against the striker. In every case therefore the bulk of the injury suffered is without remedy, and the law proves wholly inadequate to meet the mischief.

There would seem to be no good reason why in some cases, at least, the third person injured should not have a remedy, also theoretical, but practically useless, against the striker, not for breach of contract, but for a tort committed in that breach, by the misfeasance or nonfeasance of duty. It would appear to be as clearly an act of negligence to leave perishable freight side-tracked, as for a servant to drive his master's carriage carelessly along the street; and while the master is liable in each case for the tort of the servant, the servant is liable individually in the latter case, and should be so in the former. Such a liability is enforceable against a boycotter, for his tortious inference with the business of the person boycotted: Steamship Co. *v.* McKenna, 30 Fed. Rep. 48; Moores *v.* Bricklayers' Union, 23 Wkly Law Bull. 48; Carew *v.* Rutherford, 106 Mass. 1.

The criminal liability of the striker is capable of more efficient enforcement. It also has a twofold aspect, the one growing out of the act of striking, the other out of the acts done in pursuance of the strike. The latter, as a general rule, forces itself much more prominently before the public.

As has been said, the theoretical strike is a harmless affair, whether morally justifiable or not, being nothing but a cessation of work; but practically it is far different. There is no such thing as a peaceable strike. Such a strike could not succeed. Mere supineness on the part of the employés would inevitably result, sooner or later, in their places being filled with new employés, and the business of the employer being

successfully prosecuted, while they themselves would be permanently thrown out of work. Accordingly, it becomes an absolute requisite of success that new employés be kept away, by force if necessary, and this, if peaceably done, is none the less a violation of the right of the employer to employ whom he pleases. If done by violence, as is usual, it is not only a violation of the rights of the employer, but of the intending employé, as well as a violation of positive law, resulting at times even in murder. The proofs of this are to be seen in the papers almost daily. We read of wanton attacks made upon men whose only offence was that they had taken the places of strikers, of dynamite placed under the houses in which they boarded, of shots fired through their windows, of poison placed in their food. Again, we read of the property of the employers being destroyed in sheer malice, by fire or other instrument of destruction, of reckless defiance of legal authority, of talk at least of open rebellion. At times, as at Homestead, the rebellion is all but a fact. Assault, riot, arson, murder, treason—this is a pretty list of offences to compare with the impudent claim, made at every strike, that the strikers are acting only on their legal rights.

It is no excuse, as has been argued and refuted time and again, to urge that these crimes are committed, not by the strikers themselves, but by the criminal classes, who take the opportunity of indulging their evil propensities. This is no doubt true to some extent, but not by any means to the extent claimed, as witness the Homestead poisoning case, which is the most noted example of modern times. Even if it were true, the strikers would not stand acquitted of blame, for it is their action that incites and encourages the others; and they stand rather in the light of accessories than otherwise, as there are but few recorded instances in which they have interfered to check criminal excesses. Both morally and legally, they are responsible for most of the crimes thus committed.

The strike is itself criminal in many cases. If it have no valid reason, but is merely an attempt to coerce the employer

to accede to the demands of his employés by leaving his service in a body, it is an indictable conspiracy at common law, equally with an attempt to induce a workman to leave his master's employ: R. *v.* Ferguson, 2 Starkie, 489; R. *v.* Bykerdike, 1 M. & Rob. 179; R. *v.* Duffield, 5 Cox C. C. 404; R. *v.* Rowlands, 5 Cox C. C. 437, 466; S. C., 17 Q. B. 671; R. *v.* Brown, 12 Cox C. C. 316; State *v.* Glidden, 55 Conn. 46; S. C., 8 Atl. Rep. 890; State *v.* Donaldson, 32. N. J. L. 151; Peo. *v.* Fisher, 14 Wend. 9; State *v.* Stewart, 59 Vt. 273; S. C., 9 Atl. Rep. 559; Crump *v.* Com., 84 Va. 927; S. C., 6 S. E. Rep. 620. Vermont has adopted this rule by statute, R. L. Vt. §§ 4226, 4227, but Pennsylvania and New Jersey have abandoned it in favor of a weaker doctrine, by permitting the use of peaceable persuasion to induce others to quit service: Acts Pa. 1872, June 14, P. L. 1175, and 1876, April 20, P. L. 45; Rev. Sup. N. J. p. 774, § 30, wholly overlooking the fact that in so doing they deprive the employer of his best protection; that it is not the manner of the persuasion, but the persuasion itself, that makes the act criminal; that the wrongfulness of the persuasion depends not upon its nature between the persuader and employé, but upon its results as affecting the rights of the employer; and that the legalizing of a crime is a dangerous precedent.

Yet even this criminal remedy has proved inefficient, owing, as in the case of the civil remedy, to the expense and difficulty of prosecuting it fully. It would of course be impossible to prosecute criminal actions at one and the same time, against thousands of persons scattered over a large territory, all of whom are ready to defend at any length, without great cost and harassing of the courts. The very idea of punishing all the offenders is therefore preposterous; and the punishment of a select few only tends, in many instances, to encourage the rest by their impunity. Even if the leaders are convicted, there are always plenty of others willing, for the sake of a little brief authority, to emulate their prowess and take their chances. Add to this the fact that the union movement is so widespread that it is almost impossible to secure a jury without union sympathies, and it will be clear that the criminal remedy,

at least as at present existing, fails, equally with the civil, to afford adequate protection and redress.

This state of facts affords good ground for the interference of equity; and of late years the tendency has been to invoke its assistance. That has been granted on the grounds previously mentioned as negativing the efficiency of the legal remedies, the inadequacy of the remedy on the contract or tort, and the prevention of multiplicity of suits: See Blindell *v.* Hagan, 54 Fed. Rep. 40; S. C. aff., 56 Fed. Rep. 696. So, where strikers enter the premises of the employer, and interfere with the men at work there, their acts will be enjoined as a continuing trespass and irreparable injury: N. Y., L. E. & W. R. R. *v.* Wenger, 17 Wkly. Law Bull. 306; Coeur D'Alene Co. *v.* Miners' Union of Wardner, 51 Fed. Rep. 260. The mere fact that the act sought to be enjoined is also criminal, will not oust the jurisdiction of equity. It is true that a crime, as such, will not be enjoined; but the reason of that is that the court will not suppose that a crime is intended, and therefore cannot take cognizance of the act until it is committed; but that rule cannot be extended to a case where the continuance or repetition of an act, criminal in one respect, leaves no reasonable doubt as to the intention to commit it, such as the maintenance of a public nuisance, the commission of a continuing trespass, the keeping of an unlicensed saloon, and the like. The injunction in such a case issues to remedy the private wrong, not the public offence; and has nothing to do with the latter. It rests upon the principle that permits a suit at law to be maintained concurrently with a criminal prosecution, and represents the civil remedy for the criminal act. It will accordingly lie in any case where the civil remedy would lie, when that is inadequate, and may be either negative or mandatory, as the circumstances of the case require; for when the *status quo* would inflict irreparable injury, a mandatory injunction will issue to change that status: Beadel *v.* Perry, 3 L. R. Eq. 465; Whitecar *v.* Michenor, 37 N. J. Eq. 6; Broome *v.* N. Y. & N. J. Telephone Co., 42 N. J. Eq. 141; S. C., 7 Atl. Rep. 851. The remedy by injunction has the further advantage that it can be enforced by summary process

for contempt: Lake Erie & W. R. R. Co. *v.* Bailey, 61 Fed. Rep. 495.

For some reason, probably political, this remedy does not seem to have been invoked in the State courts to any extent, at least directly against the strikers, though interference by third parties with the business of an employer by means of the boycott and kindred annoyances has been restrained: Sherry *v.* Perkins, 147 Mass. 212; S. C., 17 N. E. Rep. 307. It has been found more convenient, by the railroads at least, against which most large strikes are directed, to institute such proceedings in the Federal courts, under the Interstate Commerce Acts, especially that of July 2, 1890: 26 U. S. Stat. at Large, c. 647, p. 209. Since the passage of that act, every combination in restraint of trade or commerce among the several States is illegal; and a strike or a boycott can no longer be effective, as they necessarily affect interstate commerce: Waterhouse *v.* Comer, 55 Fed. Rep. 149. Any combination of men to secure or compel the employment of none but union men becomes a combination in restraint of interstate commerce, within the meaning of the statute, when, in order to gain its ends, it seeks to enforce, and does enforce, by violence and intimidation, a discontinuance of labor in all departments of business, including the transportation of goods from State to State, and to and from foreign nations; and an injunction will be granted to restrain them from so doing: U. S. *v.* Workingmen's Amalgamated Council of New Orleans, 54 Fed. Rep. 994.

This reasoning applies with more force to the case of a common carrier, such as a railroad, than to any other; and there is hardly an instance in which the Federal courts have refused to grant the relief asked, their tendency being to enlarge the remedy rather than curtail it. The first important case was that of the strike on the Toledo and Ann Arbor road in 1892. The Brotherhood of Locomotive Engineers had struck for some reason of dissatisfaction, and it was attempted to make the strike effectual by boycotting the road, that is, compelling other roads to refuse to receive and handle its cars under threat of extending the strike to them. The

Ann Arbor road thereupon filed a bill against its connecting lines, and their employés, praying that the latter might be restrained from refusing to handle its cars, which was accordingly granted: Toledo, A. A. & N. M. Ry. *v.* Penna. Co., 54 Fed. Rep. 746. The court went a step farther, and, being asked for an injunction against Mr. Arthur, the Chief of the Brotherhood, to restrain him from issuing, promulgating or continuing in force any order of the Brotherhood requiring any employés of any defendant railroad company to refuse to handle and deliver any cars of freight in course of transportation from one State to another, etc., but finding that order already issued, granted a mandatory injunction to compel him to rescind it: Toledo, A. A. & N. M. Ry. Co. *v.* Penna. Co., 54 Fed. Rep. 730.

In the Chicago strike, however, a form of injunction, based on this ground of interference with interstate commerce, was adopted generally throughout the region affected, which has become famous as the "omnibus injunction." Its essential parts were as follows: "Eugene V. Debs, etc., and all other persons combining and conspiring with them, and all other persons whomsoever, are enjoined absolutely to refrain from interfering with or stopping any of the business of any of the railroads in Chicago engaged as carriers of passengers and freight between States, and from interfering with mail, express, or other trains, whether freight or passenger, engaged in interstate commerce, or destroying the property of any of the railroads; from entering their grounds for the purpose of stopping trains or interfering with property . . .; from compelling or inducing by threats, or persuasion, or violence, any of the employés of said roads to refuse or fail to perform any of their duties as employés of such road in connection with interstate commerce of such railroad, or the carrying of mail, passengers, or freight, or attempting to induce by threats or intimidation any of the employés of such roads engaged in interstate business or operation of mail trains, to leave the service of such roads, or preventing any persons from entering the service of such roads."

This leaves little more to be desired in its special province,

being, as the district attorney said it was intended to be, a veritable dragnet, involving in its meshes all possible offenders against the law. It has, however, this fault in common with all the other remedies thus far mentioned, that it is remedial only. It does not operate to prevent a strike, but to hinder the commission of illegal acts in furtherance of that strike; and is, therefore, in so far ineffective to cure the evil. But one bold effort in that direction has been made, which succeeded in bringing down upon its author the woes of a congressional investigation. Judge Jenkins, in Farmers' Loan and Trust Co. *v.* N. Pac. Ry. Co., 60 Fed. Rep. 803, issued a remarkable injunction, in effect forbidding the employés of that road to carry out a threat to strike and leave its service. The injunction restrained them "from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property or to prevent or hinder the operation of said railroad." This was vigorously animadverted on from several quarters, and the investigating committee, while very considerately exonerating the judge from all accusations of unfairness and abuse of power, recommended that legislation be adopted to prevent a recurrence of such action, which report was adopted by the Judiciary Committee of the House.

All the arguments against the exercise of such a power rest on a fancied arbitrary right of an employé to work or not for whom he pleases. That right only exists at birth, if ever; for in human society there is no such thing as an absolute unqualified right to anything. All rights are relative. A man has a right to enjoy his personal liberty, or his personal property; but if he infringes the rights of his fellows in these respects, his rights are *pro tanto* gone, and revive again only on the satisfaction of the demands made upon him for that violation. So in this case, the right of a man to quit work must of necessity be governed by the nature of his employment and the rights of third persons. Granting that the

employer's only right is to recover for breach of the contract, it does not follow that the rights of third persons who have no remedy are to be recklessly jeopardized. Judge Jenkins has very forcibly stated this side of the question. "One has not the right arbitrarily to quit service without regard to the necessities of that service. His right of abandonment is limited by the assumption of that service, and the conditions and exigencies attaching thereto. It would be monstrous if a surgeon, upon demand and refusal of larger compensation, could lawfully abandon an operation partially performed, leaving his knife in the bleeding body of his patient. It would be monstrous if a body of surgeons, in aid of such demand, could lawfully combine and conspire to withhold their services. . . . It would be intolerable if counsel were permitted to demand larger compensation, and to enforce his demand by immediate abandonment of his duty in the midst of a trial. It would be monstrous if the bar of a court could combine and conspire in aid of such extortion by one of its members, and refuse their service. I take it that in such case, if the judge of the court had proper appreciation of the duties and functions of his office, that court, for a time, would be without a bar, and the jail would be filled with lawyers. It cannot be conceded that an individual has the legal right to abandon service whenever he may please. His right to leave is dependent upon duty, and his duty is dictated and measured by the exigency of the situation." 60 Fed. Rep., p. 812.

This terse, vigorous argument leaves little more to be said. It may be added, however, that conceding all that is claimed on the other side, the injunction granted by the judge does not violate any principle of law. It may be taken as true that a contract of service cannot be specifically enforced, either directly or indirectly, though that is an arbitrary rule of equity, and could be rescinded at will: Stocker *v.* Brockelbank, 3 MacN. & G. 250; Johnson *v.* Railroad, 3 DeG. M. & G. 914; Lumley *v.* Wagner, 1 DeG. M. & G. 604; but the injunction granted by Judge Jenkins did not enforce service. All that it enjoined was the conspiracy to quit, leaving the right to quit as individuals untouched. In short, he simply

followed out the principles on which the prior decisions were founded to their logical conclusion, and enjoined the illegal, injurious action threatened, while not in the least interfering with the legal rights of the employés. The precedent is an admirable one, and if followed would go far to simplify the question of strikes. It is to be hoped Congress will adopt it, rather than the measures suggested by the report of the Judiciary Committee.

It is the more to be regretted that that body adopted such a course, as it is in line with the lax tendency noticeable in such matters of late years, and which led to the passing of the statutes of Pennsylvania and New Jersey already cited. Any encouragement of crime is sure to bring about a recrudescence of criminality; and this has been true in this case. The Pennsylvania statutes were followed by the Pittsburgh riots of 1877, the Reading strike and the Homestead strike; the legislation adopted by Congress after that last outbreak, forbidding the movement of armed bodies of men from one state to another, was followed by the New York strike and the coal strike in the bituminous coal regions; while the report of the Judiciary Committee on the Jenkins injunction was followed so closely by the Debs rebellion that its heels must have suffered considerably. The only effect of toleration of crime is to encourage it, and if that is not now clear with respect to strike legislation it never will be. The need is of repressive legislation, the more stringent the better, something that will teach the lawbreakers that they must respect the rights of others; and above all, measures that will render it impossible for any unprincipled, irresponsible demagogue to hold in his hands the welfare of a whole region.