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LAW SCHOOL NOTES.

The new rules for admission to practice in the Supreme Court of the State of Pennsylvania went into effect on January 1. These rules require that all persons who desire to practice in the Supreme Court of the State shall take a final or law examination before the committee of lawyers appointed by the Supreme Court and known as the State Board of Law Examiners. The announcement of the first examination of the State Board was made in April, and the first examination was fixed for the twenty-second of June. Forty-seven members of the graduating class desiring to practice in Pennsylvania presented themselves for examination. The examination was written, the student not signing his own name to the paper. Ninety-six persons in all took the examination, including the forty-seven graduates of this department. I have been

informed that slightly more than one-fourth the total number of those who took the examination failed, but that forty-six of the forty-seven graduates of the Law School were successful. In other words, of those who were not graduates of the department, more than 50 per cent failed, while of those who were graduates, only one man out of forty-seven failed. This result justifies the assertion made by members of the faculty to the committee of the Bar which prepared the new rules for admission, that the graduates of the department were prepared on graduation, without any special preparation, to take and pass any examination which would be given by a Board of Examiners in law.

CONTRACT. REFUSAL TO PERFORM. RETRACTION. ANTICIPATORY BREACH.—*Perkins* v. *Frazer et al.*, 31 So. Rep. 773 (Supreme Court of Louisiana, December 2, 1901), 107 La. 390. The facts briefly are as follows: In March, 1898, one Mason, of the defendant firm, and one Perkins, the plaintiff, made an agreement for the prolongation of Mason's irrigation canal easterly along the north boundary of Perkins' land; later another agreement provided for the prolongation of the same canal in another direction, the reciprocal obligations being, on the one part to construct the canal and furnish water from year to year, on the other part to cultivate a specified number of acres in rice and pay a particular water rent.

The plaintiff now brings suit to set aside these contracts on the ground of non-performance, and to recover damages. The facts appeared as follows: In 1899 the defendant failed to furnish to a certain part of the land enough water; in 1900 the defendant refused to furnish any water at all. The plaintiff claims that such action was a complete rescission, justifying his suit for damages. But the point especially desirable of notice is that the refusal to furnish water for the crop of 1900 was a hasty and imprudent step; it was speedily retracted within a few days and while the situation was still intact; and thereafter water was furnished by the defendant abundantly; the plaintiff received it as if there had never been a refusal. And, moreover, it appears that at the time of the refusal the defendant made claim for and still claims a certain amount of unpaid water rent. About two weeks after the defendant's refusal, its retraction and the continuance of supply, the plaintiff notified the defendant, in spite of the fact that he was constantly receiving the water, that he held his refusal of two weeks past to be default under the contract, and that he would sue to set said contract aside and for damages. The lower court held, and the Supreme Court affirmed the judgment, that so long as things are whole a man who has rashly repudi-

ated a contract may retract his repudiation. Here the demand for water and the refusal and its retraction took place early in the season, when the crop could without detriment wait for a time for the water. The objection to such ruling is that a court is reading into an agreement something that is not necessarily there, and probably is not there at all; but a generally prevailing policy of all courts is to adjust a situation reasonably where a man has entered into unreasonable transactions. But to continue with the rulings of the court: it was further found that the notification by the plaintiff that the refusal was considered a default was even then not sufficient to prevent the defendant from taking advantage of an opportunity beneficially to retract the refusal. The contract was not put an end to by such refusal or by the notice. It continued in full force and effect; nothing short of a judgment—barring, of course, consent of the parties, or other sufficient methods—could bring it to an end. And reference was made to the Civil Code, Article 2047.

The point for especial attention is whether refusal and retraction, even when held by the opposite party as default but not definitely acted upon, are capable of extinguishing an obligation, if no direct injury has fallen upon such opposite party on account of the refusal and if no decided change of position has taken place. It has been generally held that mere repudiation does not put an end to the contract, but only entitles the injured party, at his election, to terminate it. Therefore the refusal may be withdrawn at any time before it has been accepted or decisively acted upon by the other party, and the party refusing may take advantage of any event which will enable him to retract the refusal and proceed to carry out his agreement. But the question as to what is sufficient decisive action by the party who elects to consider the refusal as an entire extinguishment of the contract is wholly unsettled. In one of the latest cases in America, this question of anticipatory breach arose, and it was adjudged that a mere refusal was sufficient to constitute a final breach and the injured party might sue upon the contract at once, without waiting even for the time for performance to arrive. *Mut. R. Fund Ass'n* v. *Taylor*, 99 Va. 208 (1901). If, after a refusal, an election to sue is considered as a sufficient notification that the contract is held to be at an end by the injured person, we then come to an equally unsettled and difficult question: when may the injured party sue?

If a party to a contract has paid money, or in some way substantially fulfilled, even in part, his side of the contract, and the other party refuses to perform before the time for his performance has virtually arrived, it is generally considered that restitution may be had at once. *Giles* v. *Edwards*, 7 T. R. 181 (1797); *Ferrer* v. *Nightingale*, 2 Esp. 639 (1807); *Lyon* v.

Annable, 4 Conn. 350 (1822); *Widdle* v. *Lyman*, 2 Peak's Rep. 30 (1829); *Wilkinson* v. *Ferree*, 24 Pa. 190 (1855); *Doherty* v. *Dolan*, 65 Me. 87 (1876); *Payne* v. *Pomeroy*, 21 D. C. 243 (1895). But it was recognized long ago in Pennsylvania that notice of an intention not to perform a contract, if not accepted by the other party as a present breach, remained only a matter of intention and might be withdrawn at any time before the performance was in fact due, *Zuch* v. *McClure*, 98 Pa. 541 (1881), but an expressed intention to treat the refusal as a breach and to sue at once was sufficient to end the whole contract and to justify such suit. This rule, allowing a suit before the time for performance had arrived, was adopted in England, in the leading case of *Hochster* v. *De La Tour*, 2 El. & Bl. 678 (185.); and in the United States Supreme Court, in *Roehm* v. *Horst*, 178 U. S. (1899), and seems applicable, whether or not the defendant has retracted his refusal between the time when the injured or opposite party published his determination to sue upon the contract and the time when performance was really due. But in *Roehm* v. *Horst* (*supra*) the rulings seem to imply that should the party receiving the refusal not elect to sue at once, the refusing party may retract while the agreement is kept open for his benefit, and proceed with his performance when due, the contract remaining always in force. In accord, *Dingley* v. *Oler*, 117 U. S. 490 (1885), had already decided that "the refusal of one party to deliver goods under a contract, if not treated as final by the party making the demand, cannot afterwards be treated as a refusal authorizing the commencement of a suit." Thus far the rule is that one may treat a refusal as a complete extinguishing of the contract by bringing suit upon the contract at once, even though the time for performance has not arrived; but if the refusal is not acted upon immediately, the right to sue is lost and the contract remains valid, allowing the refusing party to take advantage of intervening benefits.

This rule is denied in other states, among which is Massachusetts, where, in *Daniels* v. *Newton*, 114 Mass. 530 (1874), it was held that an action for anticipatory breach could not be maintained, even though there was proof of an absolute refusal on the defendant's part ever to perform, for the opposite party, the plaintiff, must be able to show the defendant's indisposition to tender performance at a time when and under conditions such that he is entitled by the agreement to require performance. This rule was first announced in Massachusetts in *Frazier* v. *Cushman*, 12 Mass. 277 (1815); and found support in *Pomeroy* v. *Gold*, 2 Met. (Mass. 1841) 500; *Hapgood* v. *Shaw*, 105 Mass. 276 (1770); *Carpenter* v. *Holcombe*, 105 Mass. 280 (1870), and has found support in England in *Lovelock* v. *Franklin*, 8 Q. B. 371 (1846); *Ripley* v. *Mc-*

Clure, 4 Exch. 345 (1849); *Phillpotts* v. *Evans*, 5 M. & W. 475 (1855). These cases held that the announcement of a determination to break a contract before the time for fulfillment has arrived is nothing more than an offer to rescind; and if not retracted in due time, it is evidence, when the day for performance comes, of a continued refusal and decisive breach.

However, there is a well-recognized principle, soundly supported, that a refusal at any time to perform puts an end to the contract, and the injured party may immediately claim damages, but must reduce those damages by making the best use he can of his liberty. *Bowdell* v. *Parsons*, 10 East. 359 (1808); *Planché* v. *Colburn*, 8 Bing. 14 (1831); *Short* v. *Stone*, 8 Q. B. 358 (1846); *Drake* v. *Gorce*, 22 Ala. 409 (1853); *Leigh* v. *Patterson*, 8 Taunt. 540 (1868); *Festing* v. *Hunt*, 6 Manitoba, 381 (1890); *Elder* v. *Chapman*, 176 Ill. 142 (1898). And other courts have modified the rules above so that an expressed intention never to perform, if made before the contract time for performance, though not of itself a breach, and withdrawable at any time until the other party has taken some conclusive action upon it, becomes irrevocable by the injured party's bringing suit. *Swain* v. *Seamans*, 9 Wall. 254 (1869); *La Société* v. *Milders*, 49 L. T. N. S. 55 (1883); and compare *Zuch* v. *McClure*, 98 Pa. 541 (1881).

The doctrine of allowing suit upon an anticipatory breach, at the election of the injured party, has been looked upon with approval, and often with unqualified favor, in the following cases in England: *Cort* v. *A. and U. R. R. Co.*, 17 Q. B. 127 (1851); *Danube and B. S. R. R. Co.* v. *Xenos*, 11 C. B. N. S. 152 (1861); *Frost* v. *Knight*, L. R. 5 Exch. 322 (1870); and in the following cases in the United States, *inter alia: Crabtree* v. *Messersmith*, 19 Iowa, 179 (1865); *Fox* v. *Kitton*, 19 Ill. 519 (1858); *Dugan* v. *Anderson*, 36 Md. 567 (1872); *Burtis* v. *Thompson*, 42 N. Y. 246 (1870); *Howard* v. *Daly*, 61 N. Y. 362 (1875); *Wolf* v. *Marsh*, 54 Cal. 228 (1880); *Thompson* v. *Kyle*, 39 Fla. 582 (1897); *Kurtz* v. *Flank*, 76 Ind. 594 (1881); *Platt* v. *Brand*, 26 Mich. 173 (1872); *Kalkhoff* v. *Nelson*, 60 Minn. 284 (1892); *Mfg. Co.* v. *McCord*, 65 Mo. App. 507 (1896); *Schmitt* v. *Schnell*, 14 Ohio C. C. 153 (1897); *Mountjoy* v. *Metzgar*, 9 Phila. 10 (1872); *Davis* v. *Grand Rapids Co.*, 41 W. Va. 717 (1896); *Chapman* v. *Beltz Co.*, 35 S. E. 1013 (W. Va. 1902). Other courts demand that the refusal shall have been distinct, unequivocal and absolute, or that it shall have gone to the essence of the contract before the injured party is justified in suing at once. *Lee* v. *M. Life Ass'n*, 97 Va. 160 (1900); *Spiers* v. *Union Drop Forge Co.*, 180 Mass. 92 (1902). The latter case verifies the inconsistency of the rules upon this topic in Massachusetts. Cf. *Daniels* v. *Newton* (*supra*).

Without dissent, in the majority of the states, the refusal must be treated and acted upon as such by the party to whom the promise was made; for if he afterward continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end (v. *Benjamin on Sales*, 2d ed., sec. 568), and therefrom it may be readily deduced that if he acquiesce in receiving the benefits of a retraction he considers the contract still intact. See *Smoot's case*, 15 Wall. (U. S.) 36 (1872). And still further, there is no lack of authority to support the view that retraction may follow a refusal and bring the whole contract into force again, even though the refusal had been definitely accepted and the intention to sue made known: this is the rule in Louisiana in the case which opened our discussion.

That the plaintiff has an immediate right of action before the time for performance arrives, whether such day has been definitely ascertained or not, has been severely criticised and said to be based upon a fallacy—but a reasonable one, indeed—transmitted through many years of judicial reasoning (14 *Harvard Law Review*, pp. 317, 421 ff.), yet it is established by both English and Canadian courts, and finds sanction in an overwhelming majority of our own state courts, though several of the states heartily condemn it, *supra* and *Carstens* v. *McDonald*, 38 Neb. 858 (1894); *King* v. *Waterman*, 55 Neb. 324 (1898); *Parker* v. *Pettit*, 43 N. S. L. 512 (1881); *Stanford* v. *McGill*, 6 N. D. 536 (1897); and in many states the question is still unsettled, so that the final outcome in America is not yet certain, and indeed seems at times to be almost beyond conjecture when we see a majority of the lesser states standing adverse to a minority of those of more impressive authority. See *Freer* v. *Denton*, 61 N. Y. 492 (1876); *Day* v. *Conn. Co.*, 45 Conn. 480, 485 (1878); *Dugan* v. *Anderson*, 36 Md. 567 (1872); *Maltby* v. *Eisenhauer*, 17 Kan. 308 (1876); *Sullivan* v. *McMillan*, 26 Fla. 543 (1890), and cf. *Thomson* v. *Kyle*, 39 Fla. 582 (1897); *Pinckney* v. *Danibaum*, 72 Md. 173, 182 (1890).

The reasoning to support the majority opinion is the result mostly of practical convenience and free-going policies. If the plaintiff has a possible action on account of the defendant's refusal, it is naturally contended that he might just as well have it at once; but the answer to such contention is that the defendant is put to a disadvantage entirely too unfair and far outweighing the benefit which accompanies the plaintiff's right of immediate action. The defendant has promised to do something at a future day; before that day comes we are allowing the plaintiff to sue him upon a promise which is not yet thoroughly broken, or we might more subtly say, upon a promise which he has never made. If the contract made in January

calls for work in July, and the promissor gives notice of a refusal in February, it is obviously unjust to him to allow the plaintiff to bring suit on account of such refusal at once, when in reality he is not yet entitled to the work in question and can be said to have suffered no damages, for the essential breach of the contract will not, if at all, be consummated until July. But on the other hand the law must consider a man's word as good as his work, and when he has broken his promise, he has broken all that the promisee then had to rely upon, all that represented the work which the promisee was eventually to require; and if the promise cannot be preserved entire, then the precariousness of the promisee's position increases from day to day. This is answered by commanding that the promisee treat the refusal as a breach of the contract, refuse to accept a retraction if offered, enter into contractual relation with more reliable parties and sue upon the broken promise when the day set for performance has arrived.

It is also necessary to consider the case in which the defendant, having refused in February, retracts the refusal and proceeds to perform in July. Why, then, should the plaintiff, having supposedly sustained no disadvantage, but rather having received the full benefit of the contract in view of the defendant's retraction, be allowed to set aside the contract on the ground of anticipatory breach, when such work has been tendered as he bargained for, in spite of the ephemeral refusal? In such event, unless the plaintiff, feeling the magnitude of the refusal, has so changed his position that he cannot let the contract go on without a substantial prejudice to his plans, certainly the defendant should be permitted to retract and repent of his hasty and probably unadvised determination. The doctrine of anticipatory breach, if carried to its logical conclusion, would wholly deprive the promissor of any opportunity of making a beneficial retraction or of taking advantage of helpful intervening circumstances, even though any reasonable number of reasonably supported refusals and retractions should occur preceding the time for performance or while allowing due indulgence without injury to the plaintiff, if the work finally is done in harmony with the stipulations of the contract. We should presume no change of relations sufficiently material to allow an action to lie for a breach of the contract. Whence it has been adjudged that if the promisee, after receiving the repudiation, demands or manifests a willingness to receive performance, his rights are lost; and having had the benefit of a retraction, thereafter he may not set up his right to end the contract, and he has justified the promissor in making the best use possible of all supervening circumstances. *Leake on Contracts* (3d ed.), 752, and notes; *Frost* v. *Knight*, L. R. 7 Ex. 111; *Leigh* v.

Patterson (*supra*); *Phillpotts* v. *Evans* (*supra*). Moreover, if one of the parties to a contract has derived an advantage from a partial performance, he may not hold such and consider the contract as rescinded because of the non-performance of the residue. *Boon* v. *Eyre*, 1 H. Bl. 273 (1776); *Hunt* v. *Silk*, 5 East. 449 (1804); *contra*, see *Giles* v. *Edwards*, 7 Term R. 181; though the criterion of these cases seems to be whether a reversion to primary relations is possible.

It has been laid down in some of the earlier decisions that after the least default in an executory contract an offer to execute came too late, thus practically sustaining the doctrine of anticipatory breach. *Pratt* v. *Craft*, 20 Lo. An. 291 (1868); in this case the defendant made no attempt to comply with his part of the contract until more than two years after it had been entered into, and after the plaintiff had suffered an essential change of position; and in the light of such facts it was very easy for the court to make so broad a rule as the above. By the same opinion, however, *semble* that a retraction coming before any detrimental change of position had occurred between the parties would have been a good cause for considering the contract as still binding, in spite of the fact that the earlier Louisiana case of *Moreau* v. *Chauvin*, 8 Rob. Lo. 161 (1844), had announced also that the barest default was equivalent to a breach great enough to permit the plaintiff at once to set the contract aside.

The Civil Code of Louisiana, Article 2047, expressly authorizes the courts to allow the contract, if possible, to be performed after a retracted refusal; and in support is cited *Turner* v. *Collins*, 2 Martin (U. S.) 605 (1822), where the plaintiff, not having proved that he had sustained damages on account of the temporary refusal, could recover no damages nor could he rescind the contract. References are there given to numerous French treatises sustaining the ruling in that case.

The apparent severity of most of the Civil Code is everywhere tempered by the rights of reason and justice; and it is only reasonable that a person should not be compelled to suffer undeserved injury and damage by being denied the privilege of retracting a harmless and possibly a not unprovoked threat of refusal, and without torturing the meaning of the contract, fulfill its stipulations. If, however, the theoretically injured party at once treats the refusal as a breach, makes a change of plans such as he is justified in doing and enters into safer contracts with more reliable parties, then the question becomes more difficult and confusing. In conclusion, we deem it the most satisfactory rule that a party to an executory contract should consider the promise as the extent of the obligation, for while the contract remains executory the promise is the focus of his plans; and if the word is broken and

unsafe, there can be nothing stable in the matter of contingent arrangements. If the injured party solicits performance, however, he has waived his rights and the contract should remain in full effect; if he treats the refusal as a breach, he should be allowed to sue at his election, mitigating the damages in every reasonable way. *E. H. B.*

PICKETING A STORE. INJUNCTION.—*Foster* v. *Retail Clerks' Association*, 78 N. Y. Supp. 860.—In this case, after the employees had been refused shorter hours, there was a strike and the defendants, members of an allied labor union, stationed themselves near the plaintiff's store persuading passers-by not to deal there. They also distributed a placard containing the following words: "Kirk Block [referring to the plaintiff] has been declared unfair by the —— Union and this action has been indorsed by the Trade Assembly. Union men keep away."

An injunction was granted against entering the store or standing upon the sidewalk in front of the store except for bona fide purposes of trade; also against collecting crowds in the vicinity and obstructing the passage of the people; also against any force or intimidation. In this last injunction the words force and intimidation are intended to be very comprehensive. No actual violence is needed to constitute intimidation, but all the circumstances are to be considered in determining whether force and intimidation are being used, such circumstances as the number of men, the nature of the circulars and other devices and the general methods of the strikers. Unless force and intimidation could be shown, the court refused to enjoin the picketing. When the defendants combined with others peaceably and by persuasion only to induce persons passing on the street to refrain from trading with the plaintiff, they were not doing any unlawful act. Whether picketing is unlawful must depend upon the circumstances of each case. Intentional injury to another is not always legally wrongful. Any one man may induce another to refrain from dealing at a certain store, though his motive be malicious, provided no slander be uttered. Again, the mere fact of combination does not convert a legal act into an illegal.

This is the position and these, in brief, the arguments of the New York court on this vexed question. Before delivering the decree, Justice Andrews says that a consultation of authorities from other jurisdictions would be useless, since cases for any proposition could be found in abundance. This is too true. Many of the courts, even in New York, have felt that in cases like the present there is an injury which requires

legal remedy, but they all find some difficulty in determining on just what grounds to hold these acts illegal.

An injunction, of course, is granted only where property is injured and where rights in property are interfered with. Equity acts rather in spite of the criminality than because of it in any given instance. The protection of property is its particular duty. Consequently in all these cases there is a conflict between the personal rights of one and the property rights of another. Employers have a right to carry on their business free from interference and should not be compelled to give up any property to save themselves from the business loss threatened by the interference of irresponsible workmen. On the other hand, there are many rights in which the employee should be protected. He should be allowed to claim the highest wage possible and should be free to use all his personal rights to obtain what he can for his labor. In some respects the rights and interests of the employer and employee are bound to conflict. The law must select which right is to prevail and to what extent.

The question to be answered in a review of this case is, can persuasion be considered illegal under any circumstances? The simple act of persuasion has never been considered either criminal or tortious unless it has been used in the furtherance of some unlawful purpose. But since the case of *Lumley* v. *Gye*, 2 Ellis and Blackburn, 216, it has been very generally held that it is tortious to persuade an employee under contract to leave the service of his employer from a mere motive to injure the employer. There is a tendency to apply the same rule where the employee is not working under contract. It was suggested by Lord Coleridge that this was not a tort at common law, but was an actionable wrong merely by virtue of the English Statute of Laborers. The element of intent in this tort was thought to be of statutory origin. Harm, and not motive, is the essential element of a tort and it is generally said that intent is entirely foreign to the realm of torts.

But even if *Lumley* v. *Gye* is good at common law, it does not attempt to decide whether it is a tort to persuade customers not to deal with a certain tradesman for malicious reasons. The boycott is a powerful instrument to do harm and it has often been termed illegal and has been enjoined. So often it has been connected with actual force and intimidation that it is not easy to say just how a court would stand where the boycott was made effectual by persuasion alone. Can this persuasion be tortious upon any theory?

A tort, positively defined, is a wrongful act causing harm to another. In the case of persuasion, another element must be added, and the definition must read, a wrongful act intentionally done to cause harm to another and actually causing

harm. A tortious act in every case must first of all be a wrongful act. If harm is caused by the exercise of what is called a legal right, there is no remedy, and that is so even where the intent is evil (*Heywood* v. *Tillson*, 75 Me. 225). This then is the first and main difficulty. Is the act of persuasion wrongful?

There are three considerations that enter into the determination of whether an act is legally wrongful. They are harm, an essential element in all illegal acts; intent, not essential, but a makeweight; and third, a consideration of the relative importance of the right injured to the right exercised by the person doing the injury. The second consideration, intent, is necessary in wrongful acts punished as criminal, perhaps because the penalty is a deprivation of freedom. In tort it is usually absent, and it would seem that to determine whether an act is wrongful so as to be a tort only the first and third considerations should be used. But where the rights of the opposing parties are of nearly equal importance, if great harm must be occasioned by the exercise of the defendant's right, the courts will be inclined to call his act illegal. If, however, the defendant's right is of supreme importance, publicly considered, and the law thinks it should be protected at any expense, it will not hold his exercise of that right unlawful, though it work harm to another. But if the plaintiff's right is also of great public importance and it is to the interest of society that it too should be protected at all costs, at once a difficulty is encountered. Now, in just such a case the element of intent might be introduced as a makeweight to solve the difficulty. In this way intent might enter into the tort, to determine the wrongfulness of the act which causes the harm. If this is a true explanation, we can see why the words "with malicious intent" or the like are added. They merely call attention to the fact that in the particular class of actions where they are needed, the conflicting rights are both so important that to make their exercise wrongful, an intent to do harm must be present; that intent in this tort is essential to make the act wrongful which does the harm; and that harm is no sufficient test.

Even if this question were settled, still the tortiousness of persuasion under such circumstances as exist in strike cases would be doubtful. There remains the question of motive, whether it is malicious. In almost all these cases there is a double motive. The ultimate motive of the workingman is to better his condition in the matter of wages, shorter hours and the like. To accomplish this aim, a secondary purpose arises to crush his employer if he does not yield. In some jurisdictions the ultimate aim of the workingman is considered so favorably that the secondary motive is disregarded as a mere incidental. But where it has not been considered good public

policy to encourage the working class specially, the secondary motive rises into prominence and naturally lessens defendant's right to use his freedom of speech to the harm of another's right of property. Thus again public policy may cause a difference in the law.

Thus far the discussion has been confined to the act of persuasion itself. No consideration has been given to the fact of combination which enters into all these cases. In some courts the simple act of persuasion, though malicious, is not of sufficient consequence for the law to notice. It would unnecessarily limit the rights of the individual persuading to consider such act unlawful. But the power of a combination, closely organized, to do harm is so enormous that the welfare of the community demands that it shall not be used maliciously for the ruin of others. Mr. Justice Gibson accurately expressed the thought as follows: "Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert, where there is a direct intention that injury shall result from it or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals and where such prejudice or oppression is the natural and necessary consequence" (*Com.* v. *Carlisle*, Brightley's Pa. Rep.). Justice Agnew in a later case, after quoting the words above, continued: "There is a potency in numbers when combined which the law cannot overlook when injury is the consequence. . . . If the motives of confederates be to oppress, the means they use unlawful or the consequences to others injurious, their confederation will be a conspiracy" (*Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. 187). These principles have been widely accepted and applied. The New York case refuses to accept them in words while really accepting them in application. There are no combinations illegal whose intent is not to do harm. There are few, if any, cases of boycott which are unaccompanied with pressure, and therefore intimidation in its widest meaning expressed by the New York court. The true difference between the New York law and Justice Gibson's dictum is a difference of attitude toward combinations, whether of hostility or of protection. The New York court feels that it should not abridge the workingman's right by giving the name of picketing a taint of illegality without an examination of the circumstances in each case.

The whole question is one of public policy and arises out of new economic conditions and business methods. In old England, the birthplace of the common law, the only laborers were farm laborers and they were much scattered. When they did upon one memorable occasion combine to demand higher wages, statutes were passed making their acts illegal. That was possible at a time when laborers had no voice in legislation,

but it would be highly impracticable now. As a consequence, the burden of making the law to satisfy modern conditions has been left to the courts in the exercise of their duty of interpreting and applying the common law to new cases. A simple act of persuasion must have seemed entirely harmless several centuries ago. Not until the age of large manufacturing and mercantile establishments, employing armies of workmen, has the mighty power of persuasion and social pressure been realized. Its baneful effects were not known and so the law was not ready to cure the evil and to-day is not ready for a final decision in this matter. The problem is more than legal; it is also social and economic. Time alone will tell what law is the best law.

A. L. D.