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Bulletin No. 74 of the U. S. Bureau of Labor, dated January, 1908, and issued in May, is a document of the utmost importance to anyone who is interested in the subject of Employers' Liability. We know of no publication which can be compared with it for complete presentation of the present status of that subject. It begins with an admirable treatise of 120 pages on the American law upon the subject, which is followed by the text of all American constitutions and statutes which alter the common law, including the statutes of 1907. To this is added a clear statement of the law of each of the European countries and their dependencies as to employer's liability, with the full text of the British Workmen's Compensation Act of 1906, and of the Canadian Industrial Disputes Investigation Act of 1907; and a statement of the more important decisions of American courts on labor questions during the past year. This statement of the contents will show that the pamphlet is indispensable to any one who desires to investigate any phase of this most important subject. *E. P.*

DAMAGES UPON REPUDIATION OF A CONTRACT.

In the April number of this journal Professor Joseph H. Beale, Jr., sets forth very clearly the principles governing the measure of damages in cases of anticipatory repudiation of a contract. It seems to the writer than in one respect only is a criticism to be made of

his analysis. Professor Beale shows convincingly that where "the plaintiff sues at once for an anticipatory breach of the contract, his damages are to be assessed according to the cost of performance, not at the time of the breach, but at the time set for performance." To this rule, however, he says there may be one exception: where parties have made a contract for the future delivery of a commodity of such a nature that the right to its future delivery has a present market value, and an anticipatory breach occurs, the measure of the damages is not the value of the contract at the time for performance, but the value of the contract at the time of the breach. The example given is a sale of oats for July delivery, and a repudiation occurs in April. July oats have a market value in April representing the April value of the contract right to July oats. It is submitted that even such a case as this is no exception to the general rule.

In the first place, *all* contract rights to a future performance have a *present* value, and in every case such value is different from the value of performance at the time set by the contract, and different from the value of a precisely similar performance at the present time. The fact that some contract rights or "futures" are quoted on an exchange while others are not, has no bearing upon the underlying principle. That fact merely goes to show that in some cases there is in existence first class evidence of the present value of a contract right to a future performance, while in other cases there may be little or none. This might be a practical reason for laying down different rules for the measure of damages in the two cases, but it is not a logical one. It may indeed be true that in all cases of an anticipatory breach the injured party should be given the present market value of his contract right as of the time of such breach. He ought not to complain at such a rule, for he himself is a consenting party. In all cases he has his option between acquiescing in the repudiation and rejecting it; and he should reject it in case he wishes the value of the contract at the time set for performance. This is a question forced upon us by the anticipatory breach doctrine as discovered in *Hochster v. Delatour*. But as Professor Beale shows, the question is no longer open, and the rule as to the measure of damages is that quoted at the beginning of this discussion.

In the second place, Professor Beale's reasons for the rule that "the repudiator of a contract cannot under any circumstances call upon the other party to make forward contracts for his benefit" are almost as conclusive against allowing the repudiator of a contract to escape on paying the market value of the contract right as

of the time of the anticipatory breach. Allowing the injured party only that amount, is in effect requiring him to make a forward contract for the benefit of the repudiator, depriving him of any benefit from the forward contract, though insuring him against any loss from it. The fact that the injured party is insured against any loss to accrue from the forward contract does not add to the merit of the rule. If anything, it detracts from it. The injured party has forecasted the future. He is entitled to profits accruing after the anticipatory breach as well as before. But to get them he must now make a forward contract based upon a new forecast. If the injured party's original forecast was bad, he should bear the losses consequent thereon, those accruing subsequent to the breach as well as before. In this case, he is not in fact an injured party at all. The repudiation is not an injury but a positive benefit. Yet the rule would require the repudiator to pay damages for conferring a benefit; or to express it in another way, would require the repudiator to pay the damages caused by the making of the forward contract. As Professor Beale says: "The fact is that the repudiator is entitled to the benefit of no contract of the other party except such as the other party could not have made but for the repudiation." And likewise, the fact is that the repudiator should be made to bear the burden of no contract except that which he has himself made.

Suppose the following: A sells to B 1,000 bushels of wheat at $1.00 per bushel for delivery July 1. On April 1, wheat having risen, and July wheat being then quoted at $1.10, A repudiates. Wheat continues to rise in price, and on July 1 is quoted at $1.20 for immediate delivery. Under these circumstances, B should be entitled to $200.00. If on April 1 B makes a forward purchase for July delivery of another 1,000 bushels of wheat at $1.10, he is entitled to his profit of $100.00 thereon, in addition to the $200.00 on the first contract. But if B can hold A for damages based only upon the April price of July wheat, then B gets only $200.00 profit on the two contracts instead of $300.00. Again, suppose that after April 1 the price of wheat declines and on July 1 is once more $1.00 per bushel for immediate delivery. On July 1, the time for performance, B could buy in the market for $1.00, the contract price, and has lost nothing by reason of A's repudiation and non-performance. He should therefore not be given $100.00 of A's money. In case B made a forward contract on April 1, as before, at $1.10, the $100.00 loss thereon should not be borne by A.

In case B sues A and the trial occurs before July 1, the thing

to be proved is the prospective value of the wheat on July 1, although the best evidence of what it will be is perhaps the market quotation of July wheat at the day of trial. *A. L. C.*

THE UNCONSTITUTIONALITY OF THE ERDMANN ACT OF 1898.

The Supreme Court of the United States dealt a deadly blow to labor unions in a recent decision, *Adair v. United States,* 28 Sup. Ct. Rep. 277, holding unconstitutional section 10 of the Erdmann Act passed in 1898, for this cut out the very heart of the entire Act. The real question in the case was, may Congress make it a criminal offence against the United States—as, by the 10th section of the Act of 1898, it does,—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization? The majority of the court based their opinion on the fact that in interfering with freedom of contract it was an unwarranted invasion of the right to personal liberty and property guaranteed by the Fifth Amendment. Also that the Act was not a regulation of commerce within the meaning of Art. I, Sec. 8, of the Constitution. One dissenting Justice argues that because of the purpose, to wit: the prevention of strikes, it is not a "gross perversion of the principle" of regulation and that because of the nature of the rights, namely, those exercised in a quasi-public business, they are subject to control in the interest of the public. The other dissenting Justice, admitting it to be a limited interference with freedom of contract, attempts to justify it on the grounds of public policy.

The rights guaranteed under the Fifth Amendment are something more than mere privileges of locomotion; the guaranty is the negation of arbitrary power in every form which results in a deprivation of a right. It is well recognized, however, that this right is limited to a certain extent by the "police power," both in the States (*Holden v. Hardy,* 169 U. S. 391), and in Congress, whose power, however, is not general but rests upon the enumerated powers given it by the Constitution. *Vid., dissenting opinion, Lottery Case,* 188 U. S. 365; *Freund on Police Power,* Sec. 65. But this must not be a mere pretext—become another and delusive name for supreme sovereignty—to be exercised free from constitutional restraint. *Lothner v. New York,* 198 U. S. 56.

Going now to the second ground on which the unconstitutionality is put, denying that the government can invoke the aid of the commerce clause to sustain the indictment, raising as it does a much more complex and embarrassingly difficult constitutional question and

touching the fundamental power which is the source from which the authority to pass such an act must flow, is much broader and more comprehensive in its results than the first part of the majority opinion. The power of Congress to regulate commerce should not be tested solely by abstractly considering the particular subject to which a regulation relates, for instance, master and servant. The reason is obvious and the contention derives some plausibility from its very vagueness. The test should be, is the regulation embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce.

Commerce undoubtedly is traffic, said Chief Justice Marshall, but it is something more, it is intercourse (*Gibbons v. Ogden,* 9 Wheaton 189), and the power to regulate it extends to the persons who conduct it as well as to the instruments used. *Cooley v. Board of Wardens,* 12 Howard 316. Still this does not mean as to their general conduct but only in respect to that which directly concerns interstate commerce. See dissenting opinion by Justice Moody in *Employers' Liability Cases,* 28 Sup. Ct. Rep. 141. The act in question hardly comes within the test laid down above, for first it is not in its nature national, so as to require only one uniform system of regulation (*Gloucester Ferry v. Penn.,* 114 U. S. 196), for the practical results of the statute passed upon cannot be considered as coming within the true spirit and purpose of the Constitution as being a matter "to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation" creating invidious distinctions arising from local interests. *Madison's Journal, Scott Ed.,* 67 *et seq.* Furthermore, it only indirectly, remotely and incidentally affects the operation of interstate commerce (*Hooper v. Cal.,* 155 U. S. 648-655), unless possibly it tends to increase the efficiency of the service, as by prescribing actual qualifications for the employees (*Smith v. Alabama,* 124 U. S. 465-479), or was to promote the safety of employees (*Johnson v. Southern Pac. Co.,* 196 U. S. 1), and as it accomplishes neither it concededly falls far from being within such test but is a mere regulation between employe and employer. And surely it cannot be said as was very aptly put by Justice White in the *Employers' Liability Cases, supra:* "that because one engages in interstate commerce he thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it." The words "whim, caprice, prejudice and malice," quoted from *Cooley on Torts,* 278, pushed the effect of the decision

as far as it was possible for it to go, which was about twice as far as it would have gone without them. But the developing power of public opinion growing out of the changed economic conditions of our country will doubtless affect in the future, as it has in the past, the adaptability of the unchanging provisions of our Constitution to the infinite variety of the ever-changing conditions of our national life.

BOYCOTT AS COMBINATION IN RESTRAINT OF TRADE UNDER THE ANTI-TRUST ACT.

There have been numerous decisions in the courts of the United States during the last year that have adversely affected the interests of labor unions, and severely crippled their efforts to obtain more favorable labor conditions, but perhaps none have been more shocking to the tactics of these organizations in dealing with their industrial enemies than that of *Loewe v. Lawlor*, 28 Sup. Ct. Rep. 301, known as the "Danbury Hatters Case," decided by the Supreme Court of the United States in February, 1908. The facts were that the plaintiff was a manufacturer of hats, and was engaged in interstate trade in some twenty States. The defendants were members of the United Hatters of North America, and were combined with the American Federation of Labor in a scheme and effort to force all manufacturers of hats in the United States, including the plaintiff, to unionize their shops, and upon the refusal of the plaintiff to accede to their demands, they declared a boycott and effectually used their widespread influence to prevent the plaintiff from selling his hats to the wholesale dealers and purchasers in the several States, and to prevent the dealers and customers in the several States from buying the same. The plaintiff brought his action under the anti-trust act of July 2, 1890, 26 Stat. at Large 210, which provides that "every contract, combination, in the nature of a trust, or otherwise, or conspiracy in restraint of trade or commerce among the several States" is void, and claimed threefold damages as allowed for injuries declared to be illegal under the act. The court held that the defendants were engaged in the "restraint of trade or commerce among the several States" in the sense in which these words were used in the act, and based its conclusion on numerous previous judgments to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts in that regard the liberty of a trader to engage in business.

It was at one time vigorously contended that this statute was

to be construed to apply to the purposes announced by its title—"An Act to Protect Trade and Commerce against 'unlawful' restraints"—hence we were to look to the common law in determining what restraints of trade were unlawful, and, whereas the common law recognized *reasonable* restraints of trade as lawful, the act could apply only to *unreasonable* restraints. But when the question came before the Supreme Court, it was held that the act had a broader application than the prohibition of restraints of trade unlawful at common law, and that no limitation or exception could be added without placing in the act that which had been omitted by Congress. *U. S. v. Trans-Missouri Freight Association,* 166 U. S. 290. Subsequent cases show that this construction has been repeatedly adhered to, and the decisions have been based on the object and intention of the combination rather than the purpose of the agreement. Wherever there has been a direct interference with the free play of competition or interstate trade, they have found an illegal restraint under the act. *U. S. v. Addyston Pipe and Steel Co.,* 175 U. S. 211; *Montague & Co. v. Lowry,* 193 U. S. 38; *Swift & Co. v. U. S.,* 196 U. S. 395; *U. S. v. Workingmen's Amalgamated Council,* 54 Fed. 994.

There was a question of jurisdiction presented in this case from the fact that the restraint alleged would operate to destroy entirely the plaintiff's business and thereby include intra-state as well as interstate trade, and from the fact that the defendants were not themselves engaged in interstate trade. But neither of these objections was tenable, for it can be readily perceived that the evil towards which the statute looks is the "restraint of trade" among the States without regard to the nature of the "contract, combination, etc.," by which such restraint is accomplished, and without distinction between classes; and, as it was said, "the acts must be considered as a whole, and the plan is open to condemnation notwithstanding a negligible amount of intra-state business might be affected in carrying it out." "The fact that the means operated at one end, before physical transportation commenced, and at the other end, after physical transportation ended, was immaterial."

Congress has declared illegal "every" contract, combination, etc., in restraint of trade among the several States, and there can be little room for doubt in an unprejudiced mind that the combination of which the defendants were members was directly within the letter of the act. The trade of the plaintiff was interstate, and the purpose and effect of the plan of the defendants was to restrain directly that trade. It is true that the Sherman Anti-Trust Act was

in its inception aimed at the evils of massed capital, and it is not surprising that its present application has called forth some bitter attacks by those who in their eager effort to throttle opposition in its infancy have overlooked the broad principles that must govern the judiciary in the faithful performance of its duty. But, without comment as to whether decisions along this line evidence a disregard of the shackled conditions of the laboring classes or abridge in any way their rights of natural liberty, it is obviously certain that, if any injustice exists, the remedy will not be found in the courts. The Congressional records show that before this statute became a law, and even during the last session of Congress, strenuous efforts were made to exempt from its operation organizations of labor, and that these efforts failed. The interdiction was made to include the evil in its entirety, and is enforced accordingly.