Yale Law Journal

Volume 16
Issue 5 *Yale Law Journal*

Article 3

1907

EDITORIAL

YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 893, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

PUBLIC TRIAL. EXCLUSION OF SPECTATORS.

Does the judge of a trial court, presiding in a criminal action, have the power to exclude from the court-room all persons who have no connection with the case at bar?

Defendant is indicted on a charge of rape, and at a stage where the testimony is known to be of a decidedly loathsome and salacious character, the judge presiding announces that the proceedings will be continued in the small probate court-room, and directs the sheriff to admit none therein except the jury, counsel, members of the bar, newspaper men and one witness. The defendant's counsel offers no objections, at the time, to the pursuance of such a course.

Such are substantially the facts upon which the appeal was based in the case of *State v. Hensley*, 79 N. E. 462, recently decided in the Supreme Court of Ohio, and it is held, in a very lucid opinion by Spear, J., that such an order infringed the right of the accused to "a speedy and public trial" as guaranteed to him by the Constitution, and that failure to protest at the time against the violation of the right did not constitute a waiver of it. Like the right in case of a felony to be tried by a jury, it cannot be waived or dispensed with by mere silence.

This case presents questions of an exceedingly interesting nature, and the reasons underlying its decision could profitably be studied from the historical as well as from the legal standpoint. It has seldom been passed upon by our courts and the text-books are nearly, if not quite, barren of authority on the subject. There is neither time nor space here to treat extensively the rise and development of the right, but endeavor will be made to succinctly state a few of the salient points relative thereto.

It appears that under the Roman system of jurisprudence, publicity at a trial was not a prerequisite to the validity of the proceedings, and the taking of testimony in private was the rule rather than the exception; and in the Ecclesiastical courts of England, and wherever the procedure is found to be modelled after that of thē civil law, the situation seems to be the same. Under the common law, however, the proposition seems to be well authenticated that there existed such a right; a right recognized, perhaps, more in theory than in practice, but nevertheless affirmed in several decisions. Accordingly we find an early mention in *Lilburne's Trial* (1649) 4 How St. Tr. 1269, 1273, where a distinct claim is made by the accused to it; and again, Justice Blackstone, in commenting on the relative advantages and disadvantages of the various systems of administering justice, states: "This open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down in writing before an officer or his clerk in the Ecclesiastical courts and all others that have borrowed their practice from the civil law, where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal." 3 *Blackstones Comm.* 373. The cases of *Collier v. Hicks,* 2 B. & Ad. 663, 668 and *Danbury v. Cooper,* 10 B. & C. 237, 240, also substantiate the statement above made. In 1848, the English Parliament passed an act which invested trial justices with a discretionary power as to excluding spectators during the conduct of cases, if reasons of expediency, morality or public policy demand it. St. 11 and 12 Vict. C. 42, Section 19.

In this country, our progenitors, in order to secure inalienably the right, embodied it in our Federal Constitution, (VI Amendment), and most of the various states of the Union have incorporated in their Constitutions the same provision in substance, and in the great majority of instances have adopted identical phraseology.

It has been held that the first ten amendments to the Federal Constitution are primarily restrictions on the power of the Federal government only and not applicable in their provisions to the various states. Hence it follows that the right to a "speedy and public trial" therein guaranteed is restricted to prosecutions in the U. S. Courts. *Spier v. Illinois,* 123 U. S. 131, 166. If the marshall of a district court, by order of the presiding judge, stands at the door and in the exercise of his discretion as to proper persons to admit, prevents the entrance of practically all negroes who present themselves, it is reversible error. *U. S. v. Buck,* 24 Fed. Cas. No. 14680. No further interpretation than this has been placed upon what constitutes a "public trial" within the meaning of the constitutional provision, by the Federal judiciary.

In the state courts the decisions as to the interpretation of similar clauses in their respective constitutions, have been by no means harmonious. To start with, there are three classes of cases: First, those in which the court excluded all persons except jury, officers, defendant and counsel without any reservations or qualifications: Second, those in which all persons were excluded, with aforesaid

exceptions, but permission was given to accused to name any special friends he desired to have present, who, it was stated, would be allowed to remain: Third, those in which the court excluded a certain portion of the audience such as children, "court loafers," etc.

Regarding the first class, such action, in view of the decisions, would probably not be sustained by any court of review. In a Texas case there were facts existing which at first blush would seem to bring it under this category, but there the spectators were so boisterous as to completely obstruct the course of the trial, and the ones causing the disturbance could not be separated or distinguished from the others. All were excluded temporarily. *Held,* no error. *Grimmett v. State,* 22 Tex. App. 36.

As to the second class, the decisions of two states at least are irreconcilably at variance; the Supreme Court of New York holding such a course of proceeding not to be error, and the Supreme Court of Michigan, that it is. In *People v. Murray,* 89 Mich. 276, 290, the court ordered an officer to stand at the door and admit none but respectable citizens. A judgment of conviction rendered by the lower court was reversed on this ground, and the statement was made that it is not incumbent on the accused to show that he was injured or prejudiced by such action. A constitutional right of his has been invaded and that is sufficient; the law will conclusively presume that injury resulted. It is not to be considered, the court proceeds to state, as a wrong solely to the individual, the accused, but the whole body politic is aggrieved thereby. In a later case, where the court made an order that none should be admitted but jury, court officers, counsel and whatever friends defendant desired, it was held error, and a statute conferring such power on the court, declared invalid. *People v. Yeager,* 113 Mich. 228. On practically the same state of facts (but members of the press were here allowed to remain) the New York court arrived at a contrary conclusion. *People v. Hall,* 51 App. Div. 57. This latter view is also maintained by the California Court. *People v. Kerrigan,* 73 Cal. 22.

Respecting the third class, the principal case, *State v. Hensley, supra,* contains a dictum to the effect that such a course would be fully justified and constitute no impairment of a constitutional right, and the position is also supported by *dicta* in other cases and by at least two eminent authorities, Judge Cooley and Professor Wigmore, who both concur in the opinion that prudential reasons often demand that youths of both sexes, "court room loafers" and those attracted merely by a prurient curiosity should be rigorously excluded from the court-room in occasional cases. Ethical reasons dictate such a course; public morality demands it. "A public trial is not of necessity one to which the whole public is admitted, but it is one so far open to all that the prisoner's friends and others who may be inclined to watch the proceedings, in order to see that justice is intelligently and impartially administered, may have an opportunity to do so. There may be and often is justifiable occasion to exclude from a trial those who are inclined to attend from idle or morbid curiosity only, and especially in cases involving loathsome or dis-

gusting details." *Cooley, Principles of Constitutional Law,* 320. See *Wigmore on Evidence,* Section 1834.

This constitutional provision so often found in no wise is applicable in civil suits, and for this reason the New York Code of Civil Procedure enacts that in all cases of divorce for certain enumerated grounds, "the court may in its discretion exclude all persons not directly interested except jurors, witnesses, and officers of the court," and this appears to be a most salutary provision.

Abbott's Trial Brief for Criminal Cases, (N. Y.) lays down the following: "The exclusion . . . of all persons other than those interested in the case, where, from the character of the charge and nature of the evidence, public morality would be injuriously affected. does not violate the right to a public trial;" but as we have seen, it is extremely doubtful whether this proposition can be maintained on grounds of logic or authority. It is stated too broadly. The better opinion seems to be the one shared in by Judge Cooley and Professor Wigmore to the effect that the sound discretion of the court should control as to what spectators should be present, but that the power should not and does not extend to a wholesale exclusion of persons not directly interested. The presence of persons of mature years and whose moral standards are not notably deficient, exercises a wholesome effect upon the conduct of a trial, and to dispense with general publicity in trials involving criminal offenses would neither be expedient nor consonant with those principles of liberty which permeate the whole fabric of our jurisprudence.

AMOUNT OF RECOVERY FOR UNLAWFUL DISCHARGE.

In a recent Louisiana case, *Thurmond v. Skannal,* reported in 42 So. 577, the plaintiff sued to recover the full amount of his stipulated salary from the time of his unlawful discharge to the natural end of his term of service. The action was brought before the term was up, but the court held that he was entitled to the agreed salary in full for the unexpired portion of his contract.

The question involved is not a new one and many decisions are to be found as to the amount of recovery which seems to vary with the nature of the action brought. An employee wrongfully discharged is given a choice of three remedies; (1) He may treat the contract as rescinded and sue on a *quantum meruit* for the value of the services rendered, or (2) he may sue for breach of contract and recover his probable damages, or (3) he may wait until the end of the term and sue for actual damages sustained. *Colburn v. Woodworth,* 31 Barb. 381.

A leading case on this subject is that of *Howard v. Daly,* 61 N. Y. 362. Here a valid contract of employment was entered into, and plaintiff was not allowed to begin his actual service; but this fact does not affect the ruling in the principal case where the service had already been entered upon. The court, in an opinion by Dwight, C., says that it is important to decide whether the plaintiff sues for wages on the basis of a constructive service, or for mere damages. An actual performance will undoubtedly entitle the plaintiff to her stipulated salary, but here there has been no per-

formance of the contract. Disapproving the doctrine of a constructive service, (*Gandell v. Pontigny,* 4 Campb. 375), the court says that a suit for wages as such is not maintainable, and damages for breach of contract only may be recovered. 7 Ad. & Ell. 544. *Prima facie,* the amount of this recovery is the agreed salary. But the plaintiff must make some reasonable effort to mitigate the damages which the defendant must pay by using reasonable diligence in seeking some other similar employment. This rule is based upon public policy, and tends to prevent a discharged employee from living in idleness while drawing a salary.

Conceding the general rule to be true, that the party aggrieved by a breach of any contract should make every effort to mitigate his damages, it would seem to be only fair that a discharged employee should seek other similar work. And so it has been held by the authorities that the defendant may show that the plaintiff has obtained other employment or might have, with reasonable effort, secured similar employment. *Troy Fertilizer Co. v. Logan,* 96 Ala. 619; *Howson v. Mestayer,* 14 Daly 83. It is true that some cases lay down the rule of liability approved of in the principal case, but on principle and sound policy, this rule should be taken, at the most, as a *prima facie* measure of recovery. *Heim v. Wolf,* 1 E. O. S. (N. Y.) 70; *King v. Staren,* 44 Pa. 99; *Jones v. Jones,* 2 Swan (Tenn.) 605. In all fairness, however, the defendant should be required to assume the burden of proof in an attempt of this nature to decrease his liability. *Van Winkle v. Satterfield,* 58 Ark. 617; *Horn v. Western Land Association,* 22 Minn. 233; *Emery v. Steckel,* 126 Pa. 171; *Barker v. Knickerbocker Ins. Co.,* 24 Wis. 630; *Owen v. Union Match Co.,* 48 Mich. 348; *Williams v. Anderson,* 9 Minn. 50; *Cumberland & P. R. Co. v. Slack,* 45 Md. 161.

In considering the law on this subject in Louisiana, Art. 2720 of the code of that state must be taken into account. This section provides that the discharge of an employee under these circumstances vests in him at once all his unearned salary; and the fact that he has secured other employment makes no difference. *Sherburn v. Orleans Cotton Press,* 15 La. 360. Thus by means of this statute and decision, the very evil and injustice, which other courts have prevented by allowing mitigating defenses, is fostered and encouraged. In such cases the law only aims at compensation, and such defenses tend to obtain it and no more. Any person guilty of a breach of a contract should only be required to pay actual damages. The rule in Louisiana places an employee discharged without cause in the enviable position of drawing a salary while idle or engaging in other employment and perhaps earning double what he is worth, in an economic sense, to the community. Plainly such a rule is contrary to both policy and authority.

STATUTE OF FRAUDS. PAROL MODIFICATION OF CONTRACT.

The Supreme Court of Illinois in a recent decision (*Kissack et al. v. Burke,* 79 N. E. 619) decides the point, *inter alia,* that when one party makes an offer to another in writing, to sell land, with a proviso that it be accepted within a certain time, a parol agreement

to extend such period of acceptance is not void, and in the event that the other party is ready, able and willing to perform his portion of the contract before the expiration of the time verbally stipulated, he may maintain a bill in equity for a conveyance of the land. It was strongly urged by appellees that the extension not being in writing, was entirely inoperative, as offending the Statute of Frauds, and that the rights of the appellant were concluded by his not having accepted the contract in its original form, but they were not sustained in their contention.

Authority may be found on either side of this proposition. At common law, of course, the terms of a written contract cannot be varied, added to or subtracted from by parol evidence. But in case the parties agree to alter it in some essential particular by a *subsequent* agreement, the old contract is discharged, a new one formed, and an action may be maintained upon this new *verbal* contract. But a different question is presented when the original was such as was required to be in writing. Then the substituted agreement is invalid, and the query is whether the original, with a parol modification engrafted upon it, is capable of enforcement.

At first the courts began to differentiate the cases on the ground of whether the particular in regard to which the contract was changed was a material one or not, *Stead v. Dawber,* 10 Adol. & Ell. 57, but this finds no countenance in the later cases. Then there are a number of decisions in which it is held that such a contract is invalid. *Goss v. Lord Nugent,* 2 Nev. & Man. 33, 34; *Harvey v. Grabham,* 5 Adol. & Ell. 61, 73; *Hasbrouck v. Tappen,* 15 John. 200; *Doar v. Gibbs,* 1 Bailey Eq. (S. C.) 371. The following statement is made in *American & Eng. Cyc. of Law* (2 Ed. Vol. 29, 825): "If any alteration is made, so that part of the contract has to be proved by oral evidence, it ceases to be a contract in writing, and is thus exposed to all the evils which the statute was intended to remedy. Within the rule, the time of performance cannot be extended or changed by parol, nor the time within which the contract is to be completed by an acceptance by one of the parties." Thus where a party orally agreed to "carry" goods for a longer time than the contract specified, only the terms of the original contract could be considered as binding upon the parties. *Clark v. Fey,* 121 N. Y. 470. A case arose in Wisconsin on a state of facts analogous to those in the main case (cited *supra*) and it was adjudged that the verbal extension of the time for acceptance could not be considered effective, and it is there stated: "Where the law requires a contract to be in writing in order to bind the parties, and the writing signed and produced in evidence shows that the contract signed by the party who is to be bound by it is to be completed by an acceptance of the other party within a limited time, it is incompetent to show by parol evidence that the time for its completion, by such acceptance, was extended to some other date not mentioned in the contract signed by the party to be bound. The acceptance of the party after the time fixed in the written contract, which is to bind the party signing it, does not show that the contract in writing was the contract between the parties, but an entirely

different contract, and so the contract actually made by an acceptance, after the time fixed in the writing, is a contract not in writing, and so void under the statute." *Atlee v. Bartholomew,* 69 Wis. 43, 50. Numerous cases can be cited which take the opposite ground. See cases cited in 20 *Cyc.,* page 288, note 74; and 23 *Cent. Dig., tit. "Frauds, Statute of,"* Section 284.

In this apparently irreconcilable conflict of decisions, there is one rule to be deduced which will materially aid in harmonizing many of them, and that is:—When the written agreement as altered by the parol modification is declared upon, the action will not be sustained as this would be going in the teeth of the statute, but where the original agreement, and that alone, is the foundation of the action, then the substituted or altered term may be reliéd upon by way of accord and satisfaction, as performance or readiness to perform under the terms of the parol variation is equivalent to performance or readiness to perform under the contract as written; and it is held that proof of such will not constitute a variance from the declaration. *Stearn v. Hall,* 9 Cush. 31; *Whittier v. Dana,* 10 Allen 326; *Browne on Statute of Frauds* (2 Ed.) Section 423, 425, and cases there cited. *Cummings v. Arnold,* 3 Met. 486, holds that in defense to an action on a written contract, the defendant may show that he has performed it according to an oral agreement for a substituted performance, or, being ready to do so, was prevented by an act of the plaintiff. So by this method effect is given to an oral change in the manner or time of performance without contravening the terms of the Statute of Frauds.

The question is often involved in contracts for the sale of goods which come within the purview of the statute and a verbal alteration is made as to the time of performance, etc. In such cases, the courts show much reluctance, and justly so, in allowing the statute to be interposed as a defense and thereby constituting thēmselves innocent means in the perpetration of a fraud. Endeavor is constantly shown to obviate the rigidity of this rule of law and not to extend its scope but rather to mollify its effect. Reasons of expediency and justice, in its widest and primary sense, demand such a course; otherwise that which was intended for the prevention of wrong might become an engine for its accomplishment.

In many cases the equitable doctrine of estoppel may be invoked. Thus it is stated by the Illinois court in the case under consideration: "In equity, a party is not permitted to deceive and defraud another by agreeing to such an extension, and then disregard it, and thus gain an unjust and inequitable advantage," citing *Thayer v. Meeker,* 86 Ill. 470, 473.

The principal decision is not only in accord with a large line of cases, but is also commendable on other grounds.

EXTRADITION. HABEAS CORPUS.

The scope and limitations of the federal laws relating to interstate extradition are quite clearly expounded in *Pettibone v. Nichols,* 203 U. S. 192, decided Dec. 3, 1906. Pettibone was arrested in Colorado in accord with a requisition from the governor of Idaho,

taken to Idaho by its authorized agent and there held in custody in the state prison on a charge of murder committed in Idaho. Pettibone made application for a writ of *habeas corpus.* In this appeal the facts sufficiently alleged in the application were treated as true in their legal bearing on whether the detention was in violation of the Constitution or laws of the United States. In this application Pettibone alleged that he had not been in the state of Idaho for more than ten years prior to the act complained of, and that the governor of Idaho knew that he had not been in the state at the time of the commission of the crime nor at any time near that day. He further alleged that there was a conspiracy between the governor of Idaho and his legal advisors and the governor of Colorado to prevent the accused from asserting his constitutional right under the Constitution (Cl. 2, Sec. 2, Art. 4) and the act pursuant thereof. (Sec. 5278 Rev. Stat.) The execution of the conspiracy was set out and was in substance, that by arrangement he was secretly arrested late Saturday night, and that early Sunday morning he was hurried out of the state of Colorado, on a special train making fast time, by the officers of the state and "certain armed guards being part of the militia of the state of Colorado." He was given no chance to communicate with friends or counsel although he requested opportunity to so communicate. In Idaho he was held charged with the murder of one Steunenberg by throwing an explosive bomb at and against his person. At the earliest opportunity application was made for the writ of *habeas corpus.* The Supreme Court of Idaho, the United States Circuit Court for the District of Idaho, and the United States Supreme Court, McKenna J., dissenting, refused to discharge the accused. Mr. Justice Harlan delivered the opinion of the U. S. Supreme Court. In considering the arrest in Colorado he says, "we do not perceive that anything done there, however hastily and inconsiderately done, can be adjudged to be in violation of the Constitution or laws of the United States." As this man was held for trial under an indictment in one of the courts of Idaho for the crime of murder, charged to have been committed in that state against its laws, his custody was by due process of law. The courts uniformly held that, "his imprisonment was not illegal unless his extradition makes it so, and as an illegal extradition is no greater violation of his rights of person than his forcible abduction, if forcible abduction from another state and conveyance within the jurisdiction of the court holding him is no objection to his detention and trial for the offense charged, as held in *Ker v. Illinois,* 119 U. S. 437, and in *Mahon v. Justice,* 127 U. S. 712, no more is the objection allowed if the abduction has been accomplished under the forms of law." *In re Moore,* 75 Fed. Rep. 821.

The discretionary power of a governor in preparing requisition papers and in granting warrants for arrest upon such papers is generally recognized. The governor's action establishes a *prima facie* case or presumption that all essential prerequisites have been observed. If uncontroverted in such a proceeding as *habeas corpus* such a presumption becomes conclusive evidence of the right to extradite the person charged. *People ex rel. Hamilton v. Police*

Com. of City of New York, 91 N. Y. Sup. 760; *Cook v. Hart,* 146 U. S. 183; *ex parte Reggel,* 114 U. S. 642. By the method of arrest and deportation from Colorado the accused was deprived of all opportunity to invoke judicial aid. Had he succeeded in obtaining a writ of *habeas corpus* in Colorado there is no doubt but that he could have successfully interposed that he was not a fugitive from justice under the terms of the federal statute and Constitution. *Ex parte Smith,* 3 McLean 132. Mr. Justice McKenna in his dissenting opinion says, "The foundation of extradition between states is that the accused should be a fugitive from justice from the demanding state, and he may challenge the fact by *habeas corpus* immediately upon his arrest. If he refute the fact he cannot be removed. *Hyatt v. Cockran,* 198 U. S. 691. And the right to resist removal is not a right of asylum. To call it so in the state where the accused is, is misleading. It is the right to be free from molestation. It is the right of personal liberty in its most complete sense." As Mr. Justice Harlan suggests, Congress might provide for the compulsory return to the state of parties wrongfully abducted from its territory on application of the parties or of the state. But Congress has not seen fit to add to nor change the existing law.

The zeal which prompts the bringing of criminals to justice is commendable. But in the exercise of such zeal the safety of the public demands that no means shall be used which are against the intent of federal law. In the present case a man's right to personal security as guaranteed by the federal law is infringed by a legal abduction. This seems an anomoly. It would technically be a legal crime if there could be such a thing. The inadequacy of the law to prevent such abduction is a menace to the personal security and liberty of all citizens of the United States. In our treaty with Great Britain provision is made assuring every person for whom requisition is made, a hearing before the court issuing the warrant of arrest. Thus opportunity to claim any just defense is given. *Ashburton Treaty* (1842). Considering the great extent of our country such a safeguard would be equally warranted, and would be but a reasonable protection to citizens of any state against being surprised and subjected to deportation, possibly from coast to coast or even to the Philippines.

ON THE RIGHT OF A "WALKING DELEGATE" OR "BUSINESS AGENT" TO ORDER MEN OUT ON STRIKE.

For many years the courts have been endeavoring to find some solid ground on which to decide the respective rights of employer and employee during labor troubles. Adding to this the problem of the rights of interested third parties, sympathizers, would-be patrons and last of all the duties of the belligerents to the general public a situation then arises which requires the utmost care and study in attempting to conserve the rights of all and wrong none.

In the case of *Booth v. Burgess,* 65 Atl. 226, Vice-Chancellor Stevenson of the New Jersey Court of Chancery has contributed a remarkably well-written and clear opinion. In this case a boycott

was ordered, not by anyone directly interested, but on direction of a business agent or walking delegate who was the representative of a federation of building trades numbering about 2,500 men. The number of men who were actually engaged in dispute with their employer was about twenty-five. It was not questioned that the union to which these men belonged, or its members acting individually refused to deal with the complainant. The right of any member to so bind himself that he might, against his own desire, be ordered or "instructed" to leave his employment for the advancement of the aims of independent associations was denied. The decision goes on the right of everyone to a "free market" recognizing, at the same time, the idea of legitimate competition even when carried to great lengths as in the *Mogul v. McGregor* case. (23 Q. B. Div. 598.) The terms "malicious" and "unlawful" which have proved such a stumbling block in former cases have been treated with scant notice in the principal case. In this connection it is important and interesting to notice the successive stages by which the general question of strike and boycott has developed.

In *Allen v. Flood,* App. Cas. 1 (1898), the jury found that 1. Allen "maliciously" induced the Glengall company to discharge Flood and 2. Allen "maliciously" induced the Glengall company not to engage Flood and 3. that damage was done to the extent of twenty pounds. When the House of Lords, on appeal, decided, after much discussion, that Allen was not liable it seems that the most important fact in the case, *i. e.,* whether the men "would knock off" or "be called out" was still undecided. Naturally, if Allen's statement was that the men would (of their own volition) "knock off" he would not be liable, while if it was that they would be "called out" (leaving the question of volition open to inquiry) the case would not be so plain. In *Quinn v. Leathem* (1901) A. C. 506 (atp. 542) Lord Lindley denied emphatically the right of a union to make use of the boycott and in this connection should be considered the dissenting opinion of so great an authority as Mr. Justice Holmes in the case of *Plant v. Woods,* 176 Mass. 504: "I think it is lawful for a body of workmen to try by combination to get more than they are now getting, although they do it at the expense of their fellows and to said end to strengthen their union by the boycott and the strike." It will be recalled that the majority in this case held the strike unlawful on the ground that it was unlawful to use this means of compelling a rival union to amalgamate with them coupled with the fear that violence, etc., would ensue. The *Plant* case can hardly be considered a strong decision. In *Jersey City v. Cassidy,* 63 N. J. Eq. 764, (also decided by V. C. Stevenson) the court was perplexed to know how an injunction would issue to protect men who were interfered with in quest of employment and sought no redress themselves—the would-be employer being the complainant. The same argument was advanced by the defendants as that advanced by the defendants in *Quinn v. Leathem,—supra,* that the complainant could have no redress or protection for injury to the asserted right to deal at will as opposed to damage caused by the breaking of an actual contract. This was met by the "right to

a free market" idea in line with Lord Ellenborough's suggestion of a right to a "possible expectancy." The New York state courts have attempted to decide whether a union may make an agreement with an employer that, on consideration that he will employ only members of a certain union and expel all other tradesmen of the same kind who are not members, it will, in return, keep him supplied with men and ward off strikes for a certain period, a sort of offensive and defensive alliance. In *Curran v. Galen,* 152 N. Y. 37, where non-members of the union were discharged by force of the agreement, Judge Gray says "the effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges." In a later case, *Jacobs v. Cohen,* 183 N. Y. 211, an agreement substantially the same existed but the action was to recover on a note given by the employer as security for his performance of the agreement. Judge Gray there said: "This case is not within *Curran v. Galen.* If it might operate to prevent some persons from being employed by the firm or, perhaps, from remaining in the firm's employment, that is but an incidental feature" and (p. 215) "if they (the employers) regarded it (the agreement to give the note) for their benefit to do so does it lie in their mouths, now, to urge the illegality?" After studying the two cases it is rather difficult to understand why the agreement should be agreeable to public policy when the subject of controversy was between the parties and without the pale when attacked by the injured party directly.

The case of *Temperton v. Russell* (1893) 1 Q. B. 715, was almost analogous to the present case under discussion. There an agent representing a joint committee of a federation of unions coerced an employer by threats of strike to break a contract with complainant who was on the "unfair" list. Lord Esher (p. 725) said "as between themselves the members of the union had a perfect right to do that (threaten to and actually strike, etc.) and to bind themselves to comply with such rules. But these rules cannot bind any person who did not belong to such union" and "there is no distinction between inducing a person *to break* a contract and (inducing him) *not to enter* into a contract." This is the same idea referred to previously as a "probable expectancy."

In *Nat. Prot. Assn. v. Cumming,* 170 N. Y. 331, Parker, C. J., said, "A labor organization is endowed with precisely the same legal right as an individual to *threaten* to do that which it may lawfully do." This case is a clear and avowed affirmation of the right to strike.

A summary of the cases indicates that under the law as now understood, *one* or *one thousand* may unite, whether such union be called "conspiracy" or other technical name, and not only refuse to enter into or continue in the employ of a master but may name the terms on which the relation shall commence or continue. That these terms seem founded on good or bad motives or that they may interfere with the employment of others at that place and under that master is immaterial. It seems to be denied that a number of such unions may, through federation with other trade councils, force the

members who have no direct concern in a quarrel to obey the order of a delegated official to leave or refuse to enter the employment of a black-listed employer—even though these employees may have agreed to this very thing on becoming members of their individual unions. It is of course a well-known fact that such agreements exist among the employers and are generally cheerfully carried out.

The principal case, in line with *Temperton v. Russell* (1893), Q. B. 713, holds that, even if an individual member be willing, that it is against public policy and violating the right of "free market" to allow him to so bind himself.