THE

AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW.

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Edited by members of the Department of Law of the University of Pennsylvania under the supervision of the Faculty, and published monthly for the Department by BOYD L. SPAHR, Business Manager, at S. W. cor. Thirty-fourth and Chestnut streets, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the BUSINESS MANAGER.

THE RIGHTS OF AN EMPLOYEE AGAINST EMPLOYERS' BLACKLISTS.

The question has arisen in connection with a recent strike in Philadelphia as to the legal rights of an employee prevented from obtaining work through the combination of his employers, either by means of a business blacklist or confidential communication. Together with all other questions involving combinations of labor or capital interests, the problem is in its infancy; its discussion, in view of the frequency of its occurrence, is pertinent.

To state the case, A., a union loom-worker, is employed by the B. Co., textile manufacturers. The union orders its members on strike, and in obedience to such orders, A. leaves the B. Co. Finding himself without means of support, A. later applies to the C. Co., another textile firm, for employment as a weaver. He is engaged and proves satis-

factory, but the B. Co., learning of his action, notify the C. Co. of his earlier relations with them, and ask that he be discharged. A. is accordingly dismissed. Has he any remedy?

Briefly put, if the communication made by the B. Co. to the C. Co. is of a purely personal and private nature, A. has no redress. There is no illegal conspiracy possible to be shown; the law of libel is not directly in issue, for the transaction is in the nature of a semi-privileged communication. Where, however, the method of notifying the C. Co. is of an official nature, as by a trade blacklist or other concerted action, we find a recent line of cases in each of which the court has been restricted to the barest principles of law. The question has not yet come before the courts of Pennsylvania for decision. It cannot be doubted that it will soon arise.

Two remedial methods have been suggested in the case of a blacklist. The first, by injunction, was dealt with at length and finally refused by the Supreme Court of Massachusetts in *Worthington* v. *Waring*, 157 Mass. 421 (1892). The second, by action for damages against the informant company, was allowed in *Mattison* v. *Lake Shore Railroad*, 3 Ohio Dec. 526 (1895). It is to be noted in passing that the blacklisting of discharged employees by a corporation, or a combination of a number of employers to prevent the employees discharged by one of them from obtaining employment, or otherwise attempting to prevent them from obtaining employment, has, in Maine, Iowa, Georgia and Montana, been made a statutory misdemeanor.

The right to form business relations is as surely a legal right as to hold property. "It is a part of every man's civil rights," says Cooley (Torts, 2 Ed., p. 328), "that he be left to refuse business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others he is entitled to redress. . . . Thus, if one be prevented by the wrongful act of a third party from securing some employment he has sought, he suffers a legal wrong, provided that he can show that the failure to employ him was the *direct and natural consequence* of the wrongful act." Under the head of conspiracy to prevent employment, Judge Cooley says:—

"By conspiracy is here intended the combination of two or more persons to accomplish by some concerted action an unlawful end to the injury of another."

He continues:—

"The quality of the act and the nature of the injury inflicted by it must determine the question whether the action will lie."

The most pertinent lines are those at the end, where, after dealing with the subject principally with reference to the business of employers, when this has been injured by strikers, the writer concludes:—

"The same doctrine would undoubtedly be applied to the case of employers who, by combination and unlawful means, should prevent or seek to prevent the employment of any special class of laborers. Every man has the liberty of employing and being employed, and every man must respect the like liberty in others."

Under the head of "Malicious Interference with One's Occupation," we find in Webb's Pollock on Torts, p. 406, that

"There may be other malicious injuries not capable of more specific definition, 'where a violent or malicious act is done to a man's occupation, profession or way of getting a livelihood.'"

Continuing, the editor notes that

"To maliciously interfere with the business of a person engaged in a lawful occupation, with injurious results, constitutes a ground of action of trespass on the case. Such interference may be by a single individual or by a number of individuals conspiring together. . . . To maintain a suit for the malicious interference with one's occupation, it is necessary to prove (1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damages and loss resulting."

The fundamental right involved is, of course, the right of every individual to seek any legal employment he may, and as the court said in *Walker* v. *Cronin*, 107 Mass. 562:—

"One of the aims of the common law has always been to protect every person against the wrongful acts of every other person, whether committed alone or in combination with others; and it has provided an action for injuries done by disturbing a person in the enjoyment of any right or privilege which he has."

In *Boutwell* v. *Marr*, 42 Atl. 607 (1899), the Supreme Court of Vermont said:—

"The crime of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means. (*State* v. *Stewart*, 59 Vt. 273.) But the grounds of recovery in a civil suit are not identical with the elements of the crime. The law punishes the mere agreement to effect an illegal purpose or to use illegal means. But it is clear that

a civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement; and it is claimed to be also requisite that the thing done be something unlawful in itself. This would preclude a reliance upon the existence of an illegal purpose, and require that the means used be legal. The agreeing together to effect an illegal purpose being itself illegal, it might seem that any act done in furtherance of the agreement and resulting in damage, even though itself not a violation of right, would sustain a recovery. But the view suggested is not sustained by the authorities, and we proceed with our inquiry upon the assumption that there can be no recovery unless illegal means were employed.

"It is clear that every one has a right to withdraw his own patronage when he pleases, but it is equally clear that he has no right to employ threats or intimidation to divert the patronage of another. It it be true as a general proposition that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means. . . . It may be true that if the defendants, acting independently of any organization and moved solely by similarity of interest and views, had united in withdrawing their patronage, the effect upon the plaintiff's business would have been the same. . . . But in the case supposed the united action would result from the free exercise of individual choice. It will be seen upon further inquiry that this cannot be said of the action of an organization like that operated by the defendants. . . . It is clear that the law cannot concede to organizations of this character the powers and immunities claimed for their association by these defendants and retain its own power to protect the individual citizen in the free enjoyment of his capital or labor."

The same point is incidentally discussed in *Bohn Manufacturing Co.* v. *Hollis*, 54 Minn. 223 (1893).

The best opinion on the question of a right to an action for damages against the blacklisting employer is undoubtedly that of Pratt, J., in *Mattison* v. *Lake Shore R. R. Co.* (*supra*). After reviewing authorities, he says:—

"Now, as I have perhaps said before, the question here is whether the doctrines thus announced in favor of the employer are the principles which should be employed in the case of the employee. It is said in Pollock on Torts, speaking of the right to employment by an employee, that it is the most serious right affecting the laboring man's life. Now, it seems to me, with all due deference, of course, to the opinions of the

courts which are adverse, that the employee's right to employment is equally sacred with the right of the employer to employ him. It is not only a serious right affecting a man's life, but you may say that it is his life. The laboring man's employment is the only thing that stands between him and starvation, or what is very little less than starvation—pauperism—and it is for the public interest and the public good that the right of a man to seek his own employment in any honest work which he may seek should not be interfered with or violated. This, of course, does not interfere at all with the right of a company or of a man to judge himself who he will have work for him, and it makes no difference whether he refuses to let a man work for him because he is incompetent or because he dislikes him; he has a right to seek his employees, but, as is frequently said, one man's right ends where another man's commences, and *the right of the employer to discharge ends with his own employment*, and he must not trench upon the right of the employee to seek other employment by which he may support himself and his family, and it is for the public interest that the largest liberty to seek employment should be before every man, whatever may be his employment or whatever may be his business, trade or occupation."

Summing up his opinion, the same Judge says:—

"It is also a matter of public interest to encourage men in becoming proficient in their employment. It is, of course, a matter of public policy a railroad should have the right to employ such men as it sees fit and to judge itself of the competency of its employees; there is no doubt about that. It is, however, for the public interest that a man who is skillful and who has become proficient in his employment should be able to find employment, if not with one railroad, then with another. . . . At least, that the field should be open to him that he should have that right, and while a railroad company may discharge their men and not employ them themselves, they trench upon the rights of the employees whenever they, by one deed or another, seek to prevent their employees from getting other employment of other railroad companies, or contribute or conspire in any way to prevent it."

So much for the right of an employee in an action for damages. Let us examine his right to an injunction. In *Worthington* v. *Waring*, 157 Mass. 421, the petition set forth that the petitioners, the employees of a certain mill corporation, left work upon the refusal of their demand for higher wages; that the treasurer and superintendent of the corporation sent the names of the petitioners to the officers of other corporations in the same city on a blacklist, which informed the officers that the petitioners had left the mill on a strike, and that thereupon the treasurer and superin-

tendent conspired together, and with the officers of other mills, and agreed not to employ the petitioners, with intent to compel them either to go without work in the city or to go back to work for the mill corporation at such wages as that corporation should see fit to pay them. It did not appear that any of the petitioners had existing contracts for labor with which the treasurer interfered. The prayer was that the treasurer and superintendent be restrained from annoying the petitioners and from interfering with their rights to earn their livelihood at their trades, and that they be enjoined to withdraw and destroy all blacklists or other devices issued by them, mentioning the names of the petitioners. The Court, in a short opinion, held that if the injury constituted a cause of action at all, the remedy was by an action of tort to be brought by each petitioner separately. The only grievance alleged of a continuing nature was the conspiracy not to employ the petitioners, and equity furnished no precedents for enjoining such a conspiracy, nor for compelling the defendants to employ the petitioners or to procure work for them with other persons.

It would then seem that an injunction would in no case lie against the employers, but in cases of a proven blacklist an action for damages might be brought against the offending employer. The ground for this would be that an illegal conspiracy was taking place to prevent the exercise by the employees of their right to work.

It has been broadly held in Pennsylvania, however, that it is lawful for employers to combine to resist a combination of workingmen in an attempt to advance wages, and that an agreement made in furtherance of such a combination is not ground for an action of conspiracy. The facts in the case in point, *Cote* v. *Murphy*, 159 Pa. 420 (1894), do not resemble those in a case of blacklist. In this case A. brought trespass to recover for damages occasioned by an alleged conspiracy of defendants, and the evidence showed a combination of workmen to advance wages; a combined effort of an association of employers to resist the advance, and an agreement of employers that they would not sell material to contractors who conceded the advance. A. sold material to the strikers and contractors, and because of the combination could not secure all of the materials he desired, and was therefore injured in his business. The Court refused defendant's request for binding instructions.

The question is therefore still an open one in Pennsylvania. Where no formal blacklist appears and the communication is of a purely personal nature, there being no combination capable of being demonstrated, the employee would seem to have no right of action. Where the black-

list or the equivalent exists, the Pennsylvania courts would probably follow Massachusetts and deny an injunction, though they might very possibly allow an action for damages. This latter view, that the employee deserves such protection, would seem to be slowly gaining ground, as evidenced by the fact that four States have at a comparatively recent date made the formation of blacklisting combinations punishable as misdemeanors.

Rupert Sargent Holland.