SOLIDARITY OF INTEREST AS BASIS OF LEGALITY OF BOYCOTTING.

It is my object in the present article to briefly consider the causes of the conception, enormous in my view, yet extensively prevalent, that there is anything inherently illegal whatever in a mere boycott; and more particularly to consider the development of what seems to be the growing conception of a legitimate "solidarity of interest" as furnishing a sufficient basis for the legality of a boycott, assuming it to be otherwise illegal.

A vast deal of confusing material is at a stroke swept from our field of inquiry, when we exclude from consideration *illegal acts accompanying boycotts,* which are too often identified, in the minds of courts, as well as of the public, with the boycotts themselves. Such acts commonly consist of actual violence to person or property, or threats of such violence sufficient to produce a reasonable apprehension. It surely seems feasible to draw a sharp distinction between merely requesting A not to deal with B (to here anticipate the definition of a boycott) and doing violence to the person or property of A, because of his persistence in dealing with B. At any rate I shall now leave such acts of violence out of consideration, confining my attention to boycotts as legitimately defined.

In my view a boycott is nothing more or less than *the act of a combination of persons in refusing to deal or in inducing others not to deal with a third person.** The root idea of a boycott, then, is merely *refusal to deal or inducing others not to deal.* Leaving out of consideration for the present the conception of a number of persons *combining* in the act of boycotting, and regarding the act of re-

*In addition to the definitions in the standard dictionaries, for instance, the Century Dictionary, and the law dictionaries of Anderson and Black, see the definitions of a boycott in Moores v. Bricklayer's Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn, 1889); Toledo, Ann Arbor & Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 738 (Cir. Ct. Ohio, 1893); Crump v. Commonwealth, 84 Va. 927, 940 (1888); State v. Glidden, 55 Conn. 46, 77 (1887); Casey v. Cincinnati Typographical Union, 45 Fed. Rep. 135, 143 (Cir. Ct., Ohio, 1891); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 121 (1894).

fusal to deal, or of inducing others not to deal, as merely the independent act of an individual, it scarcely requires argument that there is nothing illegal in a boycott. Certainly this is so as to a refusal to deal. And notwithstanding that some footing has been gained for the anomalous doctrine that it is actionable to induce another to break his contract* there has been little or no tendency to go further and hold it actionable to merely induce a refusal to deal, in the absence of any contract relation.

Thus far, then, there is nothing illegal in a boycott. The only possible element that can infuse illegality into it is the circumstance that the act of refusing to deal, or of inducing others not to deal, is that of a *combination* of persons, as distinguished from the mere independent act of an individual. Here we encounter another anomalous doctrine, and one of comparatively recent introduction; that an act entirely lawful if done by a mere individual, may be unlawful by reason of being done in pursuance of a combination of individuals to do the same act.† Yet on the slender basis of this anomalous and repudiated doctrine seems to hang the conception that there is anything in a mere boycott.

But it is not my main object in this article to demonstrate the fallacy of the conception that there is anything illegal whatever in a mere boycott. Rather for present purposes I assume that soundness of such conception, and proceed to attempt to show how its influence has been *pro tanto* nullified by the growth of the counteracting doctrine that a legitimate solidarity of interest furnishes a sufficient basis for the legality of a boycott, assumed to be otherwise illegal.‡

*See for instance Lumley v. Gye, 2 El. & Bl. 216 (1853), which has been followed in a number of American discussions, as well as in England.

†See for instance Toledo-Ann Arbor & Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 740 (Cir. Ct. Ohio, 1893); Save v. Same, Id. 746 (Cir. Ct. Ohio, 1893); Cote v. Murphy, 159 Pa. St. 420, 427, 431 (1894); Bailey v. Association of Master Plumbers, Tenn. (1899). Although this doctrine, largely American in its development, is professedly based on English decisions, it seems now to have been repudiated in England. Lee Huttley v. Simmons, 1 L. R. Q. B. (1898) 181; Kearney v. Lloyd, 26 L. R. (Ireland) 268 (1898).

The broad doctrine of the inherent illegality of a mere boycott has in some instances been recognized or applied. See for instance Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 819 (Cir. Ct. Ohio, 1894); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 122 (1894). As a rule, however, it is not boycotts, as I have defined them, but acts of coercion accompanying boycotts that have been held illegal.

A boycott is conceivable, that is, so to speak, purely wanton; not being the natural incident or outgrowth of any existing lawful relation whatever, sustained by the boycotters to any person or thing. Thus, if an organization of iron workers in Boston should induce the employees of a manufacturing jeweler in San Francisco to leave his employ, or his customers to cease to purchase from him, we should, under ordinary conditions, have an unjustifiable, illegal boycott, that is if a boycott, as I have defined it, is ever illegal. For it is not easy to conceive of the Boston iron workers as having any relation to the San Francisco jeweler or his employees, such as to furnish a basis for the legality of their boycott. But, suppose two rival organizations of carpenters in Boston, A and B, consisting of 500 members each; 200 members of each organization being out of employment and the other 300 members of each being in the employment of the same builder. The builder now enters upon new construction, capable of furnishing employment to 200 more carpenters. He is inclined to employ 100 members of each organization. But the members of A desiring to secure the additional employment for their own unemployed exclusively, inform the employer that unless such employment is given to the unemployed members of A to the exclusion of those of B, the members of A already in his employ will refuse to continue to deal with him, that is, will "strike." The builder, thereupon, to avoid the annoyance of a strike, gives the additional employment to the members of A exclusively.

Now, in a sense, injury is done to the unemployed members of B, in that they fail to obtain employment that otherwise they would have obtained. But, is it an actionable injury? No more, it seems to me, than in case of the injury done every day to one engaged in trade by a rival, who, by means of superior enterprise in advertising, for instance, succeeds in securing custom that, but for his efforts, would have been secured by the other. Of such injuries, the universal, inevitable result of the struggle for existence, the law can take no account. They are the natural incident and outgrowth of the relation in which the members of A are placed, as struggling for the subsistence and comfort of themselves and families.

It may indeed be urged that, so far as concerns the members of A already in the employment of the builder, no justification for the boycott exists. Its immediate result, if successful, is not benefit to them. They were already in his employment; they continue so to be. But, as a result of their efforts, others, members of the same

organization, are benefited. And surely it is a narrow view that the acts of an individual, as the members of an organization, are to find justification or condemnation, according to whether the immediate result of such acts is benefit or injury to him. A few months later the conditions may be reversed; he may be in the ranks of the unemployed, glad to avail himself of the efforts of his more fortunate brethren to procure him employment. Thus, in a broad view, the "solidarity of interest" of the members of the organization justifies the acts of "all for one," as well as of "one for all."

It was on this doctrine of solidarity of interest that the celebrated decision in Allen v. Flood,* might, it would seem, have rested. There the defendant, a "delegate" of a trade union, procured the discharge of the plaintiff's day laborers (with a promise not to employ them again), by stating to the employers that members of the union in their employ would quit employment unless the plaintiffs were discharged. The plaintiffs had become offensive to iron workers, who were not only members of the union, but also their fellow employees, by reason of having, though shipwrights, previously worked for certain employers on "iron work." Although what I call the doctrine of solidarity of interest was not prominently discussed, yet it was said in one of the prevailing opinions (p. 132) that "the object which the defendant and those whom he represented had in view throughout was what they believed to be *the interest of the class to which they belonged;* the step taken was a means to that end."

Allen v. Flood was followed in National Protective Association v. Cummings,† where the conditions were similar, but the doctrine of solidarity of interest was much more clearly recognized. There neither a labor union nor any individual member thereof was held to have a right of action against a rival labor union or the members thereof, because of the latter union refusing to permit its members to work upon any "job" where the members of the former were employed, and informing the employer in each instance that unless the members of the former were discharged, its (the latter) members would abandon the job. As a result members of the former were discharged, and their places filled by members of the latter. The court said (p. 231): "It cannot be questioned but that one may by lawful means obtain employment either for himself or another. He may procure the discharge by lawful means of another person,

*L. R. App Cas. (1898) 1.

†53 N. Y. App. Dw. 227 (1900).

in order that he may obtain employment either for himself or another. This is all the E association did. *It was seeking to obtain employment for its own members."* So it was said in another opinion, that so long as the members of the association *"tended merely to obtain employment for themselves,* even though it was at the expense of the plaintiff and his associates, no legal wrong was done."*

But in other decisions is manifest a tendency to repudiate or ignore the solidarity of interest of employees belonging to the same organization, as furnishing a basis for the legality of a boycott. This seems to have been the case in Plant v. Woods,† where the contest was between "two labor unions of the same craft," the plaintiff union (A) being composed of workmen who had withdrawn from the defendant union (B). B being desirous of "having all the members of the craft subjected to the rules and discipline of their particular union, in order that they might have better control over the whole business," took the following measures to cause the members of A to become members of B: They requested those employing members of A to induce the latter to apply for reinstatement in B. Although there were no threats of personal violence, and although the members of B did not even expressly ask that the members of A be discharged, yet it was found from the circumstances under which such requests were made, the members of B intended that the employers should fear trouble in their business if they continued to employ the members of A, and that employers to whom these requests were made were justified in believing, and did believe, that a failure on the part of their employees who were members of A to apply for reinstatement, and a failure on the part of the employers to discharge them for not doing so would lead to trouble in the business of the employers, in the nature of strikes or a boycott; that certain strikes appeared to have been steps taken by the members of B to obtain the discharge of such employees as were members of A, who declined to apply for reinstatement. In the dissenting opinion of Holmes, C. J., it was, as it seems to me, correctly contended that "the purpose of the threatened boycotts and strikes was such as to justify the threats," it being said by this learned jurist, in this connection:

*See also Davis v. United Portable Hoisting Engineers, 28 N. Y. App. Dw. 396 (1898); also the vigorous argument in the dissenting opinion of Caldwell, J., in Hopkins v. Oxley Stove Co., 83 Fed. Rep. 912, 935 (Cir. Ct. App. 8th Cir., 1897).

†176 Mass. 492 (1900).

"The immediate object and motive was to strengthen the defendant's society, as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest." But the majority of the court concurred in what I regard as the narrow and inadequate view that "the necessity that the plaintiffs should join this association was not so great, nor was its relation to the rights of the defendants, as compared with the right of the plaintiff's to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition."*

Although I have here discussed the doctrine of solidarity of interest, with especial reference to action by combinations of *employees,* the doctrine has a much wider application. Thus, on the ground of the interest common to a body of tradesmen to protect themselves against dishonest debtors, have been sustained agreements among the members of such a body, not to deal with a person indebted to any one of their number.† Analogous is the case of the interest common to a body of employers in a contest with employees, as furnishing a basis for the legality of acts of such employers.‡

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*For other instances of what seem to me to be more or less distinct failure to give effect to the doctrine of solidarity of interest as justifying a boycott by employees, see Toledo, Ann Arbor St. Ry Co. v. Pennsylvania Co., 54 Fed. Rep. 730 (Cir. Ct. Ohio, 1893); Mocres v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889); Old Dominion Steamboat Co. v. McKenna, 30 Fed. Rep. 48 (Cir. Ct. N. Y., 1887); Barr v. Essex Trades Council, 53 N. J. Eq., 101, 115, 136 (1894); Casey v. Cincinnati Typographical Union, 45 Fed. Rep. 135 (Cir. Ct. Ohio, 1891); Hopkins v. Oxley Stove Co., 83 Fed. Rep. 912, 921 (Cir. Ct. App. 8th Cir. 1897); Thomas v. Cincinnati N. V. & T. P. Ry. Co. 62 Fed. Reps. 803, 807 (Cir. Ct. Ohio, 1894).

†Delz v. Winpee, 6 Tex. Civ. App. 11 (1894); Brewster v. Miller, Ky. (1897). To similar effect Schutten v. Bavarian Brewing Co., 96 Ky. 224 (1894).

‡See Cote v. Murphy, 159 Pa. St. 420, 430 (1894); Buchanan v. Kerr, 159 Pa. St. 433 (1894).