MANDAMUS AS A MEANS OF SETTLING STRIKES.

By Stephen B. Stanton.

The great Brooklyn strike just ended, has added its contribution to strike law, in the shape of a further definition of the sphere of the writ of mandamus. However purposeless its short and disastrous history may seem, however lessonless it may appear to pass, yet, each strike, we may hope, in the wearying succession, adds its quotum to the gradually growing fund of strike law. The experience gained in one strike, makes the conduct of the next more intelligent, and its outcome more just; each brings us a step nearer the solution of the underlying problems, and the removal of the underlying evils. This hope is inspired chiefly by the ever increasing tendency of both sides, in labor controversies, to seek protection from the courts. Judicial intervention has already given us a jurisprudence of injunction as applicable to strikes, a legacy left by the recent great strikes of the West and Northwest. And now the Brooklyn trolley strikes have filled a like office with respect to the writ of mandamus.

Without going minutely into the history of the Brooklyn strike, suffice it to say, that the usual concomitants of a strike prevailed, lawlessness, disorder, violence and riot. Cars of the companies returned to the stables windowless; new "non-union" motormen, with broken heads, or not at all. The cutting of wires became a general pastime. The efforts of Brooklyn's entire police force, and 7000 State troops, proved unavailing as a preventive. The city authorities to lessen their responsibilities, advised the companies not to attempt running their full complement of cars. At this juncture, application was made to Judge Gaynor, of the New York Supreme Court, for a writ of mandamus, to compel the Brooklyn Heights Railroad Co., to resume the operation of its road. The writ was granted in its alternative form, and Brooklyn, I may say the country, was astounded to read in the learned judge's decision, the statement, that "the claim of violence, amounting to a prevention, is not legally made out.

Instances of violence, generally by others than the former employés of the company, are shown, but it is also shown that, not only the police force of the city, but also over 7000 soldiers are preserving order, and I cannot believe that this company is not protected in its rights. It is entitled to the full protection of the government in the performance of its public duties, protection on the one side, and obedience to law and duty on the other, being reciprocal, and going hand in hand. . . .

It has had such protection, and it now has it. I do not find that Government has failed in that respect at all. Instances of disorder have occurred, but have been speedily suppressed.

I cannot, therefore, attribute to government the failure of this corporation to perform its public duties. . . . That this corporation is not fulfilling its ordinary corporate duties to the public is not denied. It presented the issue to the court, that the reason for it is, that it is overcome by violence, and that the government does not adequately protect it.

This might be a sufficient answer in law, if true, but I refuse to find that either the judicial, or the executive branch of Government has failed in affording protection to this corporation. There is no evidence before me upon which I can cast such a reproach upon the State."

A few days later, a similar application was made to the same justice against the Atlantic Avenue Railroad Co., and was similarly disposed of by him on the same grounds.

A week before Judge Gaynor's decision, however, and before the situation had assumed the seriousness requiring the calling out of the First Brigade, in addition to the Second already on the scene, Judge Cullen, also of the Supreme Court of New York, had refused just such an application against the Brooklyn City Railroad Co., on the grounds that "the duty of the company to operate its road is to be exercised reasonably. In its operation, the company is absolutely entitled to the protection of the authorities, and to the protection of the court. The court cannot shut its eyes to the fact that assaults and violence have been committed, and that detachments of police are scattered all over the city. The com-

munity owes a duty of protection to the company in operation of its road.

As long as the acts of violence continue, the court certainly will not compel the road, by mandamus, to operate."

It does not here concern us to ascertain the cause of the wide discrepancy between the facts, as Judge Gaynor found them, and the facts; nor, further, why Judge Gaynor, in the very crisis of the strike, denied the existence of assaults and violence, to which Judge Cullen, in its beginning, had held, the court could not "shut its eyes." Had Judge Gaynor found the facts to be as they are generally believed to have been, it is clear, from his reasoning, that he would not have issued the writ.

But Judge Gaynor, and Judge Cullen, agree in stating the rule of law, that interfering mob violence releases a railroad from the public duty to maintain the operation of its road. And such, of course, is the law. Even as between railroads and private individuals, who can in no way be regarded as responsible for its existence, mob violence releases from liability. As for instance: "The fact that a railroad company has reduced the wages of its employés, cannot be held to justify or excuse a mob, composed of indiscriminate persons, in stopping a train of cars, and delaying the receiving of goods, or the transportation of freights; nor can the railroad company be held responsible for the consequences of such unlawful proceedings, when they cause such delay." (*P. C. & St. L. Ry. Co.* v. *Hollowell*, 65 Indiana, 195.) "Where employes suddenly refuse to work, and are discharged, and delay results, from the failure of the carrier to supply promptly their places, such delay is attributable to the misconduct of the employés in refusing to do their duty, and this misconduct, in such case, is justly considered the proximate cause of the delay; but when the places of the recusant employés are promptly supplied by other competent men, and the 'strikers, then prevent the new employés from doing duty by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employés, but arises from the misconduct of persons for whose acts the carrier is in no

manner responsible: (*P., Ft. W. & C. R. R.* v. *Hazen*, 84 Illinois, 36.) To same effect, see *Geismer* v. *L. S. & M. S. R. R. Co.*, 102 N. Y. 563; *G. C. & S. F. Ry. Co.* v. *Levi*, 76 Texas 342; *Cogley on Strikes*, p. 353.

The case last quoted points out clearly the distinction between peaceable and violent strikes as affecting a carrier's ordinary contract liability toward shippers of freight. The ground of the carrier's liability in the former being found in the fact that the delay or damage caused by the strike is due simply to the cessation of work, which being an act or omission of employés, on the principle of *respondent superior*, the employer, the carrier, is responsible (see cases above cited and *Blackstack* v. *N. Y. & Erie R. R. Co.*, 20 N. Y. 48). We shall expect, therefore, the same distinction and rule of responsibility to be applicable to a carrier's duty toward the public or state, and so we find it. A railroad company is not excused from performing its public duty of maintaining and operating its road, simply because its men refuse to work at its terms and quit its employ. Judge Gaynor well stated the law in this connection to be as follows: "Railroad companies have duties to the public to perform, and they must perform them. If they cannot get labor to perform such duties at what they offer to pay, then they must pay more, and as much as is necessary to get it.

"Likewise, if the conditions in respect of hours or otherwise which they impose repel labor, they must adopt more lenient or just conditions. They may not stop their cars for one hour, much less one week or one year, to thereby beat or coerce the price or condition of labor down to the price or conditions they offer. . . . The company's duty was to have gone on, and now is to go on with its full complement of employés, having the right, gradually, and from day to day to supersede its employés, if it can, by new employés who will work on its terms, or to supersede them all at once when it has obtained a sufficient number of new employés for that purpose; but in such a controversy it has not the right to stop its cars while it is thus gradually getting other men." In the case of *People* v. *N. Y. Central & H. R. R. R. Co.*,

28 Hun. 543, quoted and followed by Justice Gaynor, the court issued a writ of mandamus to enforce exactly this public duty of the railroad. That was a case where it was not "shown that the workmen committed any unlawful act, and no violence, no riot and no unlawful interference with other employés" appeared. The cause of the strike was the refusal of the company to accede to the demand of its freight handlers for an advance of wages from $1.70 a day to $2. The total cost to the company of such increase in wages would not have amounted to more than $300 a day, whereas its refusal to pay this was inflicting upon the commercial community a loss of millions of dollars. Furthermore, the company failed to procure other men competent or sufficient in number to take the place of the striking freight handlers, in consequence of which, for two weeks, the freight service of the railroad was practically suspended. The case thus presented every reason for the court's interference to frustrate this impudent attempt on the part of the railroad to save money at the expense of the community and to compel it peremptorily to restore its freight service. Said Presiding Justice Davis, in delivering the opinion of the court: "According to the statement of the case a body of laborers, acting in concert, fixed a price for their labor, and refused to work at a less price. The respondents (the railroad company) fixed a price for the same work, and refused to pay more.

"In doing this, neither did an act violative of any law or subjecting either to any penalty. The respondents had a lawful right to take their ground in respect of the price to be paid, and adhere to it, if they chose; but, if the consequences of doing so were an inability to exercise their corporate franchises, to the great injury of the public, they (the railroad company) cannot be heard to assert that such consequences must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their causes." The mandamus applied for against the railroad company accordingly issued.

This question arises, however, will the common carrier be compelled by mandamus to resume public traffic and travel where

these have been interrupted by a peaceable controversy in all cases with employés and under all circumstances? Judge Davis, in the New York Central strike case, just described, asked and answered this question as follows: "Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employés over the costs or expense of doing that? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost." In the Brooklyn City Railroad application Judge Cullen said "As between your company and the men, if the men are in a position to dictate terms there is no reason why they should not do so." Judge Gaynor uses equally unqualified language as to the railroad's duty and the court's scope of compulsion. Judge Emmons, in *Talcott* v. *Pine Grove*, 1 Flippen, 145, required every farthing of a railroad's "tolls first to be devoted to paying the public tax, and to the continuance of the road, its ample equipment and regular operation as the interests of the community, not those of shareholders, demand. No matter that a dividend is never paid, that the private investment is sunk and worthless, that the interest upon its bonds is not met, and that all its creditors go unpaid, every dollar of its earnings must nevertheless be applied to keep up its maxium efficiency, as required by the political powers in the law which created it. The neglect of the smallest of these duties in which the community is interested will be enforced by the public writ of mandamus." But if we consider that, under certain circumstances, mandamus to a railroad company to resume is equivalent to an order to take back its striking employés at their own terms, shall we not see that this wide rule needs qualification? Is it not apparent that then the merits of the labor controversy, the reasonableness of terms, becomes a subject of preliminary judicial inquiry? Suppose, for instance, a contemplated strike should be planned with such secrecy that the company has no notice of it until the men actually went out on strike. Suppose, further, that the terms for which the men struck were not only unreasonable but extortionate, and that the annual contracts with the men were about to be made. Of course,

on such sudden notice, men to fill their places would not be obtainable short of at least a day. Can it be law that, under these circumstances, the company must accede to the extortion of its striking employés because they are in a position to dictate terms," that it refuses so to accede at peril of its charter, and that acceptance of its employés' snap terms may be compelled by mandamus? That, be the terms of strikers never so extortionate, a railroad company is bound to submit to them, if they are only sprung upon it by the strikers with sufficient dexterity? The situation with which employés might thus confront the company, clearly does not represent the true condition of the labor market, nor serve as a standard of the just financial relations which should exist between employer and employed.

But let us suppose still further that "due and timely" notice of strike on the part of employés were required by law, that where the company had had no notice it was given at least a reasonable time by the court in which to procure other men and resume operation of its road, and that until such time the court would not compel the company by mandamus. Yet it would still be within the power of labor, by use of the writ of mandamus against the railroad corporation, to exact extortionate terms, even to ruin it. For instance, imagine labor to have become so well organized that it controls the entire labor force of the country. The employés of a railroad strike for exorbitant and ruinous terms. The company of course cannot replace the strikers even at just and reasonable rates. Mandamus to the company under such conditions would place it at the mercy of its men who might rifle its treasury at their pleasure under the guise of higher wages or shorter hours. The court would become an accessory to extortion. The law of free contract would give place to the highway law of the brigand when railroad employés might, with judicial sanction and aid, hold up a railroad with the challenge "Money or your corporate life!"

Yet such are not only the possible but the probable consequences of a rule which requires a railroad to maintain and operate its road "at whatever cost," and permits employés to "dictate terms" whenever they are in a position to do so.

One method by which the risk of injustice as above described can be avoided is by inquiry on the part of the court into the merits of the controversy, and when the terms demanded by the strikers as a condition precedent to resuming their employment are extortionate, fixing just and reasonable terms. Such was the conception of its duty by the Supreme Court of Montana in the case of *State ex rel. Haskell* v. *Great Northern Ry. Co.*, 36 Pac. Rep. 458. Application was made to it to compel the Great Northern Railway to resume the operation of its road. The controversy was occasioned by the general refusal of its employés to serve the company for the wages proposed to be paid. They therefore went out on strike awaiting an adjustment of the controversy. The petition alleged that sufficient, competent, skilful and experienced men are available, ready and willing to serve the railroad company in the operation of the railroad for reasonable compensation; and this was admitted to be the main predicate upon which the decision would turn. "It is proposed," said the opinion, "that the court shall inquire and determine what would be a schedule of reasonable wages for a corps of skilled and unskilled employés necessary to operate said railway, and then ascertain whether the requisite number of employés can be procured at wages determined, and if that fact is found to be true, as alleged, then command the operation of said railroad, under penalties attached to disobedience to the writ of mandamus. Those questions mentioned must be determined by the court upon proper inquiry whether the respondent should answer and traverse the allegations of the petition or no, because the court, before sending forth this extraordinary writ, will, by careful inquiry, become satisfied of its own jurisdiction, and that the conditions are such that the act commanded is feasible of performance. If the proposed scheme is feasible, it evidently affords a remedy going far towards the solution of a problem of great moment to all parties concerned."

It is not plain, however, upon what principle such an inquiry proceeds. Obviously, justice demands it, yet the duty of the road to run continuously and without interruption is

absolute. Nothing but the act of God or the public enemy excuses. And the mere fact that obedience to a writ of mandamus to compel performance of that duty causes the company loss, or even ruin, from extortion, is no obstacle to its issue. To this dilemma, we believe a fixing of the attention upon the railroad corporation solely and upon its duty to the public, leads. Widen our view, however, and the fallacy by which we have been thus misled is revealed, and a principle suggests itself by which we may escape from the dilemma. The breach of duty, calling out the mandamus against the railroad company, consists in the suspension of the operation of the road. This is caused as much by the striking employés as by the corporation, and is not to be laid at the door of the latter only. There are two parties to the operation of a railroad, and so there are two parties necessary to the performance of the act commanded by the writ of mandamus. Compulsion of the performance of this act must be by compulsion of both of these parties. "A corporation," said Judge Taft (in a case which see *infra*) "acts only through its officers and employés, and it is through them only that its action can be restrained or compelled. While doing the work of the company, the employé is the company." To compel one of the two parties only, is to discriminate in favor of the other against that one, and to take sides in the quarrel between them. A command that certain work be done can be made effectual only by being laid upon all persons whose participation in the work is necessary to its accomplishment. It is inefficacious, it is unjust, it smacks of the nature of impossibility which mandamus abhors, to order one to do an act, the doing of which depends upon the assistance of others whose will may not be within his control.

For these reasons a writ of mandamus to compel resumption of the operation of a railway should be directed to all whose participation and co-operation in such operation is necessary. Observe that we are, by this line of reasoning, inevitably led to the position that a writ of mandamus to be complete, to be just, indeed, in many instances to be possible of performance, must command the striking employés, as well

as the railroad company itself, to resume and continue the operation of the road.

Two objections at once present themselves. *First*, mandamus will not lie against private individuals like railroad employés, unless they hold some relation of agency or trust towards the public, and, except to compel performance of some public duty. *Second*, to direct the writ of mandamus to them as proposed, would be to deny their right to leave their employment at will.

Justice Harlan, in the case of *Arthur* v. *Oakes*, 63 Fed. Rep. 320 and 321, (U. S. Circuit Court of Appeals, Seventh Circuit, October 1, 1894,) decided, over-ruling Judge Jenkins, that railroad employés have the right, in a body, without notice, and at will, to leave their employment. Consequences to the public constitute no limit or bar to that right. In the face of such authority, it would, indeed, seem idle to regard the question as still open, were it not for the opposite view taken by Judge Jenkins in the court below, (*Farmer's Loan & Trust Co.* v. *Northern Pac. Ry. Co.*, 60 Fed. Rep. 812,) U. S. Circuit Court, Southern District of Wisconsin, April 6, 1894, and the important considerations and able reasoning upon which he founded his decision. The question came up before these learned justices in the form of an application for an injunction. And, in considering the matter of enjoining employés from leaving the employment of a railroad, the fact that such an injunction would, in effect, be a mandatory injunction to perform personal services, determined Justice Harlan against its issue. An injunction to perform personal services is, of course, without precedent in the law. Such compunctions flow naturally, from regarding the question as merely one of master and servant, in which the right of the servant to quit must be preserved inviolate. If we may say so without disrespect, the wider aspect of the question did not, with sufficient distinctness and force, present itself to the mind of the learned justice. By half closing his eyes to the important public relation and duty, which all who accept employment with a railroad company assume, he failed to find the ground upon which judicial interference would have been

warranted, and, if not a mandatory injunction, at least a writ of mandamus would lie. Granted, that a court may not command the performance of an act of personal service toward the railroad corporation, yet it may direct the performance of an act of public service and duty. The mere fact that the one involves the other, that to enjoin a strike, or to command strikers to resume or would-be strikers to continue work, is, in effect, an injunction or mandamus to perform personal service to their employer, should not deter. That is a mere incident. A mandamus to compel a railroad corporation to resume the operation of its road, is, in effect, an order to employ workmen, and in certain cases, (as see *supra*,) to employ a designated class of workmen, to wit, the strikers,—a matter with which, in its private aspect, the court has no authority to interfere, and in doing so, is depriving the corporation of one of the rights of an employer. Nevertheless, the courts have said: That is a mere incident. Your public duty warrants, public welfare demands our interference.

Justice Harlan could not have had this in mind when he said that "equity will not compel the actual, affirmative performance by an employé of merely personal services, any more than it will compel an employer to retain in his personal service one, who, no matter for what cause, is not acceptable to him for service of that character," or again that "no court of equity will compel any managers against their will, to keep a particular employé in their employ." We have shown that equity will do this very thing in the case of a railroad employer by issuing its writ of mandamus under circumstances which must inevitably lead to this very result. We see, therefore, no reason why it should not similarly interfere with the corresponding right of railroad employés.

If the rights of an employer may thus be infringed, it is difficult to see why the right of an employé may not. If a railroad corporation may be bidden to abandon its prerogative of managing its own business in its own way, of employing whom it will, or no one, if it will, it is difficult to see why a railroad employé may not be bidden to abandon his prerogative of throwing up employment at will. If public welfare is

powerful enough to call for the subordination of private advantage in one case, it is equally powerful to call for it in another. As Judge Jenkins put it in the case of the *Farmers' Loan and Trust Co.* v. *N. P. Ry. Co.* (overruled in certain particulars by Justice Harlan on appeal), "their (employés') rights, as the rights of bondholders and stockholders, are subordinate to the rights of the public and must yield to the public welfare."

Justice Harlan held, modifying to this extent the injunction issued by Judge Jenkins, that a strike with the object and intent of crippling and embarrassing the operation of the railroad was not wrongful unless violence, intimidation and such like wrongs were resorted to, because only the exercise of an employé's lawful right to give up his employment at will. Is it not safer and better policy to say with Judge Jenkins that "a combination cannot be justified on the plea of the lawful exercise of a right when, the threatened abandonment of service is a mere pretext, the real intent and design being to cripple the property and to hinder and prevent the operation of the road, the necessary effect of which would be to inflict great loss upon the public;" that the right of a railroad employé to leave his employment must be exercised (quoting Judge Pardee) "peaceably and decently;" that "one has not the right arbitrarily to quit a service without regard to the necessities of that service."

The best argument for this view is found in the exigencies of the case then before Judge Jenkins, which he graphically describes, substantially as follows: "A large number of employés formed a combination to abandon the service of the Northern Pacific Railroad suddenly and without reasonable notice, with the result of crippling the operation of the railway and injuring the public. The skilled labor necessary to the safe operation of the road could not be readily supplied along 4,000 miles of railway. The difficulty of obtaining substitutes is intensified by the fact that no member of their organization would dare to take their place, for fear of the penalties of expulsion and social ostracism. If this combination had proved effective by the failure of this court to issue its preventive writ, this vast property would have been paralyzed in its

operation, the wheels of active commerce would have ceased to revolve, many portions of seven States would have been shut off in the midst of winter from the necessary supply of clothing, food and fuel, the mails of the United States would have been stopped, and the general business of seven States and the commerce of the whole country passing over this railway would have been suspended for an indefinite time. Are all these hardships and inconveniences to be submitted to, in order that certain of these men, discontented with the conditions of their service, may combine and conspire, with the object and intent of crippling the property of the railroad, to suddenly cease the performance of their duties?"

Justice Harlan concedes that great evils are, by his view of the law, allowed to continue; "but these evils," says he, "although arising in many cases from the inconsiderate conduct of employés and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employés and employers so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance and safe management of the public highways." If restraining there must be, alike to employés and employers, is it not well for the court to find and declare the ground upon which such needed restraint rests and adapt its wide equity powers to its accomplishment? The broad language of Judge Ricks sanctions such a course: "That the necessities growing out of the vast and rapidly multiplying interests following our extending railway business make new and correspondingly efficient measures for relief essential is evident, and the courts in the exercise of their equity jurisdiction must meet the emergencies as far as possible within the limits of existing laws until the needed legislation can be secured."

In the case of *Toledo A. A. & N. M. Ry. Co.* v. *Penn. Co.*, (54 Fed. Rep. 746), Judge Ricks, and (in the same case and volume, p. 730, both decided in U. S. Circuit Court, Northern District of Ohio, W. D. March 25, and April 3, 1893, respectively), Judge Taft expressed views similar to those of Judge Harlan, with respect to the unenjoinable right of railroad

employés to leave their employment. But Judge Taft's expression of opinion was obiter, and the circumstances of the case before Judge Ricks were far different from those of the Northern Pacific case. The question before the latter was whether the court had power to punish for contempt certain employés who had left the employment of the railroad rather than comply with the injunction order of the court. Judge Ricks held that they could not be so punished, as that would be practically to construe the order as one forbidding them to leave the railroad company's employ or, inverted into its positive form, to continue in the service of the railroad. But he considered the question with reference only to the three or four employés then before the court. Their isolated acts in abandoning their employment involved no violation of public duty. *Non constat*, that other employés were ready to fill their places. In dealing with them the court was not dealing with acombination of employés to abandon the service of the railroad.

"An act," argued he, "when done by an individual in the exercise of a right may be lawful, but when done by a number, conspiring to injure or improperly influence another, may be unlawful. One or more employés may lawfully quit their employer's service at will; but a combination of a number of them to do so for the purpose of injuring the public and oppressing employés by unjustly subjecting them to the power of the confederates for extortion or for mischief is criminal. We do not, therefore, here determine that a conspiracy entered into by the employés of one railroad to boycott another railroad may not exist under such circumstances of aggravation as to make it entirely proper for a court of equity, in dealing with such conspiracy, to prevent an employé from quitting the service in which he is engaged, solely as a means of carrying out his part in such conspiracy, and for no other purpose than to aid in enforcing such boycott." "There certainly are times and conditions when" the employés right to quit work at will "must be denied."

That Judge Ricks would, in a similar case, incline to the position taken by Judge Jenkins, appears best from his own lan-

guage: Engineers and firemen "represent a class of skilled laborers, limited in number, whose places cannot always be supplied. The engineers on the Lake Shore & Michigan Southern Railroad, operate steam engines, moving over its different divisions 2500 cars of freight per day. These cars carry supplies and material, upon the delivery of which, the labor of tens of thousands of mechanics are dependent. They transport the products of factories, whose output must be speedily carried away, to keep their employés in labor. The suspension of work on the line of such a vast railroad, by the arbitrary action of a body of its engineers and firemen, would paralyze the business of the entire country, entailing losses, and bringing disaster to thousands of unoffending citizens. Contracts would be broken, perishable property be destroyed, the traveling public embarrassed, injuries sustained, too many and too vast to be enumerated. All these evil results would follow to the public because of the arbitrary action of a few hundred men, who, without any grievance of their own, without any dispute with their employer as to wages, or hours of service, as appears from the evidence in this case, quit their employment to aid men, it may be on some road of minor importance, who have a difference with their employer, which they fail to settle by ordinary methods. If such ruin to the business of employers, and such disasters to the thousands of the business public, who are helpless and innocent, is the result of conspiracy, combination, intimidation, or unlawful acts of organizations of employés, the courts have the power to grant partial relief, at least, by restraining employés from committing acts of violence and intimidation, or from enforcing rules and regulations of organizations, which result in irremediable injuries to their employers and to the public. It is not necessary, for the purposes of this case, to undertake to define with greater certainty the exact relief which such cases may properly invoke; but that the necessities growing out of the vast and rapidly multiplying interests following our extending railway business, make new and correspondingly efficient measures for relief essential is evident, and the courts, in the exercise of their equity jurisdiction, must meet the emergen-

cies as far as possible within the limits of existing laws, until needed additional legislation can be secured."

The relation of railroad employés to the public and the duties resulting from that relationship cannot, of course, be deduced from the same source as in the case of a railroad corporation. The act of incorporation and the acceptance of its franchise cannot devolve upon employés, who are not parties to them, the duties which they devolve upon the corporation itself. Nevertheless, the acceptance of employment under such a corporation is an acceptance to that extent of the benefits of such franchise. The employment must be deemed to be assumed by the employé with a view to its nature, its requirements, its obligations. "The primary duty of a railroad," said Judge Jenkins, in *Farmers' Loan and Trust Co.* (*supra*), "is to the public. It must be kept a 'going' concern, although it prove an unremunerative investment. So also, employés on entering its service assume obligations co-extensive in kind with that of the corporation. Their rights—as the rights of bondholders and stockholders—are subordinate to the rights of the public, and must yield to public welfare." Every contract is deemed to be entered into in view of and with reference to the law of the land. The provisions of the law are regarded as entering into and forming part of the contract as an implied term. This is fully and ably stated by Judge Ricks in the Toledo case already adverted to: "Holding to that employer, so engaged in this public undertaking, the relation they did, they owed to it and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew that if it failed to comply with the laws in any respect, severe penalties and losses would follow for such neglect. An implied obligation was, therefore, assumed by the employés upon accepting service from it under such conditions, that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied

conditions, on their behalf, was that they would not leave its service or refuse to perform their duties under circumstances, when such neglect, on their part, would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe penalties. In ordinary conditions as between employer and employé, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employé has it in his power to arbitrarily terminate the relations, and abide the consequences. But these relative rights and powers may become quite different in the case of the employès of a great public corporation, charged by the law with certain great trusts and duties to the public. The very nature of their service, involving as it does the custody of human life, and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them."

In the case then before the learned justice, it was held that a railway employé is amenable to an injunction order issued to secure compliance with a requirement of interstate commerce law. If a railway employé, by virtue of his contract and the nature of his employment, assumes such a duty of compliance with the law, in that case, that he may be held to it by injunction, why he is not equally bound and why may he not be equally coerced with respect to the well-known law requiring continuous and uninterrupted operation of a railroad? This requirement is part of the law surrounding his employment with reference and in obedience to which a railroad employé contracts. To that extent then, he engages to maintain the uninterrupted operation of the railroad, and to that extent there devolves upon him the public duty to do so.

Railroad employés, said Judge Taft, in the case already cited, "are fully identified with the employer in the discharge of his public funct ons." "Corporations," to quote Judge Ricks further, "can act only through their officers, agents and servants, so that the mandatory provisions of the law, which apply to the corporation, apply with equal force to its officers and employés."

The writer believes that the public should be saved the inconvenience and the commercial paralysis consequent to railroad strikes, not by judicial intervention against one side to the controversy only, but against both sides. Injunction in form, this intervention should be, when undertaken before the strike and in contemplation thereof; thereafter in form of mandamus; but in both cases against both employer and employé, railroad corporation and railroad operators.

There need to be no fear for the practicability of this course on the score of the impossibility of making all employés parties, or of serving them with notice either of the application or of its allowance. These formalities have been decided to be unnecessary, and the court's order binding upon all officers and employés of the railroad, having actual knowledge of its existence and scope. (See the two Toledo cases, *supra.*) The deadlock, to end which is the public's concern and the court's ground of interference, is most effectively ended by controlling and coercing all implicated in it. It has been shown at the beginning of this article that a mandamus against a railroad corporation alone might result in forcing the corporation to employ strikers at their own terms. It will readily be seen that a mandamus or mandatory injunction against strikers alone would be an equal discrimination on the part of the court by forcing them frequently to work for the company against their will, at its terms. In directing a mandamus against both corporation and employés, discrimination in favor of either side of the labor controversy is avoided. But better still an opportunity, nay a necessity, of doing justice between them as regards the merits of the controversy is thus afforded to the court. If both company and employés are ordered by the court to cooperate in the resumption of operation of the railroad, some terms upon which they are to do so must from the necessities of the situation be prescribed. This involves a judicial inquiry into what terms are just, and as to whether employers' or employés' terms or some terms between the two are to govern.

The duty, the opportunity of judicial intervention in and regulation and prevention of strikes will thus at last be found.

New York, February, 1895.