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A NEW LEGAL PROBLEM IN THE RELATIONS OF CAPITAL AND LABOR

The problem referred to in the title may be stated concisely as follows: Will the law uphold a contract between a workman and his labor-union whereby he agrees for a period of two years not to work in a non-union shop?

It is believed not only that this question is novel, but that its determination will be fraught with great consequences.

The case which first raised it was that of *The International Stereotypers and Electrotypers Union No. 31 v. Meyer*.¹ It appears that Local No. 31 of the International Stereotypers and Electrotypers Union of Cincinnati, Ohio, entered into a contract with each of its members, wherein the member agreed that for a period of two years from July 28, 1921, he would not enter into an agreement with any employer which should provide that the shop of the employer was to be operated on a non-union basis, that is to say, that members of a labor-union would be refused employment in such shop because of their membership in a union, and the member further agreed that he would not accept any employment with an understanding that the employer would not recognize labor-unions, or with the understanding that he would not be or become a member of any labor-union while employed

¹ Superior Court of Hamilton County, Ohio, September 5, 1923. A summary of the facts and some quotations from the opinion of the court are given in the issue of September, 1924 (volume 6, No. 9) of the periodical entitled "Law and Labor," published in New York by the League for Industrial Rights.

by said employer. The consideration for this promise was alleged to be work to be done and money to be expended by the union in advancing the conditions of workers and the material prosperity of the members of the worker's craft in the community where he worked.

Notwithstanding this contract, Meyer, who was one of the union members signing such an agreement, on January 29, 1923, while there was a strike on in the industry, went to work for the McDonald Printing Company of Cincinnati, which operated upon a non-union basis and which entered into an understanding with Meyer that he would not have dealings with any labor-union, and that he was not and would not become or continue to be a member of a labor-union during the period of his employment.

On April 11, 1923, the union in question brought a bill in equity praying that Meyer be restrained for a period of two years from July 28, 1921, from working for the McDonald Printing Company, or any other establishment, contrary to, and in violation of, his agreement with the union. The defendant demurred. The court in its opinion refused to decide the case, because the contract between the union and Meyer expired by its own limitations on July 28, 1923, before the court had time to arrive at a decision, and therefore the question was moot.

It will be noted that the case arose on an attempt to enjoin Meyer from working for any employer in violation of his agreement with the union. The question came up for the second time in American courts, but in a somewhat different form, in the case of *The Philadelphia Electrotypers and Finishers Union No. 72 v. Bethlehem Plate Company*.² In that case the plaintiff filed a bill in equity alleging that on April 3, 1923, the Electrotypers union entered into a written contract with each of its members, including one J. M. Davis, wherein each member agreed that for a period of two years he would not accept employment as an electrotypist in any shop which operated upon a non-union basis, or where the employer would not recognize labor-unions, or with any understanding or agreement that the employee was not a

² Court of Common Pleas of Philadelphia County, Pennsylvania.

member or would not become a member of any labor-union during his employment, or with any understanding that the employee's right to become affiliated with organized labor and to hold and retain membership in the union was to be in any way restricted or prohibited, or in any shop which had been declared unfair by the union. The consideration for this agreement was stated to be the union's acceptance of the member's application for membership, the benefits accruing to him from being a member of the union, the entering into similar agreements by his fellow-members of the union, the money spent and to be spent by the union, and the work done and to be done by it for the benefit of the craft and in protecting and improving the wages and working conditions of electrotypers, and the paying of burial and death benefits. The bill in equity alleged that, notwithstanding this agreement, Davis, on October 7, 1924, entered into the employ of the defendant, the Bethlehem Plate Company, which operated its shop on a non-union basis, this employment being effected as a result of the solicitation of Davis by the Bethlehem Plate Company, although the latter had full knowledge of the existing contract between Davis and the union. The plaintiff, unlike the union in the Cincinnati case, asked for an injunction, not against Davis, but against the Bethlehem Plate Company, to restrain it from continuing to employ Davis, and from soliciting or enticing any other members of the union to break their contracts with it.

The bill in equity in this case was filed on December 17, 1924. The defendant demurred, but the case was not argued until a date so near to the expiration of the two years for which Davis had contracted with the union that the court was not able to decide it within the period during which alone the decision would be of any practical effect. Therefore this case also was dismissed, as was the Cincinnati case, as involving a moot question. As far as the writer knows the question thus remains undecided by any court, and there is left for future judicial consideration the important question whether a contract by a union with its members that they will not work for a stipulated future period in a non-union shop is one that is valid and enforceable.

That the question is important is readily obvious. If such an agreement is valid it will prove to be a powerful weapon in the hands of the unions on the one hand, and, if adopted by manufacturers, in the hands of capital on the other. If the unions can sign up enough persons to agree that they will not for a specified time work in non-union shops, and if employers of labor can contract with enough workingmen that the latter will not, for a given period of years, work in union shops, or become or remain members of unions, the ranks of the two forces will thus be correspondingly augmented in the historic battle between the army of labor to establish its power and combinations of capitalists to seek free markets of labor. Indeed the practical result of declaring such an agreement valid might involve a picturesque consequence. As each man attained the age of twenty-one years, and thus became capable of entering into a binding contract, he would be importuned by trade-union men on the one hand, and by anti-union employers on the other, to sign away his freedom for a specified period of years, two, five, ten or more, as the case might be, and to agree that during that term he would or would not be a union man; and we would thus have the spectacle of both employees and employers seeking in the pool of labor, as each person therein reached his majority, to align such person, by binding contract, on the side of trade-unionism or against it. The visualization of such a situation leads vividly to reflection of the great consequences that might, and probably would result in the industrial world.

It is because of this apparent importance of the question that it is herewith presented for analysis and consideration by students of law, the intention of the writer, for obvious reasons, being not to express any opinion or conclusion in regard thereto; but rather to marshal the conflicting principles and arguments applicable to the case, and to indicate the extent to which existing decisions throw any light upon the solution of the problem when it shall finally be presented for judicial determination.

It has already been noted that in the *Cincinnati* case the action was against the mechanic himself who had entered into the agreement with his labor-union, and it sought to enjoin him

from working in a non-union shop. Perhaps it might have been successfully contended against the plaintiff in that action that a contract not to work for another employer or general type of employer would not be enforced in equity by injunction, because of analogy to the cases which hold that, since a person cannot be compelled to work, the same result cannot be attained by indirection by enforcing a negative covenant not to work for another, unless the case falls within the well-known exception that the person has such unusual or unique skill in the practice of his trade or profession that his services are practically irreplaceable. On the other hand, this principle might not be applicable to the case in hand, in that the contract between the mechanic and his union did not call for the rendering to the union of personal services upon his part, as would have been the case had the contract been with an employer, but was merely to the effect that in return for the benefits derived from membership in the union he would not work for a proscribed class of employers. Be this as it may, however, this question did not arise in the Philadelphia case, inasmuch as there the bill in equity sought to restrain, not the mechanic, but the non-union employer, who, with knowledge of the agreement between the mechanic and the union, nevertheless successfully solicited the mechanic to break that agreement and to work for the non-union shop. The law seems to be established that in such a case relief can be had; that is to say that a third person can be enjoined from seeking to break any contract between two other persons where he does so deliberately and with malice, and malice means merely the doing of a wrongful act intentionally and knowingly. Neither does any great difficulty arise in regard to the question as to whether the damage to the union in such a case would be irreparable, since in law irreparability includes situations where the damages cannot be measured by any definite or accurate standard. In short, it would seem that all such collateral matters would not militate against the right of injunction in the case under discussion, and that the only question, and the important question, for discussion, is as to whether or not the agreement itself is valid; that is to say, whether or not it is consistent with "public policy."

The doctrine of "public policy" is one which, though continuously criticised in judicial opinions and by philosophers of the law, took root at an early stage in the history of English jurisprudence. Its opponents have always denounced it as judicial legislation; its defenders have insisted that judges upon the bench vested by the people with governmental powers cannot enforce private contracts which obviously tend to the impairment of the public welfare and which can no more be adequately covered by statutory legislation than the myriads of cases which continually arise in the administration of the common law. From the very nature of the doctrine it is impossible that there should be any definition of it by the courts as applicable by rule of thumb to the various cases that arise, and it has been left quite as undefined as "fraud" and similar subjects. Moreover it is necessarily fluctuating and uncertain, varying with the evolution of moral standards, the change of economic conditions, the usages of trade, and, in general, the social conditions and habits of thought of each successive generation which studies and enforces it.

Under the doctrine of "public policy" arise questions of the enforcement of contracts in restraint of trade and limiting the right and duty of labor. In the early stages of the English law, when the rule originated, trade was in its infancy, and the number of mechanics in England was limited. As a result the judges viewed any such restraint or limitation with alarm, and frowned upon any attempts which seemed to bear in their train undesirable results to the industry and commerce of the nation. Later, however, as population and trade increased, the stringency in the enforcement of the rule of "public policy" as applicable to these subjects was abated, and accordingly, instead of the courts holding all contracts in restraint of trade and labor illegal and void, the ban of the law was placed only upon such contracts as were unduly broad and unreasonable in their operation, while, on the other hand, restraints which were properly limited as to time and place and were based upon reasonable grounds were held valid and were enforced.

The theory upon which such limitations and restraints were

discountenanced was apparently twofold in its conception. On the one hand, there was taken into consideration the injury to the party himself who was being precluded from pursuing his occupation and thus prevented from supporting himself and his family. On the other hand, there was involved the detriment to the public welfare in that the capacity of the individual to labor and to produce constitutes his value to the public, and the branch of industry to which he is best fitted is presumably the one in which he can render the greatest profit and service to the community. These two grounds as constituting the basis of the doctrine that contracts in restraint of trade and labor are invalid as against public policy are enunciated and explained by Mr. Justice Bradley in *Oregon Steam Navigation Company v. Winsor*.³

The application of the doctrine of "public policy" to the question now under discussion rests, however, upon far deeper and more fundamental considerations than those involved in the historical aspect of the cases involving restraint of trade and of labor. If the matter were one merely of a contract by an individual mechanic not to work for a specified time in a given industry or for a particular employer or set of employers, there would probably be little difficulty in arriving at the conclusion that such a contract would be valid if based upon a propriety of objects to be attained. We are familiar with the common case of the owner of a store selling it to another and agreeing that he will not for a certain period engage in a similar business within a specified locality. The reasonable necessities of such a case and the obvious purpose designed to be accomplished, being fair and reasonable, outweigh the comparatively remote and unimportant loss to the public resulting from the vendor's self-imposed obligation to restrain from further continuation of the business which he had theretofore conducted. So it would seem that in regard to a contract whereby a laborer agrees that for a certain period he will not work for a person other than the one with whom he is contracting, or that while certain conditions exist he will not lend his services to certain proscribed employers, if

³ 20 Wall. 64 (U. S., 1873).

there are apparently good reasons, economic and social, for such restraining covenant, there is no more reason why, viewing the matter merely from the standpoint of such an individual contract, it should not be enforced as being legal and valid, than in the case of the sale of the store, the only deleterious effect on the industrial world in general being the loss of the laborer's work so far as his contract prevents him from pursuing it. But modern industrial life is quite different from that of the more primitive days when such considerations were the only ones involved in these contracts. The problems of union and non-union labor, the growth of trade-unionism, and the various industrial complications resulting therefrom, have shaken the modern economic world to its depths, and have assumed gigantic aspects of social and industrial policy that render the subject far more subtle and difficult than in earlier times. The world has become more integrated, and production proceeds upon far more complicated lines. Concentrations of capital on the one hand, and associations of labor on the other, have organized for relative supremacy, and therefore the question of public policy in regard to their relations, especially in a matter so profound as that involved in the case under discussion, demands much more analysis and insight than at a period when all of these factors were relatively simple and subject to easier comprehension and solution.

Entering now upon a more specific consideration of the question involved, our first inquiry should be: is the contract a reasonable one as between the parties; has it a valid *raison d'être*? On this point it must be remembered at the outset that labor-unions are not only not under the ban of the law, but that on the contrary they are considered proper agencies for the advancement of the interests of their members, and therefore are subject to legal protection and encouragement. From this it follows that there is nothing presumptively unreasonable, or in itself to be deprecated, in the terms of a contract which serve to further the welfare of such unions. It is obviously to the interest of a trade-union that it should secure adhesion to its principles by as many eligible persons as possible, and it is equally obvious that this purpose is accomplished in large measure by having such

persons agree that they will adhere to the principles of trade-unionism and to that end will refrain from working in non-union shops. Nor is there anything unreasonable in the attitude of a union which seeks to insist that its members, at least as long as they remain in the union, should not violate its principles by encouraging shops whose policy is directed against those principles. Would it, for example, be unreasonable for a Republican or a Democratic political club to insist that, as long as persons remain members of such club, they should not vote the ticket of the opposite party? Or would it be unreasonable for a church organization to demand that its members should not worship in a church deemed heretical by the one in which such membership existed? Or that a temperance organization should seek to bind its members in an agreement under which they assumed the obligation of not indulging in intoxicating liquors while such membership continued? It would seem that where there is an incompatibility between membership in a certain organization and action on the part of the member contrary to the principles of that organization, it is not unreasonable for the organization to seek agreements by its members to restrain from doing things or accepting responsibilities contrary and inimical to the principles involved in the acceptance and retention of such membership.

Upon the question, however, as to whether the agreement now under consideration is or is not reasonable, it is to be noted that the obligation assumed by Davis was not merely that he would not work for a union shop as long as he remained a member of the Electrotypers union, but that he would not work in such a shop for a specified period, namely two years; and this involves a somewhat more difficult problem. Davis might sever his connection with the union during the period of two years and yet be bound until the expiration of that period from working contrary to his assumed obligation. In other words, the obligation not to work in a non-union shop was categorical; the mechanic was not given the alternative of avoiding an incongruous situation by either working in union shops or resigning from the union, but he bound himself for the time specified not

to work in a non-union shop, whether during that time he remained in the union or otherwise. Is such provision reasonable? Suppose the time stipulated had been five or ten or twenty-five years, or even during Davis' entire life? In the case of the sale of a store the covenant not to engage in a competing business must, as to geographical extent and the period of time during which the obligation is to be binding, bear a proper and reasonable relation to the necessities and circumstances of the case. It is to be argued in favor of the validity of Davis' restriction that the union might contract with employers in the particular industry concerned to furnish them with union labor for a period of two years or other specified term; that is to say, under methods of collective bargaining which sometimes prevail in certain industries, obligations are entered into between employers and the unions covering definite periods of time, and the union therefore might take the position that in order to be able to carry out such agreements with the employers and to furnish them with the labor stipulated at the time required, it is necessary for the union to have contracts with its own members covering a similar period of time. In determining, therefore, whether or not such a contract is reasonable, the purpose of the restriction must be considered, and its "reasonableness" must be determined with reference to all the factors and conditions which as a practical matter enter into a consideration of the case from the economic and industrial standpoint.

Suppose it be determined as the result of such considerations that the agreement not to work in a non-union shop for a given period such as two years is reasonable. Our inquiry would not thereby be concluded, for such determination in itself would not constitute a final answer as to the validity of the contract. It is possible to conceive that an agreement may be reasonable as far as the parties to it are concerned and yet be against public policy; or, to put it otherwise, an agreement must be both reasonable as between the parties and consistent with the public welfare. The very object of the doctrine of "public policy" is to view such contracts from the standpoint of the general public, and even though the contracting parties themselves may have no desire to

harm the public, may have no improper or malicious motives against any third person, and may in good faith enter into a contract reasonably justified by their own proper interests, nevertheless the general effect of that and similar contracts may be inimical to the interests of society as a whole. A contract which is not reasonable may, because of that objection alone, be against public policy and therefore invalid, but, on the other hand, even though reasonable as between the parties, it may still be against public policy from the larger social viewpoint, and therefore not judicially enforceable. If this be true it follows that prevailing industrial conditions affecting the relations of labor and capital must always be considered in order to ascertain whether contracts are apt to result in such an undesirable economic and industrial situation that, from a pragmatic point of view, they should be put under the ban of the judicial branch of the government.

With these general considerations in mind, we are prepared to examine the authorities and see what light they throw upon the question as to whether or not public policy should permit the making of a contract which definitely, and for a given period, aligns laborers and mechanics on the side of the union or the non-union shop, and, if it appear from them that public policy should permit such a contract, whether and to what extent the right is to be limited and held within bounds. Perhaps the best way of studying the recorded decisions is with reference to the parties between whom the contracts are made. It is conceivable that such a contract may be entered into between an employer and employees stipulating either that the employer will take into his shop only a specified type of employees or that the employees will maintain only certain associations and uphold certain principles if taken into such employ. Or the contract may be made between an employer and a labor organization stipulating that the employer will take into his shop only union or other approved employees and that the labor organization in return will furnish such workmen for the employer. Or, as a third possibility, an agreement may be made among employers stipulating that they will not employ certain persons or types of labor, or among employees stipulating that they will not work for certain em-

ployers or classes of employers. While this classification has, so far as the writer knows, not been definitely or at least generally made a *ratio decidendi*, nevertheless it is believed that the principles of law applicable are different according to the parties who enter into such contracts.

Let us, therefore, first examine cases in which the contract is entered into between employer and employees.

The most interesting of these is *Hitchman Coal & Coke Company v. Mitchell*,⁴ a case which was decided by a divided court, since Justices Holmes, Brandeis and Clark dissented. In that case the plaintiff established its mine on a non-union basis, under an agreement with its employees that the plaintiff would continue so to run its mine and would not recognize the union: that if any man wanted to become a member of the union he was at liberty to do so, but he could not be a member and remain in plaintiff's employ. The defendants (representatives of an organization of mine-workers), with full knowledge of this agreement, tried to induce the plaintiff's employees to join the union and at the same time to break their agreement with the plaintiff by remaining in its employ after joining. The motive for this action on the part of the defendants was not to enlarge the membership of the union, but to coerce the plaintiff, through a strike or the threat of one, into recognition of the union. It was held by the majority of the court that the plaintiff was entitled to an injunction. While the court discussed the question of the bona fides of the defendants' intentions as affecting the question of malice, nevertheless the opinion is placed squarely upon the ground that an employer is as free to make non-membership in a union a condition of employment as the workingman is free to join the union.

A quick inference from this decision, but perhaps a faulty one, would be that if, as thus decided, an employer can agree with his employees that his shop is to be strictly a non-union one, that is to say, that he will not employ union men, it should conversely be true that the members of a union can agree that they will not

⁴245 U. S. 229 (1917).

work in a non-union shop. The temptation to such inference should be controlled until consideration is given to the cases hereinafter referred to where the contract is made, not between employer and employees, but among employees themselves in regard to their relations to their employers. Indeed in this very *Hitchman* case in the opinion of the District Court⁵ there is an approval of a quotation from Sir William Erle's "Memorandum on the Law Relating to Trade Unions," filed with the eleventh report of the Royal Commissioners in 1869, wherein it is stated that while "each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour," and while such power of choice "which one person may exercise and declare singly, many after consultation may exercise and declare jointly," nevertheless "they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination. Any arrangement for that purpose, whatever may be its purport or form, does not bind as an agreement, but is illegal, though not unlawful, on account of restraint of trade, and therefore void."

In *Flaccus v. Smith*,⁶ an employer, who ran a non-union shop, had a contract with his apprentices by which they covenanted not to join labor-unions. It was held that he might maintain a bill in equity for an injunction to restrain persons with a knowledge of this fact from enticing his apprentices to break their covenants and to become members of a union. The court said, per Mr. Justice Brown, that "The appellee had an unquestioned right, in the conduct of his business, to employ workmen who were independent of any labor-union, and he had the further right to adopt a system of apprenticeship which excluded his apprentices from membership in such a union. He was responsible to no one for his reasons in adopting such a system, and no one had a right to interfere with it to his prejudice or injury."

In *Mills v. United States Printing Company*,⁷ it was held

⁵ 202 Fed. 512 (1913).

⁶ 199 Pa. 128, 48 Atl. 894 (1901).

⁷ 99 App. Div. 605, 91 N. Y. Supp. 185 (1904).

that an agreement made in settlement of a strike among the employees of a printing company, by which the latter agreed that it would in the future employ only members of the labor union to which the striking employees belonged, was valid, where it appeared that the purpose of the agreement was not maliciously to injure the non-union men theretofore employed by the company, but to advance the legitimate interests of the striking employees. It may be mentioned at this point that many of the cases make much of the motive or intention with which such agreements are entered into, and seek to ascertain, as a controlling basis of decision, whether the primary purpose is for the interests of the contracting parties or maliciously to injure third persons, but it is not thought that such a criterion is sufficiently specific or concrete to furnish the test as to the validity or invalidity of such agreements. All contracts presumably are made for the mutual interests of those who enter into them, and many contracts, whether so intended or not, necessarily involve harm or loss to third persons who by the very terms of the contract are not to receive its benefits. The matter of intention, and of mental processes in general, is rarely helpful in the determination of legal rights.

Cases holding similarly to those just cited exist in reasonable profusion, and therefore it may be stated with some degree of assurance, that an employer may enter into an agreement with his own employees stipulating that he will employ only union men or non-union men, as the case may be, and the employees agreeing in return that they will or will not belong to a union, as a condition of their employment. Of course there are some cases which do not consistently follow these principles to an inevitable conclusion. Take, for example, the case of *Erdman v. Mitchell*.⁸ In that case members of an incorporated trade union and members of an unincorporated trade union were working on a large building. A strike was ordered by the unincorporated union, and two-thirds of the men quit work. Thereupon the managers of the unincorporated union made an agreement with the contractors

⁸ 207 Pa. 79, 56 Atl. 327 (1903).

that if the incorporated union men were discharged the strike would be called off. This arrangement was carried out and work was resumed. Subsequently the unincorporated union men announced that they would pursue the same course in future and drive every member of the incorporated union into the unincorporated union. It was held that a court of equity would interfere by injunction to protect the members of the incorporated union, the court saying that while "trade unions may cease to work for reasons satisfactory to their members," nevertheless "if they combine to prevent others from obtaining work by threats of a strike or combine to prevent an employer from employing others by threats of a strike, they combine to establish an unlawful purpose," and their action amounts to a criminal conspiracy. The court quotes from 1 Eddy on Combinations 416, to the effect that "a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged," the one purpose being legitimate and the injury inflicted on the employer merely incidental, while in the other case the object sought is the injury to a third party and the benefit to the members of the combination is remote as compared to the harm inflicted upon the non-union workmen.

Logically it would appear that the members of the unincorporated union had the right to enter into a contract with the employer whereby the latter should agree that he would not continue to employ, and would not take into his employ, members of the incorporated union, and if such right existed then the position assumed by them that they would leave their employ unless such result were brought about would not seem to be beyond their legal prerogatives. Here again, however, the court dealt with the question of motive, and sought to distinguish between a primary and an incidental purpose and between direct and remote injury. Be this as it may, however, the fact remains that, generally speaking, and according to the weight of authority, agreements between an employer and his employees are valid if they provide that the employer shall employ only certain groups of workmen or that the workmen shall be union men or non-union

men, or that they should belong to some specific organization. Indeed this is true to such an extent that uniformly it has been held that a statute which makes it unlawful for an employer to require an employee to agree not to become or remain a member of any labor organization during the term of the employment is in itself invalid and unconstitutional as an impairment of the freedom of contract and therefore of property rights. This was ruled in the case of an act of Congress in *Adair v. United States*,⁹ and as affecting a state statute in *Coppage v. Kansas*¹⁰ (in which there was a vigorous and interesting dissenting opinion by Justices Day and Hughes), the court saying that "To ask a man to agree in advance to refrain from affiliation with the union while retaining a certain position of employment is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other; and, having accepted employment on those terms, the employee is still free to join the union when the period of employment expires, or, if employed at all, then at any time upon simply quitting the employment; and if bound by his own agreement to refrain from joining during a stated period of employment he is in no different situation from that which is necessarily incident to term contracts in general. . . . Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which if fulfilled prevents for the time any inconsistent course of conduct."¹¹

We pass now to a consideration of the cases in which agreements are made, not between employer and employees, but between an employer and a labor organization providing that the employer will take into his shop only employees with certain qualifications and the labor organization agreeing in return to furnish such workmen to the employer. This in a way may be

⁹ 208 U. S. 161 (1908).

¹⁰ 236 U. S. 1 (1914).

¹¹ To the same effect are *Goldfield Consolidated Mines Company v. Goldfield Miners Union No. 220*, 159 Fed. 500 (C. C. 1908) and *People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073 (1906).

considered as a modification of the situation embodied in the first group of cases; in other words, instead of an employer contracting directly with his employees, he contracts with a labor organization which may be considered as the agent of the employees or at least as representing their interests. Although, as a general proposition, it may be stated that such agreements are just as lawful as when made between employer and employees directly, nevertheless the cases are not entirely in accord, or at least there are some variations in the facts which call for corresponding differentiation in treatment.

In *Underwood v. Texas & Pacific Railway Co.*,¹² the Brotherhood of Railway Trainmen entered into an agreement with certain railroad companies whereby the latter agreed that eighty-five per cent. of their respective employees should be Brotherhood men. This agreement prevented the plaintiffs, who belonged to a certain switchmen's union not connected with the Brotherhood, from obtaining work, and they asked for an injunction against the parties to the agreement, setting forth that they were trained as railroad switchmen, and that unless they could get employment as such they could not support themselves. The court refused the injunction and held the contract valid, saying that the railroads were free to employ whom they pleased, whatever might be their whim or caprice in the matter; that the contract did not create a monopoly which interfered with or prevented others, unlawfully, from exercising freedom of contract in relation to the sale of labor; that there was a practical reason for the making of the contract; and that the agreement was not exclusive in that it provided for the employment of a percentage of Brotherhood trainmen not out of proportion to their numbers. The court further stated that the contract was not against public policy, "as it in no way affects the real needs of the people in their health, safety, comfort, or convenience."

In New York there are several cases of this type. In the earliest one, that of *Curran v. Galen*,¹³ the defendants had threat-

¹² 178 S. W. 38 (Texas, 1915).

¹³ 152 N. Y. 33, 46 N. E. 297 (1897).

ened the plaintiff that unless he would join their union they would procure his discharge from his employment as an engineer, and they carried this threat into execution. The defendants pleaded a contract between the Ale Brewers Association and the Brewery Workmen's Local Assembly, 1796, Knights of Labor, which provided that all employees of the brewing companies should be members of the Assembly, and that no other employee should work for a longer period than four weeks without becoming a member. The court held that this defense was insufficient to prevent the plaintiff from recovering damages. On the other hand, in *National Protective Association of Steam Fitters and Helpers v. Cumming*,¹⁴ the court, held, per Parker, C. J., that a labor-union may refuse to permit its members to work with fellow-servants who are members of a rival organization, and may notify the employer to that effect and that a strike will be ordered unless such servants are discharged, where its action is based upon a proper motive, such as a purpose to secure only the employment of efficient and approved workmen, or to secure an exclusive preference of employment to its members on their own terms and conditions, provided that no force is employed and no unlawful act is committed; if, under such circumstances, the employees objected to are discharged, neither they nor the organization of which they are members have a right of action against the union or its members. In *Jacobs v. Cohen*,¹⁵ a contract was held not to be violative of public policy which was entered into between employers and a labor-union and which provided that the former agreed for a certain period to employ and retain only members of the union in good standing, and the latter, for the same period, bound themselves to furnish the services of its members. And in *Kissam v. U. S. Printing Co.*,¹⁶ there was an action brought by stockholders and employees of a printing company to restrain the company and certain labor-unions from carrying out an agreement whereby the printing company agreed

¹⁴ 170 N. Y. 315, 63 N. E. 369 (1902).

¹⁵ 183 N. Y. 207, 76 N. E. 5 (1905).

¹⁶ 199 N. Y. 76, 92 N. E. 214 (1910).

to employ none but members of the unions in question and to discharge all employees in certain departments who should refuse to become members of said unions. The trial court found that the execution of this agreement resulted in great financial benefit to the company; that it disposed of the differences between the parties; that it was not entered into for the purpose of gratifying malice against the non-union employees of the printing company or of inflicting injury upon them; that it was not the object of the defendants to compel the plaintiffs to join the unions; that no pressure so imperative as to amount to compulsion was exerted upon the company with regard to the discharge of the plaintiffs from their employment; and that there was no conspiracy to compel the plaintiffs to join the unions or solely to injure them in their employment. It was held that such findings of fact led properly to the legal conclusion that the agreement was in all respects lawful; that no unlawful act had been committed by the defendants; and that the complaint should be dismissed. It will be noted in passing that here again the court touches into the question of the motive which prompted the parties to enter into the agreement, and ventures the finding that the paramount purpose was merely to benefit the parties and was not based upon a malicious desire to injure third persons who were not the beneficiaries of the contract.

In Massachusetts also there are some variations in the decisions, dependent upon the circumstances under which the cases arose. In *Hoban v. Dempsey*,¹⁷ there was a contract between the members of a labor-union of longshoremen and the representatives of certain steamship companies, by which it was agreed that all longshoremen employed by the steamship companies should be members of that union whenever such men were available, and that, whenever such men were not available, men not members of that union might be employed. It was held that if the agreement was entered into freely and fairly for the mutual benefit of the contracting parties without any intention of injuring other longshoremen or of coercing them into joining the

¹⁷ 217 Mass. 166, 104 N. E. 717 (1914).

union, it was valid, and that its performance would not be enjoined in a suit in equity brought by longshoremen in the same port who were not members of that union. The court said that there was nothing of the boycott about the contract, since an essential element of the boycott is intentional injury to somebody. And so in *Tracey v. Osborne*,¹⁸ there were agreements between members of an unincorporated labor-union and manufacturers, to continue in force for one year, providing for arbitration, pending which there were to be no strikes or lockouts, that all work of the manufacturers should be done by members of the union, and that, so long as there was a sufficient number of these to do the work, no other help should be employed by the manufacturers. It was held that these agreements were valid, and that a suit in equity might be maintained by the members of such union against the members of another unincorporated union to enjoin the defendants from taking any action to cause or intended to cause the breaking of such agreements. On the other hand, in *Plcut v. Woods*,¹⁹ it was held that if the members of one labor-union conspire to compel the members of another union of the same craft to join the former union, from which they had withdrawn, and to carry out their purpose threaten strikes and boycotts to induce the employers of the members of the latter union either to get them to ask for reinstatement in the former union, or, failing so to do, then to discharge them, such conspiracy, and the acts in pursuance of it, were unlawful, and might be restrained by injunction; (Holmes, C. J. dissenting). The same comment might be made on this decision as on the Pennsylvania case of *Erdman v. Mitchell*, previously discussed.²⁰ In *Berry v. Donovan*,²¹ it was held that if a manufacturer makes an agreement with a labor-union to employ only its members, and that he will not retain any worker in his employ after receiving notice from the union that such worker is objectionable to the union for any cause, whatever rights this agree-

¹⁸ 226 Mass. 25, 114 N. E. 959 (1917).

¹⁹ 176 Mass. 492, 57 N. E. 1011 (1900).

²⁰ *Supra*, note 8.

²¹ 188 Mass. 353, 74 N. E. 603 (1905).

ment might give the contracting parties in relation to each other, it did not justify an agent of the union in demanding and procuring the discharge of a workman by the manufacturer because the workman was not a member of the union. In *Folsom v. Lewis*,²² it was held that a strike by a labor-union to compel employers to employ none but union men, or non-union men provided that they should join the union within thirty days, would be enjoined as an unlawful act, where its real object was to force the employers to submit to an attempt to obtain for the union a complete monopoly of the labor market. The court said that "Conduct directly affecting an employer to his detriment, by interference with his business, is not justifiable in law, unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are trying to obtain. Strengthening the forces of a labor union to put it in a better condition to enforce its claims in controversies that may afterwards arise with employers is not enough to justify an attack upon the business of an employer by inducing his employees to strike." And finally, in *Shinsky v. Tracey*,²³ where a labor-union, which controlled ninety per cent. of the laborers employed in the shoe industry of a certain city, made with several of the manufacturers a contract which provided that so long as the unions were in a position to furnish help to do the work no other help might be employed, and where a member of the union was expelled for becoming a member of a rival organization, and, to discipline him, the union got his employer to discharge him, and made it impossible for him to get work with any of ninety per cent. of the factories in the city because they were controlled by the union, and highly improbable that he could obtain work with any of the other ten per cent., it was held that the discharged laborer was a sufferer from the consequences of an illegal boycott, and could maintain a suit in equity to enjoin the union from further interference with his right to labor, and for damages.

In *Lehigh Structural Steel Co. v. Atlantic Smelting and Re-*

²² 208 Mass. 336, 94 N. E. 316 (1911).

²³ 226 Mass. 21, 114 N. E. 957 (1917).

fining Works,²⁴ there was a contract between an association representing nearly all the building contractors of New York City and an association representing the labor-unions thereof, binding the contractors to employ only union men in their enterprises therein, and having for its object the closed shop. It was held, per Backes, V. C., that this monopolization of the labor market by the unions violated public policy, the court saying: "The principle of the closed shop, *i. e.*, the monopolization of the labor market, has found no judicial sponsor. In whatever form organized labor has asserted it, whether to the injury of the employer, or to labor, or to labor-unions outside of the fold, the judiciary of the country has responded, uniformly, that it is inimical to the freedom of individual pursuit guaranteed by the fundamental law of the land, and contravenes public policy. . . . None [of the courts] has gone to the length of sanctioning a strike for a closed shop, which has for its object the exclusion from work of workmen who are not members of the organization."

In *Connors v. Connolly*,²⁵ a contract was entered into by labor-unions and substantially all the manufacturers in the chief industry of a locality, to the effect that union workmen only should thereafter be employed. It was held that such an agreement was contrary to public policy, since its tendency was to expose a non-union workman to the tyranny of the will of others, and therefore to create a monopoly which would exclude what he had to dispose of, and what other people might need, from the open market, or perhaps from any market. Accordingly it was further held that the plaintiff, a hat maker in Danbury, who was discharged from employment and prevented from getting work by the defendants, members of a labor-union, could have redress for the wrong inflicted upon him, notwithstanding the defendants' attempt to justify their conduct by the existence of an agreement between the representative of their union and nearly all the hat manufacturers of Danbury and vicinity not to employ

²⁴ 92 N. J. Eq. 131, 111 Atl. 376 (1920).

²⁵ 86 Conn. 641, 86 Atl. 600 (1913).

non-union workmen. The court cited the New York case of *Curran v. Galen*²⁶ and the Massachusetts case of *Berry v. Donovan*,²⁷ above referred to, as giving countenance to the broad principle that every agreement, whatever the conditions, by a labor-union with an employer, which provides that the latter should not employ, either at all or in any given department of his work, any other persons than union members, was contrary to public policy. The court disclaimed any intention to base its decision upon such a sweeping proposition, but did assert the doctrine, which it stated that all of the authorities approved, that "where the agreement is one which takes in an entire industry of any considerable proportions in a community, so that it operates generally in that community to prevent or to seriously deter craftsmen from working at their craft, or workmen obtaining employment under favorable conditions without joining a union, it is contrary to public policy." The court said that "Whether a contract is opposed to public policy or not does not depend upon the actual results which may happen to follow its operation in each particular case, but upon what the contract itself threatens, what its evil tendencies are, and what possibilities of harm to the general welfare lie within it."

It will thus be seen that, generally speaking, agreements are valid when entered into between labor-unions and employers and provide as to a type or group of labor that should be exclusively accepted by the employer, but that this general doctrine does not apply to a case where the practical result of the agreement is to work a monopoly of the labor market, and where, in effect, it prevents other workmen from being able to labor at their trade in the vicinity where the agreement is entered into. It is also subject apparently, in some jurisdictions, to the question of the motive upon which the agreement is based; that is to say, whether or not there is indicated any malicious intent to injure third persons. And, finally, it would appear that a threat on the part of a union to call off its members on strike unless certain work-

²⁶ *Supra*, note 13.

²⁷ *Supra*, note 21.

men are discharged by the employer presents a different case than where there is an existing agreement between the union and the employer that only the members of that union should be employed, although the logic of such a distinction may be questioned, in that if it be lawful for an employer to agree with a union to employ only its members, it would seem that he could properly acquiesce in a situation where the union demands such a result, and where, in pursuance thereof, he is led to discharge an employee not belonging to that union.

This brings us to the third group of cases—those in which agreements are made among employers, binding themselves not to employ certain individuals or groups of workmen, or among employees that they will not work for certain employers or types of employer. In these cases there are conflicting decisions, or at least irreconcilable dicta, but perhaps this condition is to be expected in the case of so difficult a subject and one likely to involve diverse viewpoints in regard to the relations of labor and capital.

The leading English case upon the subject seems to be that of *Mineral Water Bottle Exchange v. Booth*.²⁸ In that case a society established for the protection of a particular trade contained a rule that no member should employ any traveller, carman, or outdoor employee, who had left the service of another member, without the consent in writing of his late employer until after the expiration of two years. It was held that this rule was unreasonable, in restraint of trade and void, Chitty, J., pointing out that this was not an agreement between the employer and the employed, but among employers of labor; and Fry, L. J., saying that the restraint of trade involved was far in excess of any legitimate purpose of the contracting parties.

In *Blumenthal v. Shaw*,²⁹ the defendants discharged one of their employees, and thereupon notified the other morocco manufacturers in the place that he had left defendants' employ and that the others should not employ him. There was an agreement

²⁸ 36 Ch. Div. 365 (Eng., 1907).

²⁹ 77 Fed. 954 (C. C. A., 1897).

or understanding among the manufacturers covering such cases, and, as a result thereof, he was generally refused employment, and two of the manufacturers who had employed him in ignorance of his identity discharged him. It was held that he had a good cause of action for damages, the implied inference of the decision being that the agreement among the manufacturers was invalid.

In *Trimble v. Prudential Life Insurance Company*,³⁰ three insurance companies agreed that they would not employ any one who had been discharged by either of the other two. It was held that the agreement was contrary to public policy.³¹

In *McCord v. Thompson-Starrett Co.*,³² it was held that an order of a building trades employers association, embracing nearly every prominent building contractor in New York, which instructed its members that no men might be set to work or retained at work who did not join a particular labor-union was void as against public policy. The court based its decision upon the ground that "While an individual employer may lawfully agree with a labor-union to employ only its members, because such an agreement is not of an oppressive nature operating generally throughout the community to prevent craftsmen in the trade from obtaining employment and earning their livelihood, yet such an agreement when participated in by all or by a large proportion of employers in any community becomes oppressive and contrary to public policy, because it operates generally upon the craftsmen in the trade, and imposes upon them, as a penalty for refusing to join the favored union, the practical impossibility of obtaining employment at their trade and thereby gaining a livelihood."³³

On the other hand, in *Atkins v. W. A. Fletcher Co.*,³⁴ it was said that "Employers have the right to combine freely to refuse

³⁰ 64 S. W. 915 (Ky., 1901).

³¹ A similar agreement was held illegal in *Cheek v. Prudential Life Insurance Company*, 192 S. W. 387 (Mo., 1917).

³² 129 App. Div. 130, 113 N. Y. Supp. 385 (1908).

³³ The same doctrine is laid down in *Grassi Contracting Company v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279 (1916).

³⁴ 65 N. J. Eq. 658, 55 Atl. 1074 (1903).

employment to any kind or class of workmen precisely as employees have a right to combine freely to refuse to be employed by any employer who sees fit to employ workmen of whom they disapprove, or sees fit in any respect to conduct his business contrary to their views." In *Scott-Stafford Opera House Co. v. Minneapolis Musicians Association*,³⁵ a rule of the defendant corporation that none of its members, all of whom were musicians, should accept employment in theatres or opera houses, except upon certain conditions, was held valid. In *Commonwealth v. Hunt*,³⁶ it was held lawful for journeymen bootmakers to form themselves into a club and agree together not to work for any master bootmaker who should employ any journeyman not a member of said club, after notice given to such master to discharge such workman. In *New York, Chicago and St. Louis R. R. Co. v. Schaffer*,³⁷ it was held lawful for railroad companies to agree to furnish to each other information as to all of their respective employees who had quit work during a strike and also as to all of their employees who were members of the American Railway Union, and further to agree that such employees would not be employed by any of said companies without a "clearance," that is, a release and consent from the railroad company last employing the employee in question. In *Rhodes Bros. Co. v. Musicians Protective Union*,³⁸ a by-law of a union was held lawful which provided that members should not, under penalty of a fine, play for any theatre which had broken a contract with any member of the union. Accordingly it was decided that an injunction would not lie in favor of the proprietor of a dance hall against the union to prevent the enforcement of this by-law, even though the effect of it was to prevent him from employing union musicians. The court said that the by-law "left the members of the union free, in one sense, to enter the employment of the complainant, although it practically compelled them to choose between the benefits of such an engagement and membership in

³⁵ 118 Minn. 410, 136 N. W. 1092 (1912).

³⁶ 4 Metc. 1113 (Mass., 1842).

³⁷ 65 Ohio 414, 62 N. E. 1036 (1902).

³⁸ 37 R. I. 281, 92 Atl. 641 (1915).

the union." And in *Goldfield Consolidated Mines Company v. Goldfield Miners Union No. 220*,³⁹ it was ruled that an agreement among mine operators that they would not employ any person who belonged to a certain labor organization, or to any organization affiliated therewith, does not constitute an unlawful conspiracy against such organization or its members.

It thus appears, as already stated, that the authorities are far from being uniform on the question as to whether or not agreements are valid when they are entered into among employers, and provide for what is practically a boycott of certain employees or classes of employees, or among employees and provide for a similar kind of boycott or discrimination against certain employers or groups of employers. The cases cited would seem to indicate that there is no definite rule or principle adopted by the courts which furnishes a test for the determination of the problem, and yet it is precisely in this group of cases that the subject under discussion falls, since the agreement here under consideration was, in effect, one between Davis and his fellow-workmen who constituted the unincorporated association known as the Philadelphia Electrotypers and Finishers Union No. 72, in which they agreed among themselves not to enter into the employ of certain employers, namely, those running non-union shops. Perhaps, however, from a consideration of the authorities and from the discussion hereinbefore entered into, certain general principles applicable to the determination of the question involved may be laid down as being indicated by the weight of authority.

The writer attempts to formulate these principles as follows:

1. The first inquiry that must be made in seeking to ascertain whether such an agreement is valid is as to whether or not it is reasonable as between the contracting parties themselves; that is to say, whether it is fairly and *bona fide* necessitated by their economic and industrial interests. This involves a consideration, *inter alia*, of the period of duration of the contract.

³⁹ 159 Fed. 500 (C. C., 1908).

Thus, in the case under analysis, a period of duration during which the mechanic remains a member of his union will seem to be reasonable, whereas a fixed period of two years can apparently be justified only if required by the necessities of collective bargaining or similar circumstances. If the contract is unreasonable as between the parties it will not be upheld by the courts, being in the nature of a restraint of labor.

2. Even, however, if the agreement be reasonable from the standpoint of the contracting parties, the question still remains as to whether or not it is consistent with public policy, and since public policy is necessarily a matter of more or less vagueness and fluctuates with changing social, economic and industrial conditions, it is impossible in any given case to venture an exact prediction as to the attitude of the courts in regard to it.

3. An important element is as to the extent to which the contract will work a monopoly in the labor market and a consequent hardship upon those militated against by the terms of the contract. If, for example, the result of such an agreement be that some of the members of the craft are practically excluded from pursuing their calling in the vicinity, or if, on the other hand, the employer is seriously restricted in his choice of workmen to a small and inadequate group, then, and in other circumstances of a similar nature which may be imagined, the agreement will be held unlawful.

4. While, perhaps, illogical, and difficult of practical application, weight is given in many of the cases to the proposition that the question of intent is important; that is to say, whether the primary purpose is to enhance the welfare of the contracting parties, or, in the exercise of spite or malice, to injure third persons, and whether the controlling motive is to strengthen the militant forces of the union or of the employers, as the case may be, rather than to follow the reasonable necessities of the specific situation.

5. Some of the authorities seem to indicate that an agreement restricting the choice of employment may be valid, whereas a concerted effort on the part of employees to obtain the same results, as for example by a strike or threats of a strike, even if

acquiesced in by the employer, would, as against third persons harmed thereby, be invalid.

6. A result arising from an agreement between employer and employees, or perhaps between an employer and a labor-union representing such employees, may be held valid and unobjectionable, whereas the same result may fail to obtain judicial sanction if it arises from an agreement among a group of employers or among a group of employees. The probable reason for this is that in the latter case the agreement takes on more of an aspect of conspiracy to harm the interests of third persons or of a third group.

7. And, upon final analysis, the entire question must be viewed from the standpoint of the effect a decision determining it would have upon the industrial world. Though the laws of reasoning, and even of meticulous judicial consistency, may apparently call for a certain result, the courts probably will treat the matter empirically and depart from theoretical logic if, in the opinion of the judges, aiming to express prevailing economic and industrial doctrines, the public welfare would otherwise be injuriously affected. This is the very essence of the doctrine of public policy. It is therefore believed that, whatever may be the force of abstract reasoning, if a broad view of public policy will seem to allow a judicial approval, or on the other hand to necessitate a judicial disapproval, of an arrangement which might be likely to result in capital and labor both seeking to sign up each workman as he attains his majority and then and there to align him for a definite period upon the side of trade-unionism or against it, there is little doubt that the courts will not hesitate to hold such an agreement legal or illegal accordingly.

In any event, the question presented by the Cincinnati and Philadelphia cases which are the subject of this article is not only interesting from a lawyer's standpoint, but is so generally important as a new problem in the relations of labor and capital, that it is well worthy of study.

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