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## LABOR LAW-TORTS-LIABILITY OF LABOR UNION FOR INDUCING BREACH OF CONTRACT

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LABOR LAW—TORTS—LIABILITY OF LABOR UNION FOR INDUCING BREACH OF CONTRACT—Among the early common law doctrines which courts fashioned to resolve labor disputes,<sup>1</sup> none was used more successfully to strike down labor organizations than the tort of inducing breach of contract.<sup>2</sup> The cause of action which was born in *Lumley v. Gye*<sup>3</sup> grew to titanic proportions in the leading American case of *Hitchman Coal & Coke Co. v. Mitchell*,<sup>4</sup> where the organizing campaign of the United Mine Workers of America among coal miners of the non-union Panhandle coal district of West Virginia was enjoined and union officials held liable for inducing breach of “yellow dog” employment contracts. This decision not only gave springboard impetus to the use of the “yellow dog” contract in American industry<sup>5</sup> but served as an illuminating guide for employers to follow in their legal battles against the rising tide of trade unionism. Labor unions increasingly found their activities enjoined for inducing breach of employers’ non-labor contracts of sale and purchase, of contracts with individual

<sup>1</sup> Other common law doctrines which organized labor met in its early struggle for recognition are discussed in 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, §§ 27-48 (1940), including criminal conspiracy [*Pettibone v. United States*, 148 U.S. 197, 13 S.Ct. 542 (1893)], civil conspiracy [*Mapstrick v. Range*, 9 Neb. 390, 2 N.W. 739 (1879)]; trespass [*Webber v. Barry*, 66 Mich. 127, 33 N.W. 389 (1887)]; nuisance [*Otis Steel Co. v. Local Union*, (C.C. Ohio 1901) 110 F. 698].

<sup>2</sup> For a discussion of the tort, see Sayre, “Inducing Breach of Contract,” 36 HARV. L. REV. 663 (1923); Carpenter, “Interference with Contract Relations,” 41 HARV. L. REV. 728 (1928).

It is generally said that the action will lie against one who, with knowledge of the contract, “maliciously” induces a breach. “Malice” is satisfied if the defendant knowingly induced a breach of the contract. *South Wales Miners Federation v. Glamorgan Coal Co.*, [1905] A.C. 239.

<sup>3</sup> (Q.B. 1853) 2 E. & B. 216.

<sup>4</sup> 245 U.S. 229, 38 S. Ct. 65 (1917). For a thorough analysis of the case, see Cook, “Privileges of Labor Unions,” 27 YALE L. J. 779 (1918).

<sup>5</sup> A leading commentator on the labor scene estimates that in 1932 over a million workmen were employed in the United States under “yellow dog” contracts. WITTE, *THE GOVERNMENT IN LABOR DISPUTES* 222 (1932).

employees, and of collective bargaining agreements with rival unions.<sup>6</sup> So effectively had employers wielded this common law doctrine that in 1930 it was characterized as "the doctrine which is being utilized today in American courts perhaps more extensively than any other, as a weapon of attack upon labor groups."<sup>7</sup>

During the past fifteen years the law as a whole has moved rapidly in the direction of favoring union activity. A labor policy expressed in numerous federal and state laws and important judicial decisions has generally recognized and protected in the courts the workers' right to be free from employer interference, to strike, to engage in peaceful picketing, and to conduct primary boycotts. Within this liberalizing judicial concept of the rights of labor, the present status of the action against labor unions for inducing breach of contract presents an interesting study of the tenacity of an early common law theory of liability in labor's mid-twentieth century struggle for a greater share of the fruits of industry.

#### A. *Inducing Breach of Individual Employment Contracts*

Before passage of legislation outlawing or making unenforceable "yellow dog" contracts,<sup>8</sup> individual employment contracts were generally of three types: term, at-will, and either of these in the form of a "yellow dog" contract, by which the worker agreed that during his employment he would not join an outside union. Judicial protection of the term contract, long recognized at the common law,<sup>9</sup> persists in recent cases to give the employer or the discharged employee a cause of action against the interfering union.<sup>10</sup> Unions have usually failed in their attempts to justify attempted inducement of breaches of term contracts on the ground of self-interest or competition for available positions. But in *Lyons v. United Hotel Employees*<sup>11</sup> term

<sup>6</sup> See 32 ILL. L. REV. 611 (1938).

<sup>7</sup> Sayre, "Labor and the Courts," 39 YALE L. J. 682, 691 (1930).

<sup>8</sup> See, supra, notes 25-27.

<sup>9</sup> South Wales Miners Federation v. Glamorgan Coal Co., [1905] A.C. 239; Mapstrick v. Range, 9 Neb. 390, 2 N.W. 739 (1879); Reynolds v. Davis, 198 Mass. 294, 84 N.E. 457 (1908).

<sup>10</sup> For example, see Eddyside Co. v. Seibel, (Pa. Super Ct. 1940) 15 A. (2d) 691 (labor union officials held liable for inducing breach of contract of dance hall operators with musicians); Crosby v. Rath, 136 Ohio St. 352, 25 N.E. (2d) 934 (1939) (injunction against picketing to induce discharge of non-union employees with whom employer had three months employment contract); The Williams Mfg. Co. v. United Shoe Workers of America, Local 119, (Ct. of Common Pleas, Scioto County, Ohio 1937) 1 Lab. Cas., § 18,024 (injunction against picketing to induce employees under individual employment contracts to leave plaintiff's employ.)

<sup>11</sup> (Cal. Super. Ct., San Francisco County, 1941) 4 Lab. Cas. ¶ 60, 633.

employment contracts were held to be no bar to picketing to unionize the employer's plant, justification being found in the interest of the union in proselyting and improving working conditions. Except for cautious dicta in a New York decision,<sup>12</sup> the *Lyons* case stands virtually alone among recent decisions in granting a privilege to a labor union to interfere with definite term employment contracts.

Where the contractual relationship may be terminated at will, as is true of most employment, the courts have not been in accord as to the liability of the interfering union. Since the parties themselves may terminate the relationship without liability, it is asserted that a third party may lawfully induce such action.<sup>13</sup> And justification may be found in the bona fide exercise of the right of competition among workers for employment. Yet many courts in the past have held the interfering union liable either to the employer<sup>14</sup> or to the displaced worker.<sup>15</sup> The law has not been freed of confusion by recent cases.<sup>16</sup> Some change, however, has been effected in the liability of labor unions in their efforts to secure a closed shop. The former rule, followed in some states, that non-union workers whose employment was threatened by the execution of a closed shop contract could secure an injunction against the union,<sup>17</sup> has been modified by a more sympathetic

<sup>12</sup> *Exchange Bakery & Restaurant v. Rifkin*, 245 N.Y. 260, 157 N.E. 130 (1927), which involved union liability for inducing breach of at-will employment contracts, where the court said: "Even had it been a valid and subsisting contract, however, it should be noticed that . . . there is yet no precedent in this court for the conclusion that a union may not persuade its members or others to end contracts of employment where the final intent lying behind the attempt is to increase its influence." *Id.* at 266.

<sup>13</sup> See *Exchange Bakery & Restaurant v. Rifkin*, 245 N.Y. 260, 157 N.E. 130 (1927); *Diamond Black Coal Co. v. U. M. W. A.*, 188 Ky. 477, 222 S.W. 1079, (1920); *Interborough Rapid Transit Co. v. Lavin*, 247 N.Y. 65, 159 N.E. 863 (1928), discussed in 41 *HARV. L. REV.* 770 (1928).

<sup>14</sup> *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 38 S. Ct. 65 (1917); *Patterson Glass Co. v. Thomas*, 41 Cal. App. 559, 183 P. 190 (1919); 84 A.L.R. 43 (1933).

<sup>15</sup> *Truax v. Raich*, 239 U.S. 33, 36 S. Ct. 7 (1915); 84 A.L.R. 43 (1933).

<sup>16</sup> See *Chatanooga Co. v. Sheet Metal Workers*, (Tenn. Ch. Ct., Hamilton Co., 1947) 19 L.R.R.M. 2513 (picketing for a closed shop enjoined on the dual theory of inducing breach of employment contracts and as violative of the N.L.R.A. provision that "an employer may not force employees to join a union"); *Suchodolski v. A.F. of L.*, 127 N.J.Eq. 511, 14 A. (2d) 51 (1940) (plaintiff-employee's interest in his job held to be a bar to defendant-window washer union's picketing of plaintiff's employer to force plaintiff to join a union).

<sup>17</sup> *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900); *Bogni v. Perroti*, 224 Mass. 152, 112 N.E. 853 (1916); *Keith Theatre, Inc v. Vachon*, 134 Me. 392, 187 A. 692 (1936); *Wilson v. Newspaper and Mail Deliverers Union*, 123 N.J.Eq. 347, 197 A. 720 (1938).

judicial view of the legality of the closed shop which finds justification in the self-interest of union members in obtaining employment and in meeting their employers on equal terms in collective bargaining negotiations.<sup>18</sup>

The protection given to "yellow dog" contracts by the Supreme Court in the *Hitchman* case<sup>19</sup> was quickly and effectively emulated by state courts. In *Callan v. Cotton Mills*<sup>20</sup> the Georgia court went so far as to create a binding "yellow dog" contract out of an employer's announcement that no one who belonged to a union would be employed and the employees' implied consent through subsequent retention of employment. The New York<sup>21</sup> and Ohio<sup>22</sup> courts, however, refused to enjoin interference with "yellow dog" contracts. Despite adverse decisions in the *Adair*<sup>23</sup> and *Coopage*<sup>24</sup> cases, the legislative attack against the "yellow dog" contract continued until today the Norris-LaGuardia act,<sup>25</sup> sections 8 (a) (1) and 8 (a) (3) of the

<sup>18</sup> *Williams v. Quill*, 277 N.Y. 1, 12 N.E. (2d) 547 (1938) (injunction denied to restrain defendant employer from discharging employees pursuant to a closed shop agreement, on the theory that self-interest of the union in obtaining employment for its members justified its action); *Hamer v. Nashawena Mills*, 315 Mass. 160, 52 N.E. (2d) 22 (1943) (court refused to enjoin enforcement of closed shop contract, emphasizing that the union was ready to admit to membership all employees).

See generally on the subject of the legality of the closed shop, 160 A.L.R. 918 (1946).

If the union discriminates against applicants for membership under a closed shop contract, the union may be compelled to give up its demand for a closed shop [*Bautista v. Jones*, 25 Cal. (2d) 746, 155 P. (2d) 343 (1944)]; or may be forced to admit into the union qualified applicants [*James v. Marinship Corp.*, 25 Cal. (2d) 721, 155 P. (2d) 329 (1944)]; or may be liable in damages to the discharged employee [4 TORTS RESTATEMENT, § 810 and 811 (1939)].

<sup>19</sup> *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 38 S. Ct. 65 (1917); see notes 4 and 5, *supra*.

<sup>20</sup> 149 Ga. 119, 99 S.E. 300 (1919).

<sup>21</sup> *Interborough Rapid Transit Co. v. Green*, 131 Misc. 682, 227 N.Y.S. 258 (1928) (two year contract with "yellow dog" provision held unenforceable); *Exchange Bakery & Restaurant v. Rifkin*, 245 N.Y. 260, 157 N.E. 130 (1927) ("yellow dog" provision held unenforceable for lack of consideration).

<sup>22</sup> *Hamilton Tailoring Co. v. Amalgamated Clothing Workers*, (Ct. of Common Pleas, Hamilton Co. 1935) 4 Ohio Op. 295 (six months employment contract with "yellow dog" provision held unenforceable).

<sup>23</sup> *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277 (1908).

<sup>24</sup> *Coopage v. Kansas*, 236 U.S. 1, 35 S. Ct. 240 (1915).

<sup>25</sup> 29 U.S.C.A. (1947) §§ 101-115.

The case of *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 61 S. Ct. 845 (1941), would seem to have put at rest the question of the constitutionality of anti-yellow dog legislation, for, in sustaining an N.L.R.B. order finding employer discriminating against applicants for employment because of their union affiliation, the Court said: "The course of decisions in this court since *Adair v. United States* . . . and *Coopage v. Kansas* . . ., have completely sapped those cases of their authority." *Id.* at 187.

National Labor Relations Act,<sup>26</sup> and numerous state laws<sup>27</sup> have outlawed or rendered unenforceable this type of onerous contract. The paucity of recent cases of labor union liability for interference with "yellow dog" contracts attests to the virtual demise of a widely-condemned and once-powerful employer weapon to perpetuate the open shop.

### B. *Inducing Breach of Non-Labor Contracts of Sale and Purchase*

When unions have pushed their demands for better working conditions to the point of a strike, picketing, or a boycott, they have often been confronted in the courts by suits brought by an employer or his customers for interference with outstanding contracts. Since the aim of the striking workers is to weaken the economic position of the employer and thus compel acceptance of their demands, the strike, if effective, naturally interferes with the contract interests of the employer. Shall, then, the strike or other concerted activity be forbidden because it induces breach of contract? The affirmative answer handed down in many decisions in the past has often condemned even incidental, or resulting, interference by the union with contracts of sale and purchase between the employer and third parties to the labor dispute.<sup>28</sup> The logical result of such reasoning is to hold unlawful all strikes when the employer is doing business under contract.<sup>29</sup> It is doubtful that courts today would hold that incidental interference with outstanding contracts is a basis for outlawing union activity which is otherwise lawful.<sup>30</sup>

Where interference with employer third-party contracts is the primary, rather than the incidental, result of the labor dispute, labor has quite consistently been found liable. Usually this type of contractual disturbance results from economic pressures brought to bear upon third parties doing business with the employer, through secondary strikes, boycotts, and picketing. Earlier decisions almost uniformly condemned

<sup>26</sup> 29 U.S.C.A. (1947) §§ 151-166.

<sup>27</sup> See 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, § 459 (1940 and 1947 Cum. Supp.), where the author cites statutes of twenty-five states aimed at "yellow dog" contracts.

<sup>28</sup> *Carroll v. Chesapeake & Ohio Coal Agency Co.*, (C.C.A. 4th, 1903) 124 F. 305; *Vonnegut Machinery Co. v. Toledo Machine & Tool Co.*, (C.C. Ohio 1920) 263 F. 192; *Quinlivan v. Dail-Overland Co.*, (C.C.A. 6th, 1921) 274 F. 56; *R. and W. Shop, Inc. v. Scully*, 98 Conn. 1, 118 A. 55 (1922).

<sup>29</sup> PROSSER, TORTS, § 104 (1941).

<sup>30</sup> See 4 TORTS RESTATEMENT, § 809 (1939), where such incidental interference is declared privileged. Also see 32 ILL. L. REV. 611 (1938), where a distinction is drawn between "incidentally causing" and "intentionally procuring" breach of contract.

these secondary pressures, usually on the ground that unlawful means were being exerted to ruin the business of a neutral,<sup>31</sup> and sometimes on the theory of conspiracy to induce customers of the employer to breach their contracts with him.<sup>32</sup> Labor's plea of justification, that the customer is an economic ally of the employer who benefits from the protested unfair working conditions, made but slight impression upon the courts. The New York doctrine allowing secondary picketing and boycotts when there is "unity of interest" between employer and customer, was a notable, albeit qualified, exception.<sup>33</sup>

Under the *Thornhill*<sup>34</sup> and *Wohl*<sup>35</sup> cases the Supreme Court has extended the protection of the Fourteenth Amendment's free speech guarantee to peaceful picketing. This principle has been delineated by the *Ritter's Cafe*<sup>36</sup> case to exclude from its shelter the "conscripted of neutrals" which a state has chosen to prohibit, and by *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*<sup>37</sup> to exclude picketing which has become so enmeshed with acts of violence that the possibility of peaceful persuasion has disappeared. Most current state decisions have recognized the free speech principle and have protected peaceful picketing although the union activity obviously caused a breach of employer-customer contracts.<sup>38</sup> But several recent

<sup>31</sup> *Fink & Son v. Butchers Union No. 422*, 84 N.J. Eq. 638, 95 A. 182 (1915); *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753 (1906).

<sup>32</sup> *Beattie v. Callanan*, 82 App. Div. 7, 81 N.Y.S. 413 (1903); *Parker Paint & Wall Paper Co. v. Local Union No. 813*, 87 W. Va. 631, 105 S.E. 911 (1921); contra, *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 P. 1027 (1908).

<sup>33</sup> See *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910 (1938), where the picketing took place at the retail stores of customers of the employer-disputant. The court was careful to state that the picketing was directed against the non-union-made product rather than against the retailer. That the New York Court has cautiously maintained this distinction, see *Chapman v. Doe*, 255 App. Div. 893, 7 N.Y.S. (2d) 470 (1938) (injunction against picketing of beer distributor to compel truck drivers to join union); *People v. Bellows*, 281 N.Y. 67, 22 N.E. (2d) 238 (1939) (conviction for disorderly conduct of pickets of retail store which had purchased neon signs from a company employing members of a rival union).

<sup>34</sup> *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736 (1940).

<sup>35</sup> *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl*, 313 U.S. 548, 61 S. Ct. 1108 (1941) (certiorari granted and injunction of the New York Court of Appeals summarily reversed) 315 U.S. 769, 62 S.Ct. 816 (1942) (rehearing of the judgment of reversal).

<sup>36</sup> 315 U.S. 722, 62 S. Ct. 807 (1942).

<sup>37</sup> 312 U.S. 287, 61 S. Ct. 552 (1941).

<sup>38</sup> *Lo Bianco v. Holt*, 189 Misc. 113, 70 N.Y.S. (2d) 33 (1947) (picketing of customers of plaintiff partners in business, although plaintiffs conducted business without employees); *Singer v. Kirsch Beverages*, 271 App. Div. 801, 65 N.Y.S. (2d) 400 (1946) (union stopped members from working for employer selling beverages to non-union peddlers); *Park & Tilford Import Corp. v. Intl. Brotherhood of Team-*

state court cases involving secondary picketing and boycotts have sought to avoid the result of the Supreme Court decisions by disclaiming the existence of a labor dispute or by declaring unlawful the objective of union activity, using the doctrine of inducing breach of contractual relations at least as a makeweight to sustain the case for union liability.<sup>39</sup>

In defining the scope of the privilege to interfere with contractual relations by peaceful picketing of third parties, the courts have drawn a distinction between two types of outstanding contracts. In the *Ritter's Cafe* case<sup>40</sup> defendant union picketed plaintiff's restaurant to induce him to break his contract with a non-union contractor for the erection of a building twenty-four blocks from the restaurant. The Supreme Court affirmed a Texas injunction, over the plea of the union that picketing was protected by the free speech guarantee of the Fourteenth Amendment, on the ground that, despite his contractual relations with one of the disputants, Ritter was a "neutral" whose business was "wholly outside the context of the real dispute." In *People v. Muller*<sup>41</sup> the union picketed the purchaser of a burglar alarm system sold to plaintiff by a supplier with whom the union had a dispute. Although there was a contract for service and maintenance between purchaser and supplier, and the purchaser would have to break that agreement if it granted the union's demand, the New York court refused to grant an injunction, citing the *Wohl* case as authority. Under this view, the free speech guarantee privileges interference by secondary picketing with the ordinary contracts of purchase and service between employer and customer, but does not extend the privilege to contracts not directly related to the business of the person against whom pressure is brought.<sup>42</sup>

sters, 27 Cal. (2d) 599, 165 P. (2d) 891 (1946) (through circulation of "unfair list," striking union urged plaintiff's customers not to purchase plaintiff's product, in order to secure for the union a closed shop).

<sup>39</sup> *Dinoffria v. Intl. Teamsters Union*, 331 Ill. App. 129, 72 N.E. (2d) 635 (1947) (injunction against picketing and boycotting of plaintiff's suppliers to compel plaintiffs, independent service station operators, to join union); *Gulf Oil Corp. v. Intl. Brotherhood of Teamsters, Local 806*, 185 Misc. 409, 57 N.Y.S. (2d) 24 (1945) (injunction against picketing of plaintiff's purchasers to induce plaintiff to hire union truck drivers).

<sup>40</sup> *Carpenters and Joiners Union of America v. Ritter's Cafe*, 315 U. S. 722, 62 S. Ct. 807 (1942).

<sup>41</sup> 286 N.Y. 281, 36 N.E. (2d) 206 (1941).

<sup>42</sup> The question of the union's liability in damages for inflicting economic losses upon employer and customer in these privileged areas would still seem to be open. Although one accepts the premise of these cases, that picketing is the mere expression of free speech at the place where it is most effective to change economic relations, it would seem that conveying information by picketing is subject to the same restrictions as any other exercise of free speech. If slanderous, fraudulent, or intimidating state-

In summary, the use of the doctrine of inducement of breach of contract as a basis for enjoining union interference with employer-customer agreements has been seriously curtailed by the identification of picketing with free speech, although the theory has sometimes been invoked, at least as a makeweight, to enjoin picketing which is intended to cause breach of contracts unrelated to the business of the person who is the object of the picketing. Although unions today may be found liable for interference by non-picketing activity with the employer's outstanding contracts of sale and purchase, a review of the decisions shows that during the last decade the doctrine has seldom been utilized in such cases as an independent basis for fixing union liability.

### C. *Inducing Breach of Collective Bargaining Agreements*

When an employer has executed a collective bargaining agreement with Union *A*, what liability attaches to the efforts of Union *B* to displace that contract by winning recognition as the workers' bargaining agent? Earlier decisions generally disapproved of inter-union disputes, especially when the defendant union was an "outside" union,<sup>43</sup> although there is authority that if some of the employees belonged to the defendant union, relief would be refused.<sup>44</sup> Interference with collective agreements terminable at will was sometimes justified on the ground of legitimate competition.<sup>45</sup> Prior to the Supreme Court's identification of picketing with free speech,<sup>46</sup> the case of *Stillwell Theatre, Inc. v. Kaplan*<sup>47</sup> was outstanding in its declaration of the right of a rival union to interfere with a collective bargaining contract. The court denied the employer injunctive relief, asserting that: "Unquestionably defendant in picketing these three theaters was actuated by a desire to

ments are published by picketing, or if picketing results in economic injury to employer-customer trade relations such as to produce union liability on general principles, it may be contended that the free speech privilege against prior restraint should not preclude recovery of damages in a tort action against the union. The question is whether the free speech doctrine of the *Thornhill* case protects not only the right to picket peacefully but also protects the union from liability for intentional infliction of economic injury caused by such picketing.

<sup>43</sup> *Central Metal Products Corp. v. O'Brien*, (N.D. Ohio 1922) 278 F. 827; *Tracey v. Osborne*, 226 Mass. 25, 114 N.E. 959 (1917); *Wolchak v. Weisman*, 145 Misc. 268, 259 N.Y.S. 225 (1932); *Goyette v. Watson*, 245 Mass. 577, 140 N.E. 285 (1923).

<sup>44</sup> *Erdman v. Mitchell*, 207 Pa. 79, 56 A. 327 (1903); *Herzog v. Cline*, 131 Misc. 816, 227 N.Y.S. 462 (1927).

<sup>45</sup> *Steam Fitters v. Cumming*, 170 N.Y. 315, 63 N.E. 369 (1902); *Nann v. Raimist*, 255 N.Y. 307, 174 N.E. 690 (1931).

<sup>46</sup> See notes 34 and 35, *supra*.

<sup>47</sup> 259 N.Y. 405, 182 N.E. 63 (1932).

improve labor conditions, as to wages, hours, numbers of employees, and conditions of work, although incidental disadvantage to the employer might result. 'Resulting injury is incidental and must be endured.'" <sup>48</sup> To the plaintiff's assertion that the picketing was intended to cause a breach of his contract with the other union, the court said: "No one was asked to break any contract. . . . [The picketing] might make it unprofitable for the employer to go on with the contract, but to state fairly and truly to the public that the conduct of the employer is socially objectionable is no persuasion to break a contract." <sup>49</sup>

But in the case law of its period, the *Stillwell Theatre* decision stood in the minority and, indeed, it may not even state the New York law today. <sup>50</sup> In favor of prevention of interference with collective agreements by a rival union has been the unenviable position of the employer. Although he may stand willing to bargain with representatives of his workers, he is caught in the cross fire of an inter-union dispute whose first casualty is often the employer's business relations. "The plaintiff [employer] has thus been placed in a dilemma. If it accedes to the demands of the minority union, it breaches its contract with the certified union. If it attempts to abide by the terms of said contract. . . , it has a strike on its hands and picketing and other activity that go with it. It seems to the court that since the picketing by the minority union is, in effect, an attempt to force the breach of an agreement. . . , this court of equity should prevent the irreparable injury which flows therefrom." <sup>51</sup>

These are the conflicting interests, which tug at courts in the litigation of inter-union disputes: (1) the employer wants to be saved from economic losses caused by a quarrel in which he is a suffering neutral; (2) the union which is a party to the collective bargaining agreement has a valuable and, perhaps, hard-won interest for which it demands protection; (3) the minority union asserts its right to negotiate a contract in behalf of its members and to enlist new members to attempt to supplant its rival. In balancing these interests most courts, until quite recently, protected the first and second interests at the expense

<sup>48</sup> Id. at 408.

<sup>49</sup> Id. at 412.

<sup>50</sup> Cf. *Dinney & Robbins, Inc. v. Davis*, 290 N.Y. 101, 48 N.E. (2d) 280 (1943), where the court enjoined picketing by a rival union after the employer had entered into a collective agreement with another union, because "the court will not be compelled to force breach of a valid contract between employer and its employees when made as a result of collective bargaining."

<sup>51</sup> *Euclid Candy Co. of New York, Inc. v. Summa*, 174 Misc. 19, 19 N.Y.S. (2d) 382 (1940), *affd.*, 259 App. Div. 1081, 21 N.Y.S. (2d) 614 (1940).

of the third by finding the subsisting employer-union contract a bar to action by a rival union which might lead to its breach.

What has been the effect of the free speech concept of picketing on inter-union aggression? In *Millers, Inc. v. Journeymen Tailors Union*<sup>52</sup> the Supreme Court in a memorandum decision reversed the judgment of the New Jersey court<sup>53</sup> in enjoining a C.I.O. union from peacefully picketing plaintiff, who had entered into a closed shop contract with an A. F. L. union. Most recent state decisions follow the *Journeymen Tailors Union* case and emphasize the protection afforded picketing by the Fourteenth Amendment.<sup>54</sup>

When the union under contract has been certified under a labor relations act an additional difficulty confronts the employer. The Wagner Act<sup>55</sup> cast upon the employer the duty of bargaining with the certified union,<sup>56</sup> and forbade his entering into a closed shop contract except with the organization representing a majority of employees.<sup>57</sup> The Supreme Court has had no occasion to determine the legality of attempts to interfere with a collective agreement made with a certified union; but a federal district court<sup>58</sup> recently denied an injunction against strike and picketing in this situation, on the grounds that the defendant union had the right to try to change the status quo and that plaintiff had not complied with the requirements of the Norris-LaGuardia Act.<sup>59</sup> Most state courts which have passed on this issue have held that certification bars attempts to interfere with the employer-union contract,<sup>60</sup> because if not enjoined the activity of the minority union will cause a breach of contract and force the employer to violate his statutory duty to bargain only with the certified union.

<sup>52</sup> 312 U.S. 658, 61 S.Ct. 732 (1941).

<sup>53</sup> 128 N.J. Eq. 162, 15 A. (2d) 822 (1940).

<sup>54</sup> *Blossom Dairy Co. v. Intl. Brotherhood of Teamsters*, 125 W. Va. 165, 23 S.E. (2d) 645 (1942); *Park & Tilford Import Corp. v. Intl. Brotherhood of Teamsters*, 27 Cal. (2d) 599, 165 P. (2d) 891 (1946); *Washington v. Superior Court for Pierce County*, 24 Wash. (2d) 314, 164 P. (2d) 662 (1945).

<sup>55</sup> 29 U.S.C.A. (1947) §§ 151-166.

<sup>56</sup> Id. § 8 (5).

<sup>57</sup> Id. § 8 (3).

<sup>58</sup> *Yoerg Brewing Co. v. Brennan*, (D.C. Minn. 1945) 59 F. Supp. 625.

<sup>59</sup> 29 U.S.C.A. (1947) §§ 101-115.

The effect of the anti-injunction statutes upon the subject under discussion is, of course, important but is beyond the scope of this comment. For an excellent analysis of anti-injunction statutes' effect upon actions against labor unions for inducing breach of contract, see 32 ILL. L. REV. 611 (1938).

<sup>60</sup> *Markham & Callow, Inc. v. Intl. Woodcutters of America*, 170 Ore. 517, 135 P. (2d) 727 (1943); *R. H. White Co. v. Murphy*, 310 Mass. 510, 38 N.E. (2d) 685 (1942); *Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union*, 288 N.Y. 188, 42 N.E. (2d) 480 (1942); See note, 54 HARV. L. REV. 1200 (1941).

Although these reasons may be sound for granting the employer relief, it is submitted that an injunction should not issue upon the petition of a certified union to prevent peaceful bona fide competitive activity of a rival union.<sup>61</sup> To issue an injunction merely to protect the rights of the certified union would frequently deprive the union of the only effective way it may combat its rival. When a union seeks to enjoin acts of a rival group it would seem that, in the absence of illegal action directed against it or its members, the fact that such acts tend to cause breach of a contract between the plaintiff union and the employer is a circumstance which must yield to the superior privilege of the defendant union to protect and strengthen itself.<sup>62</sup>

Passage of the Taft-Hartley Act<sup>63</sup> has changed the federal law applicable to inter-union disputes. Section 8(a)(4)(B) and (C) makes it an unfair labor practice for a union to engage in or to induce others to engage in a strike or handling boycott, in order to compel "any other employer" to bargain with or recognize a labor union as bargaining agent unless such union has been certified by the board, or to compel "any employer" to recognize or bargain with a labor group when another organization has been duly certified. Insofar as these provisions do not conflict with the constitutional right to picket peacefully, the minority union is now made liable for engaging in activity which interferes with subsisting collective bargaining agreements.<sup>64</sup>

<sup>61</sup> National Labor Relations Board certification does not create a "federal right" in the certified union, enforceable against a rival union by injunction in the federal courts. *United Electrical Radio and Machine Workers v. Intl. Brotherhood of Electrical Workers*, (C.C.A. 2d, 1940) 115 F. (2d) 488; *Blankenship v. Kurfman*, (C.C.A. 7th, 1938) 96 F. (2d) 450.

<sup>62</sup> *Nann v. Raimist*, 255 N.Y. 305, 174 N.E. 690 (1931) (injunction at suit of plaintiff union, which had entered collective agreement with employer, denied against rival union's picketing, justification being found in defendant's union objective of raising standard of living for workers in the industry); *McKay v. Retail Union No. 1067*, 16 Cal. (2d) 311, 106 P. (2d) 373 (1940) (denial of injunction sought by employee group against defendant union's picketing for a closed shop, the court finding that the closed shop is legitimate means of maintaining the combined bargaining power of the workers); *Montgomery Ward E. Assn. v. Retail Clerk I. P. Assn.*, (Cal. D.C. 1941) 38 F. Supp. 321 (petitioning union, which had filed petition for certification, denied injunction against picketing and boycotting of defendant union, on the ground that picketing is an expression of free speech by which defendant union could win converts to its cause).

<sup>63</sup> LABOR-MANAGEMENT RELATIONS ACT OF 1947, 29 U.S.C.A. (1947) §§ 141-197.

<sup>64</sup> Clearly such action by a union is an unfair labor practice which is outlawed by § 8(b)(4) of the new act. Further, under Title III, § 303(b), the defendant union may be liable to both the employer and the certified union in money damages for injury to economic interests caused by the unlawful activity.

In summary, the free speech doctrine has apparently immunized from injunction peaceful picketing which attempts to displace or cause a breach of existing agreements between the employer and a rival labor organization. However, where the union has been certified under a labor relations act, and the employer has sought injunctive relief against such picketing, the majority of state courts which have passed on the question have not been willing to extend the free speech doctrine to protect the right of the defendant union to picket under such circumstances, utilizing the theory of inducing breach of contract as at least an alternative ground for decision. Although there are few decisions directly in point, it is doubtful if equitable relief should be extended to the certified union against peaceful attempts of a rival labor organization to change the status quo, even though the protested activity is directed to inducing breach of an existing collective agreement.

#### D. Conclusion

The privilege of labor unions to cause breach of contracts during labor disputes is inextricably bound within the broader policy question of labor's privilege to inflict economic injury in the pursuit of its aims. The *Restatement of Torts* gives workers a privilege to inflict losses upon an employer, including those caused by interference with contracts, if the means and purposes of the action are legitimate.<sup>65</sup> Dicta in *Imperial Ice Co. v. Rossier* spelled out an absolute privilege in these words: "The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contract between employer and employee or employer and customer."<sup>66</sup> Judges today declare with increasing frequency that the question of a union's privilege to invade contractual relations involves such considerations of economic policy that the legislature, rather than the courts, must determine the "allowable area of economic conflict."<sup>67</sup> In the Labor

<sup>65</sup> 4 TORTS RESTATEMENT, § 775 (1939).

*Id.*, § 809 provides that workers are not liable for losses caused a third person when their action is not directed against that person and is privileged against the person at whom it was directed.

<sup>66</sup> 18 Cal. (2d) 33 at 35, 112 P. (2d) 631 at 632 (1941).

<sup>67</sup> See *McKay v. Retail Union*, No. 1067, 16 Cal. (2d) 311, 106 P. (2d) 373 (1940); *Fur Workers Union, Local No. 72 v. Fur Workers Union*, (App. D.C. 1939) 105 F. (2d) 1.

"The legislative department of government alone, and not the judicial department, has the power to determine the limits of permissible conduct in the labor field of economic conflict, and to declare duties and define limits of conduct where a new social and economic condition arises and demands change." Los Angeles County Fair

Disputes Act of 1906<sup>68</sup> the British Parliament has delineated that area by granting labor organizations absolute immunity from liability for inducing breaches of employment contracts during labor disputes. Since in industrial disputes it is almost inevitable that breaches of contract will occur, it seems highly desirable that the legislative branch shall prescribe the scope and extent of that privilege as part of its general policy governing management-labor conflicts. Congress has undertaken to do this to a limited extent in the Taft-Hartley Act. But until the legislature has determined the full extent of the privilege, labor remains confronted, in its struggle for a better economic position, with a still-virile legal theory of the early common law.

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Assn. v. Pomona Valley Central Labor Council, (Cal. Super. Ct., Los Angeles Co. 1941)  
8 L.R.R.M. 1109 at 1110.

<sup>68</sup> 6 Edw. 7, c. 47 (1906).