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INTERFERENCE WITH CONTRACT RELATIONS.

I. *Problem and Analysis.*

Is it an actionable wrong to induce one person to terminate existing contract relations with another, or to refrain from entering into contract relations with another? This question has been frequently before the courts of late, and has just been considered and one phase of it decided, with great and even solemn deliberation, by the English House of Lords in the case of *Allen* v. *Flood*.[1] Its importance to the industrial world can hardly be overestimated. Its correct solution is primarily the concern of courts and lawyers, but the results of the solution will touch every trader, employer and workman in his most vital interests. The decision of the House of Lords, fixing as it does the law of England, may, therefore, fittingly be made the text for a review of the question upon principle and authority.

In order to approach the subject in an intelligible way, it will be well to analyze the various circumstances under which the question may arise. In such an analysis it will be found that these elements must be considered:

[1] 1898, A. C. 1.

I. The contract right alleged to be invaded.

II. The actor who is alleged to have invaded such right.

III. The means employed in such alleged invasion.

IV. The motives of the actor in interfering with the alleged contract right.

Under each of these heads the possible cases may be classified as follows:

I. The contract right may be,—(1) an existing contract not terminable without breach; (2) an existing contract relation terminable at will; (3) a proposed, future contract relation.

II. The actor may be, (1) a single person; (2) a combination of persons.

III. The means employed may be,—(1) intrinsically unlawful, as deceit, duress, etc.; (2) intrinsically lawful, as persuasion, advice, the withdrawal of industrial benefits, etc.

IV. The motive may be,—(1) malicious; (2) non-malicious.

Upon this analysis it is proper to observe: first, that while under I., cases 2 and 3 are separated for completeness of analysis it is doubtful whether the law, as yet, presents any distinction as to the principles applicable to them; second, that under I., 1, and I., 2, 3, there may be present any possible combination of the cases under II., III. and IV. For example, B, or B, C and D, may induce X to terminate (with or without breach) an existing contract relation with A, either by intimidation or by persuasion, and either with or without malicious motives against A. Given any combination thus suggested, has A an action against B (or B, C and D) for the damages sustained in consequence of the termination of the contract relation by X?

Having thus indicated the nature and scope of the problem, we may proceed to discuss it under two heads,—first, inducing breach of contract; second, inducing termination (without breach), or non-formation, of contract.

II. *Inducing Breach of Contract.*

Three leading English cases are authority for the statement that it is actionable for B, or for B, C and D, to induce X to commit a breach of an existing contract with A, by unlawful

means, or by persuasion coupled with malicious or unjustifiable motives.[1] The only point of difficulty experienced in studying these decisions is in fixing the meaning of the term "malicious." As defined by the court in the case of *Bowen* v. *Hall*, it is, "the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff." In short, it would seem that inducing the breach of an existing contract is actionable if the main object be to injure plaintiff or to benefit defendant at the expense of plaintiff. It is clear that the second object may involve no malevolence or ill-will toward plaintiff. It may be simply a competitive motive, a desire to drive a good bargain. A has engaged X; B desires to employ X. B induces X to break with A and contract with B, by outbidding A. There is no desire to injure A, but a desire to benefit B. This is known, however, to result in loss or damage to A. It is actionable unless B can justify the infliction of the loss or damage. "Malice," therefore, is the infliction of loss or damage without lawful justification and not, necessarily, ill-will or malevolence. A desire to benefit the actor, who is in competition with plaintiff, is not a lawful justification for inducing X to break an existing contract with plaintiff; it would be a justification for inducing X to terminate (without breach) a contract with plaintiff or to refrain from closing a proposed contract with plaintiff.

The reasoning by which this result is reached may be stated as follows: It is unlawful to break an existing contract. It is unlawful knowingly and intentionally to persuade another to do an unlawful act. It is therefore unlawful for B, wilfully and with notice of the contract, to induce X to commit a breach of an existing contract with A. The number of the actors, the means employed, the motive of the actor, are all immaterial in considering actions under this head. So runs the comment of Lord Herschell in *Allen* v. *Flood*[2] upon the judgment of the court in the leading case of *Lumley* v. *Gye*,[3]

[1] Lumley *v.* Gye (1853), 2 E. & B. 216; Bowen *v.* Hall (1881), L. R. 6 Q. B. D. 333; Temperton *v.* Russell (1893), 1 Q. B. 715.

[2] 1898, A. C. 1, 123. See also Lord Watson, p. 96.

[3] 2 E. & B. 216.

followed by the caution, however, that he "must not be understood as expressing an opinion one way or the other, whether such an action can be maintained," a caution which is re-echoed by Lord Macnaghten,[1] and Lord Shand.[2]

It is to be observed, therefore, that while the English courts have always spoken of this wrong as "malicious," and it has been somewhat vaguely assumed that malice is essential to the action, very grave doubts have now been expressed in high quarters as to whether malice is at all material. It is to be observed, further, that the question whether there is any action for inducing breach of contract has not yet been passed upon by the House of Lords, and that the lords who decided the case of *Allen* v. *Flood* were careful to reserve their opinion upon that point. That there would be an action in case unlawful means were used, can hardly be doubted.[3] But whether there would be an action where only persuasion coupled with malicious motive (or want of justification) is employed, is yet to be decided by the highest English court.[4] Should it be decided that an action will lie, there would still remain the questions. What constitutes lawful justification? Is competition a justification? Is a concern for the welfare or morals of X a justification? Does the relationship of B to X render B's interference lawful where the interference of another would be unlawful? These and other like questions have yet to be passed upon by the courts.

In the United States the doctrine of *Lumley* v. *Gye* has been accepted and applied in some jurisdictions and rejected in others. It is generally agreed that inducing breach of contract by unlawful means, as deceit, duress, and the like, is actionable; but inducing termination of contract (without breach), or non-performance of non-enforceable contract, by

[1] P. 153.

[2] P. 168.

[3] See the remarks of Lord Watson in Allen *v.* Flood (1898), A. C. p. 96, Lord Herschell, p. 138, and the reasoning of Mogul Steamship Co. *v.* Macgregor (1895), A. C. 587.

[4] Lord Hershell points out (p. 143) that dissent or doubt was expressed by Lord Coleridge in Bowen *v.* Hall, A. L. Smith, L. J., in Temperton *v.* Russell, and Rigby, L. J., in Allen *v.* Flood (1895), 2 Q. B. 21. The reserve of several of the law lords on this point seems very significant.

like unlawful means, is equally actionable.[1] Is it actionable to induce a breach of an existing contract by persuasion coupled with malice or absence of justification? Such conduct is held actionable in some jurisdictions.[2] In other jurisdictions it is held non-actionable (unless, perhaps, in the case of the enticement of servants).[3] The authorities denying liability expressly except from the decision the case of the employment of deceit, slander, intimidation, or other unlawful means, and reserve the question as to the case of the enticement of a servant engaged in manual labor, where any form of the English Statute of Laborers is in force.[4] The question whether a combination of persons inducing breach of contract by persuasion or advice is liable where a single person would not be, seems not to have arisen: it would, however, be decided on the same principles as in the case of inducing termination (without breach) by force of combination,—principles discussed under the next head.

It will be observed, therefore, that while some American states have followed the present English doctrine other American states have followed the dissenting opinions in the English cases and have already decided what the House of Lords regards as an open question, that inducing breach of contract is not actionable unless the means employed are unlawful.

III. *Inducing Termination, Rescission, or Non-formation of Contract.*

In the cases just considered the act induced, namely, breach of contract, is itself an unlawful act in the sense that the law

[1] Benton *v.* Pratt (1829), 2 Wend. (N. Y.) 385; Rice *v.* Manley (1876), 66 N. Y. 82; Lally *v.* Cantwell, 30 Mo. App. (1888) 524; Angle *v.* Chicago, St. Paul, &c., Ry. (1893), 151 U. S. 1.

[2] Walker *v.* Cronin (1871), 107 Mass. 555; Haskins *v.* Royster, (1874), 70 N. Car. 601; Jones *v.* Stanly (1877), 76 N. C. 355; Angle *v.* Chicago, St. Paul, &c., Ry. (1893), 151 U. S. 1 (*semble*); Nashville, C. & St. L. Ry. *v.* McConnell (1897), 82 Fed. 65.

[3] Chambers *v.* Baldwin (1891), 91 Ky. 121; Bourlier Brothers *v.* Macauley (1891), 91 Ky. 135, Boyson *v.* Thorn (1893), 98 Cal. 578; Glencoe Land and Gravel Co. *v.* Commission Co. (1897), 138 Mo. 439.

[4] 91 Ky. 140-142; 98 Cal. 582.

gives damages for it against the non-performing party to the contract. In the cases now to be considered the party under inducement commits no actionable wrong in yielding to the persuasion of the inducing party. This may be because the contract is terminable at will, or because the contract is subject to rescission at will, or because no contract relation has yet been formed. The problem now is, will it render B liable to A, if B induce X to terminate a contract terminable at will, or to rescind a contract subject to rescission at will, or to refrain from concluding a proposed or probable contract? Terminating a contract is used in the sense of putting a stop to further performance of a contract under which A has already been engaged in performance. Rescission of contract is used in the sense of exercising an option to be bound or not upon a contract unenforceable by A, as, for example, a contract unenforceable under the Statute of Frauds, or a contract entered into by X's agent in excess of authority, and the like. Non-formation of contract is used in the sense of exercising the right not to enter into a proposed contract. In each case the decision of X is understood to be influenced or induced by the deceit, coercion, or persuasion of B.

If unlawful means be used by B, as deceit or duress, it is generally conceded that B is liable to A, because in such case it is not X's free will that has produced the result, but the deceit or duress exercised by B, and operating through X.[1] What constitutes duress will be discussed later.

If no unlawful means be used, but only persuasion or advice coupled with a malicious motive to injure A or to benefit B at the expense of A, then under the authority of *Allen* v. *Flood*[2] no action will lie against B. Briefly stated, that now famous case is this: Allen, a delegate of a trade union of iron-workers, persuaded the Glengall Iron Company to discharge Flood and another workman by representing (truthfully) that if Flood and Taylor remained in the employ-

[1] Benton *v.* Pratt, 2 Wend. (N. Y.) 385; Rice *v.* Manley, 66 N. Y. 82; Lally *v.* Cantwell, 30 Mo. App. 524; Evans *v.* Walton, L. R. (1867) 2 C. P. 615; Boyson *v.* Thorn, 98 Cal. 578 (*semble*).

[2] 1898, A. C. 1.

ment the iron-workers (about 100 in all) would quit for the reason that Flood and Taylor, who were wood-workers, had sometimes on other jobs done iron-work, and the iron-workers were determined to prevent it. At the trial there was no evidence of intimidation or coercion, or of breach of contract, the engagement of Flood and Taylor being terminable at will. The jury found that Allen maliciously induced the Glengall Company to discharge Flood and Taylor and not to engage them further. Damages were assessed at £20 each. Kennedy, J., entered judgment for the plaintiffs. The Court of Appeal (Lord Esher, M. R., Lopes and Rigby, L. JJ.) affirmed the judgment.[1] On appeal to the House of Lords there was an argument in December, 1895. A second argument was ordered and, following an infrequent custom, certain judges were summoned to attend and give their opinion to the law lords. Eight judges attended;[2] of these, six advised that the judgment be affirmed; two (Mathew and Wright) thought the judgment should be reversed. Nine law lords rendered the final decision. Of these, six[3] held that the defendant had committed no actionable wrong; three[4] were for affirming the judgment. The sum of the reasoning on the final judgment is that it is not actionable to induce another to do what he may rightfully do unless unlawful means are used or, perhaps, unless there be a conspiracy of persons to produce the result, and that it is immaterial that the defendant acted maliciously.

The earlier precedents mainly discussed are *Keeble* v. *Hickeringill* (11 East, 574 n.), *Carrington* v. *Taylor* (11 East, 571), *Lumley* v. *Gye* (2 E. & B. 216), *Bowen* v. *Hall* (6 Q. B. D. 333) and *Temperton* v. *Russell* (1893, 1 Q. B. 715). The general result of the examination of these cases is interesting. Of *Keeble* v. *Hickeringill*, which was a case of one landowner shooting guns with the sole object of frightening ducks away

[1] 1895, 2 Q. B. 21.

[2] Hawkins, Mathew, Cave, North, Wills, Grantham, Lawrance and Wright, JJ.

[3] Lords Watson, Herschell, Macnaghten, Shand, Davey, and James of Hereford.

[4] Lord Halsbury, L. C., Lords Ashbourne and Morris.

from an adjoining landowner's decoy, the prevailing law lords say in substance that the act was itself a nuisance and so unlawful, though there is a marked disposition to treat the case as of slight authority.[1] *Carrington* v. *Taylor*, a case similar to *Keeble* v. *Hickeringill*, except that defendant was here shooting game in his own right and thereby disturbed plaintiff's decoy, is practically set aside as bad law.[2] The other three cases, so far as they hold that inducing breach of contract is actionable, have already been referred to. Of *Temperton* v. *Russell*, so far as it holds it actionable to induce one person not to enter into new contracts with another, there is a decided disapproval, subject to a reservation as to the question whether a conspiracy to produce such a result is actionable.[3] *Mogul Steamship Co.* v. *Macgregor*,[4] is treated throughout as authority for the prevailing judgment. None of the prevailing opinions refers to American cases, though Lord Halsbury, L. C., (dissenting) cites several.[5]

The three dissenting law lords, the six advisory judges, the three judges in the Court of Appeal, and the trial judge, (thirteen out of the twenty-one judges who heard the case in the three courts), place their judgment first, upon the proposition that intentionally causing damage without just cause or excuse is actionable, and that the finding of a malicious motive (under the circumstances of this case) negatives just cause or excuse,[6] and second that Allen's acts constituted coercion over the employer whose business would have been at a standstill

[1] See Lord Herschell's observations on p. 134 and Lord Davey's on p. 174.

[2] Lord Watson, p. 103, Lord Herschell, p. 135, Lord Shand, p. 169. It will be observed that these two cases do not deal with interference with contract. They are discussed to the point whether malicious motive is material.

[3] Lord Watson, p. 108, Lord Macnaghten, p. 153.

[4] 1892, A. C. 25.

[5] Walker *v.* Cronin (1871), 107 Mass. 555; Benton *v.* Pratt (1829), 2 Wend. (N. Y.) 385; Rice *v.* Manley (1876), 66 N. Y. 82; Bixby *v.* Dunlap, (1876) 56 N. H. 456; Angle *v.* Chicago, Etc., Ry. (1893), 151 U. S. 1.

[6] Lord Halsbury, L. C., pp. 75, 84; Lord Ashbourne, p. 112; Lord Morris, p. 160; Hawkins, J., p. 14.

had one-hundred ironworkers left the yard.[1] Challenged to point out what right of the plaintiffs has been invaded, they reply "the right freely to pursue their lawful calling," quoting with approval the statements of Sir William Erle in his work on Trade Unions that,—"Every person has a right under the law, as between him and his fellow-subjects, to full freedom in disposing of his own labor or his own capital according to his free will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong, to be remedied either by action or by indictment, as the case may be."

In short, the decision that defendant is liable seems to be placed by these judges mainly on these propositions: (1) Flood and Taylor had a legal right to pursue their calling without interference; (2) Allen interfered and damage resulted; (3) this interference was so decisive as to be fairly regarded as the efficient cause of the damage (rather than the act of the employer); (4) this interference was without just cause or excuse, or, in other words, malicious.

This difference of view between the prevailing and the earlier advisory and dissenting opinions is very fundamental and will be discussed later in this article. It answers our present purpose to note that the prevailing opinions find no intimidation or unlawful means used to control the employer's conduct in dismissing plaintiffs, while the other opinions find that defendant's threat was coercive and that no ground of justification was established.

We have now to examine the state of the American

[1] Pp. 17, 80, 160.

authorities upon the questions involved in *Allen* v. *Flood*, and analogous cases.

It may be stated, at the outset, that the use of intrinsically unlawful means, as fraud or intimidation, will render the interfering defendant liable to the injured plaintiff. It is, perhaps, not difficult to determine what is fraudulent or deceitful.[1] But it is more difficult to extract from the decisions a clear notion of what will amount to duress or intimidation. Some cases, to be sure, so clearly involve intimidation as to leave no room for doubt.[2] Other cases involve a kind of constructive intimidation, as a display of force by a body of men where no force is actually used or even expressly threatened. Thus, the display of banners with devices, as a means of intimidation to prevent persons from entering into or continuing in the employment of plaintiff, has been held unlawful, although there was no proof that the inscriptions were false or misleading.[3] In other cases a mere display of force by a body of men, although no force was actually used or expressly threatened, has been held to amount to intimidation.[4] Under these latter decisions it was held unlawful for a body of persons to assemble in force in the vicinity of a place where workmen were employed in order to induce such workmen to quit the employment or to refrain from entering into it. In another case the question upon which the court divided was whether a patrol of two men in front of the plaintiff's place of business, stationed there to give notice of the strike and to persuade workmen not to enter the employment, constituted such intimidation as to be unlawful.[5] The majority of the court thought the patrol should be enjoined as one means of intimi-

[1] Stone *v.* Carlan (1850), 13 Law Reporter, 360 S. C. 2 Sandf. N. Y. Sup. Ct. 738; Marsh *v.* Billings (1851), 7 Cush. 322; Rice *v.* Manley (1876), 66 N. Y. 82; Dudley *v.* Briggs (1886), 141 Mass. 582; Weinstock *v.* Marks (1895), 109 Cal. 529.

[2] Shoe Co. *v.* Saxey (1895), 131 Mo. 212; Wick China Co. *v.* Brown (1894), 164 Pa. 449.

[3] Sherry *v.* Perkins (1888), 147 Mass. 212.

[4] O'Neil *v.* Behanna (1897), 182 Pa. 236; Mackall *v.* Ratchford (1897), 82 Fed. 41.

[5] Vegelahn *v.* Guntner (1896), 167 Mass. 92. See also Cook *v.* Dolan (1897), 6 Pa. Dist. Rep. 524.

dation and of rendering the employment unpleasant or intolerable to workmen. "Intimidation," says the prevailing opinion, "is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in *Sherry* v. *Perkins*."[1] From this conclusion two judges[2] dissented, on the ground that the patrol carried with it no threat of violence, and that the means used by the patrol, namely, persuasion and advice, were lawful and justifiable in a competitive struggle between employer and employed.

Another form of compulsion, which may be regarded as intimidation, is the instituting, or threatening to institute, a boycott against A in order to prevent him from entering into contract relations necessary to the successful conduct of his business. This may involve A's rights alone, or it may also involve the rights of X. Thus the object may be to compel A to pay the defendants higher wages by inducing X (or X, Y and Z) not to deal with A until such higher wages are granted; or it may be to compel X to cease dealing with A in order to compel A to deal with defendants on their terms. In the first case A alone can complain; in the second case A and X may both complain. To illustrate: Defendants desire to compel A to cease using a machine for hooping barrels. They threaten to notify plaintiff's customers not to purchase his machine-hooped barrels, and to notify all members of labor organizations, and others, not to purchase articles packed in machine-hooped barrels. Requesting A's customer (X) not to purchase A's barrels would affect A alone, unless X were also put under compulsion. Notifying X's customer (Y) not to buy goods packed in A's barrels affects both A and X, because it may interfere with X's freedom to purchase A's barrels or to sell goods to Y, and also A's chance of selling barrels to X. In this case the conduct of defendants is regarded by the majority of the court as intimidation, and

[1] 147 Mass. 212.

[2] Mr. Chief Justice Field and Mr. Justice Holmes.

hence an unlawful interference with A, although the dissenting judge (in a very learned and vigorous opinion) regards it as lawful competition between employer and employed.[1] The question does not arise as to X's rights. Again, a circular requesting the public to boycott plaintiff's newspaper, in order to compel plaintiff to cease using plate matter or to employ union labor, is intimidation and unlawful.[2] A circular requesting the public not to deal with merchants who advertise in plaintiff's paper would affect the advertising merchants as well as plaintiff. So a notice to an employer (X) that if he continues to employ A, "we will be compelled to notify all labor organizations of the city that your house is a non-union one," is intimidation of X, and if A is thereby discharged A has an action against defendants although A's contract is terminable at will.[3] Had the threat been carried out and X's customers induced to cease dealing with him, X also would have been injured. In general it may be said that instituting, or threatening to institute a boycott by concerted action is unlawful. It may take various forms but in its essence it is minatory and is calculated to interfere in a dangerous degree with the freedom of industrial action.[4]

A puzzling phase of the boycott is presented in those cases where dealers combine to drive out of business a competitor who shall refuse to conform to the business methods fixed by the members of the combination, or to refuse to deal with any person who shall offend against the rules. Several cases have upheld the lawfulness of the means adopted by these combinations. A manufactures and sells lumber. An association of retailers agree that they will not buy of manufacturers who sell directly to consumers. A sells to consumers. The secretary of the association threatens to notify the members

[1] Hopkins *v.* Oxley Stave Co. (1897), 83 Fed. 912.

[2] Barr *v.* Essex Trades Council (1894), 53 N. J. Eq. 101; Casey *v.* Cincinnati Typo. Union (1891), 45 Fed. 135. See also Old Dom. S. Co. *v.* McKenna (1887), 30 Fed. 48.

[3] Lucke *v.* Clothing, &c., Assembly (1893), 77 Md. 396.

[4] Moores *v.* Bricklayers' Union (Ohio Super. Ct., 1890), 23 Weekly Law Bull. 48; Thomas *v.* Cincinnati, &c., R. (1894), 62 Fed. 803.

not to deal with A. This is held lawful.[1] Again: A is a plumber. An association of plumbers agree not to deal with wholesalers who sell to plumbers not conforming to the rules of the association, the practical result being that all conforming plumbers must join the association or one of its branches. A is unable to secure supplies. This is held lawful competition.[2] A combination agreeing not to sell to any person who is a delinquent debtor of any member of the association is held lawful, and such delinquent debtor has no action against the member giving notice of delinquency or against a member refusing to deal with him until he pays the creditor.[3] On the other hand it has been held that if defendants not only refuse to sell to plaintiff but also induce a third person not to sell to plaintiff, such interference in plaintiff's business is unlawful unless it can be shown to be justifiable as serving some legitimate purpose of the defendants.[4] So also where retail dealers in lumber combine and agree not to deal with wholesalers who sell to a lumber broker, not maintaining a lumber yard, and in pursuance of this agreement "fine" X, a wholesaler who has sold to plaintiff, a lumber broker, and in consequence plaintiff is thereafter unable to procure lumber of X, or of other wholesalers, it is held that plaintiff may maintain an action against defendants since defendants' conduct amounts to intimidation.[5] So also where there is an understanding that employers engaged in a certain business shall notify each other of the names of "apprentices" who leave the employment, and that one will not employ the apprentice of another, and defendant, in pursuance of this understanding, gives notice that plaintiff has left his employment, in consequence of which

[1] Bohn Mfg. Co. *v.* Hollis (1893), 54 Minn. 223.

[2] Macauley *v.* Tierney (R. I., 1895), 33 Atl. 1.

[3] Schulten *v.* Bavarian Brewing Co. (1894), 96 Ky. 224; Brewster *v.* Miller (Ky. 1897), 41 S. W. 301.

[4] Delz *v.* Winfree (1891), 80 Texas, 400; see also Olive *v.* Van Patten (1894), 7 Tex. Civ. App. 630; Sweeny *v.* Torrence (1892), 1 Pa. Dist. Rep. 622.

[5] Jackson *v.* Stanfield (1894), 137 Ind. 592, disapproving Bohn Mfg. Co. *v.* Hollis, ante.

plaintiff is unable to secure or hold new employment, the defendant is liable to plaintiff.[1]

In the cases cited in the preceding paragraph there is a prior agreement that upon a certain contingency one, or some, or all of the members of the combination will cease dealing with all persons of a designated class. The contingency is the business conduct of the persons in question. All whose business methods (though lawful) are obnoxious to the system adopted by the members of the combination are to fall into a tabooed class. Notice is to be given that A, B, C, etc., are taboo. Nobody in the combination is thereafter to have commerce with them. They are industrially excommunicated. The contingency may or may not affect the rights of some third person. Thus, if A sells direct to a consumer (X) A is taboo;[2] or, if A sells to a taboo retailer (X), A is taboo also;[3] or if A does not pay his debt to a member of the combination, A is taboo.[4] In the first two cases A and the consumer, or A and the retailer, are both affected. In the third case A alone is affected. In either case one defendant "notifies" the other members that A's conduct creates the contingency contemplated, or an agent of all the members gives like notice, and A is forthwith excommunicated. At the same time X may be expressly put under the ban, because it may have been simply because A dealt with X that A is boycotted. A warning is thereby given to all in like circumstances with A not to deal with X. The problem now raised is whether, conceding that the notifying member or agent would have been liable to A or X if no such prior agreement had existed, he escapes liability because of such agreement. If the defendant notifies Z that A's conduct in dealing with X is obnoxious to defendant, or that A's conduct is itself obnoxious without reference to X, and requests or persuades Z to cease existing relations with A, and if A or X has an action against defendant for this unlawful

[1] Blumenthal *v.* Shaw (1897), 77 Fed. 954; Mattison *v.* Lake Shore, Etc., R. (1895), 2 Oh. N. P. 276.

[2] Bohn *v.* Mfg. Co. *v.* Hollis, *supra.*

[3] Macauley *v.* Tierney, *supra.*

[4] Brewster *v.* Miller, *supra.*

interference with his freedom of industrial action, is an agreement between defendant and Z that defendant shall notify Z in case A's conduct becomes obnoxious, and that thereupon both defendant and Z will taboo A, a lawful agreement which may be set up as a bar to A's or X's action? This inquiry into the legality of such agreements seems to have been little considered in the cases cited, but was expressly considered and decided in the recent case of *Curran* v. *Galen*.[1] In that case plaintiff brought an action against G and W (officers of a trade union) for having procured his dismissal from employment in a brewery, because he refused to join the union. Defendants set up an agreement between an association of brewers and the union that all employes of the brewery companies belonging to the association should be members of the union and that no employe should work for a longer period than four weeks without becoming a member, and set up that in pursuance of this agreement defendants notified plaintiff's employer, a member of the association and a party to the agreement, that plaintiff had refused for more than four weeks to join the union. The court held the answer bad because it disclosed an illegal agreement, the object of which was to interfere with the freedom of the individual to dispose of his labor and to coerce the individual into conforming to the business methods of the defendants under penalty of the loss of his position and of his prospects. If there had been no agreement, defendants' interference with plaintiff's freedom to pursue his lawful trade or calling would have been unlawful; the agreement is an agreement to interfere with such freedom, and is itself unlawful.

There is yet another class of cases where the defendant, acting alone, with no concert with others, brings pressure to bear upon X to induce him to cease dealing with plaintiff. The clearest types of these cases are those where an employer of labor directs his employes not to deal with the plaintiff upon pain of discharge from the employment. It has been held lawful for an employer to forbid his employes to rent

[1] 152 N. Y. 33 (1897).

plaintiff's house[1] or to trade at plaintiff's store;[2] and for a quarry owner having a contract with X, terminable at will, for the cutting of stone, to compel X to discharge a workman on pain of the termination of the contract.[3] On the other hand it has been held unlawful for defendant to forbid his employes to trade at plaintiff's store.[4] In a recent case it was held lawful for an employer who also ran a store in competition with plaintiff to forbid his employes to trade with plaintiff, though it was suggested in the opinion that it would be unlawful if defendant had not been in competition with plaintiff.[5]

This last case seems to bring out sharply the real question at issue, namely, whether defendant may use even his own legal rights as an instrument of wilful harm to plaintiff without any other justification than the abstract right to do as he pleases with his own. Malice is often said to be the test in these cases. The conflict waged over the meaning and limits of that term, renders its use a source of added difficulty. It is perhaps enough to say that if defendant inflicts intentional loss upon plaintiff, defendant is liable to repair the loss unless he can justify its infliction. We should then be forced into the added difficulty of defining the grounds of justification, but this is certainly a more concrete legal question than that pertaining to malice which, after all, will ordinarily have to be inferred from the absence of justification. It is easy enough to see the difference between the case of a man who interferes with a competitor's business in order to obtain business for himself and the case of a man who interferes in another's business for no apparent purpose except to injure the other.

[1] Heywood *v.* Tillson (1883), 75 Me. 225.

[2] Payne *v.* Western, &c., Ry. (1884), 13 Lea, 507.

[3] Raycroft *v.* Tayntor (1896), 68 Vt. 219.

[4] Graham *v.* St. Charles St. Ry. (1895), 47 La. Ann. 214; again, 47 La. Ann. 1656.

[5] Robison *v.* Texas Pine Land Ass'n (Tex. Civ. App. 1897), 40 S. W. 843. This is the point of difference between Keeble *v.* Hickeringill and Carrington *v.* Taylor, discussed above. In the first case defendant showed no justification; in the second he was shooting game himself, and should have been justified if his shooting was reasonable.

It cannot be pretended that such a principle would free the law from difficulties for we should still be forced to decide what constitutes competition, and it was upon a difference of view upon that point that a dissenting opinion in part rests in the case of *Vegelahn* v. *Guntner*.[1]

Upon the point whether mere persuasion to terminate contracts, or to refrain from entering into them, unaccompanied by fraud, intimidation, oppression, or threats of temporal loss, is actionable unless special grounds of justification exist, the American authorities are unsatisfactory. There are cases which may fairly be considered as holding malicious persuasion under such circumstances unlawful.[2] Other cases which seem to sustain the same proposition have in them some elements of coercion or fraud.[3] Other cases repudiate the doctrine altogether even where the result of the malicious persuasion by the defendant is to induce X to commit a breach of contract with the plaintiff.[4] Cases in which malicious persuasion is coupled with some degree of pressure present the question in a modified aspect, and have already been considered.

In this state of the authorities, it is proper to examine the principles involved and to seek some solution of the problem which shall tend to uniformity of legal decision. We are met at the outset by two conflicting propositions.[5] (1) On the one hand it is said that if the defendant does or threatens to do that which he has a legal right to do, the plaintiff has no action against him however malicious his motives or however much

[1] 167 Mass. 92, 104-109.

[2] Walker *v.* Cronin (1871), 107 Mass. 555; Old Dominion Steamship Co. *v.* McKenna (1887), 30 Fed. 48; Chipley *v.* Atkinson (1887), 23 Fla. 206; Dannenberg *v.* Ashley (1894), 10 Ohio Circt. Ct. R. 558; Graham *v.* St. Charles St. R. (1895), 47 La. Ann. 214, 1656.

[3] Cases cited throughout this article. See also Morgan *v.* Andrews, (1895), 107 Mich. 33; Perkins *v.* Pendleton (1897), 90 Me. 166; Connell *v.* Stalker (N. Y. 1897), 20 Misc. 423.

[4] Cases ante p. 277, note 3.

[5] See the author's article, "Malice in the Law of Tort," 1 Northwestern Law Rev. 65 (March, 1893); O. W. Holmes, Jr., "Privilege, Malice, and Intent," 8 Harv. L. Rev. 1 (April, 1894).

he may have intended to injure the plaintiff.[1] (2) On the other hand it is said that the defendant has no right to inflict an intentional injury upon the plaintiff unless there exist a recognized legal justification, and that it is not necessarily a legal justification to say that the defendant used as the instrument for accomplishing the harm only means which may be used for lawful purposes.[2]

The first proposition gives us a pretty definite rule. It carries with it these two simple tests of liability: (1) Either the act induced must be unlawful, or (2) the means used to induce the act must be unlawful. Under these tests it would be unlawful to induce a breach of contract, because a breach of contract is unlawful; it would be unlawful to induce the termination of a contract (without breach) or the non-formation of a contract, only if the actor used unlawful means, not if he used lawful means. There might still be some question as to what means are lawful, but in general that would be tested by the common legal understanding as to permitted or prohibited acts, and advice, persuasion, the withdrawal of industrial advantages, the termination or threat to terminate contracts at will, and the like, would be lawful means, while misrepresentation, deceit, force or threat of force, would be unlawful means. There is still left open under this head the question whether the use of lawful means by a combination of persons stands upon any different footing than the use of such means by a single individual. This question is reserved by some of the prevailing law lords in *Allen* v. *Flood.* It is assumed to be settled in the opinion of Mr. Justice Holmes in *Vegelahn* v. *Guntner*,[3] where we read: "I agree, whatever may be the law in the case of a single

[1] This is the reasoning of Heywood *v.* Tillson, 75 Me. 225; Payne *v.* Western, &c., Ry., 13 Lea, 507; Raycroft *v.* Tayntor, 68 Vt. 219; Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223; Macauley *v.* Tierney (R. I.), 33 Atl. 1; Allen *v.* Flood, 1898, A. C. 1.

[2] Graham *v.* St. Charles St. Ry., 47 La. Ann. 214, 1656; Chipley *v.* Atkinson, 23 Fla. 206; Delz *v.* Winfree, 80 Tex. 400; Jackson *v.* Stanfield, 137 Ind. 592; Perkins *v.* Pendleton, 90 Me. 166; Allen *v.* Flood (1895), 2 Q. B. 21, and (1898) A. C. 1.

[3] 167 Mass. 92, 105.

defendant (*Rice* v. *Albee*, 164 Mass. 88), that when a plaintiff proves that several persons have conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force."[1] On the civil side this has been very unsatisfactorily dealt with,[2] and has often been dismissed with the statement that what it is lawful for one to do it is equally lawful for any number of persons to do. But it is clear from the circumstances and reasoning of cases where there was combined persuasion that this view is untenable, and that the force of concerted action may be in itself unlawful.[3] What would be nearer the truth is the statement that what it is possible for a number of persons to do it may be impossible for one to do.[4] The mere weight of numbers may be far more damaging and dangerous than the fraud or violence of a single individual. It is therefore quite probable that the two tests will be held to apply only to individual acts and that combinations to inflict injury may render the actors liable even though no "unlawful means" are used further than the oppression or intimidation of concerted action. If so, it would be rational to limit the doctrine to combinations powerful enough to produce serious harm and, therefore, menacing in character. It would also be rational to permit the defence of justification for combination. There should be a wide gulf between a case where traders or workmen combine to get trade or to get higher wages, and a

[1] Citing Walker *v.* Cronin, 107 Mass. 555; Morasse *v.* Brochu, 151 Mass. 567; Tasker *v.* Stanley, 153 Mass. 148.

[2] On the criminal side see Crump *v.* Commonwealth (1888), 84 Va. 927; State *v.* Donaldson (1867), 32 N. J. L. 151; State *v.* Glidden (1887), 55 Conn. 46.

[3] See cases cited above under the discussion of boycott. See also Dickson *v.* Dickson (1881), 33 La. Ann. 1261; Baughman Bros. *v.* Askew, 11 Va. Law Jour. 196 (April, 1887). See article by Ernst Freund, 11 Harv. L. Rev. 449 (Feb. 1898).

[4] Gregory *v.* Duke of Brunswick (1843), 13 L. J. C. P. 34.

case where ill-wishers combine solely to drive a person out of trade or of work: the result to the plaintiff may be the same in each case, but in the one case he may have suffered only from fair competition, while in the other he may have suffered from malicious or unjustifiable interference. But this question is yet to be settled, along with the whole question as to what is a sufficient justification and, more specifically, what acts of competition ought to be justified of the law.

The second proposition, that intentional injury is remediable unless justified, involves more nicety of treatment in practice than the first. It is a noticeable fact that the common law judges have ever shrunk from submitting to juries questions requiring too nice a balancing of conflicting rights. For this reason they have declined to adopt the admiralty rule of comparative negligence or to permit recovery for mental shock occasioned by negligence. In the cases under discussion they have also frequently declined to allow the defendant's liability to turn upon the question of his motive or his privilege, and have thought it safer to adopt the simpler rules involved in the first proposition. Yet this position has not passed unchallenged. Some courts have plainly said that the difficulties of satisfactory proof ought not to render safe the infliction of intentional harm, nor ought the inevitable divergence of views as to the fundamental questions of public policy underlying the defences of justification to deter the judges from passing upon the validity of such defences. After all, a good deal has been done by the law in the way of fixing the just limits of freedom of action, and it would be unfortunate if the modern judges, under new conditions, were to decline to mark new delimitations as occasion requires. The conflicts indicated among the cases cited in this article are at bottom a difference of view upon this point. Cases like *Jackson* v. *Stanfield*,[1] *Graham* v. *St. Charles St. Ry.*,[2] *Chipley* v. *Atkinson*,[3] and *Connell* v. *Stalker*,[4] illustrate our second proposition, following

[1] 137 Ind. 592.
[2] 47 La. Ann. 214, 1656.
[3] 23 Fla. 206.
[4] 20 Misc. 423.

in principle the early case of *Keeble* v. *Hickeringill*.[1] A case like *Robison* v. *Texas Pine Land Ass'n*[2] illustrates the distinction between justifiable and unjustifiable interference. A case like *Vegelahn* v. *Guntner*,[3] illustrates the difficulties of agreement as to whether a particular act is justified. In all of these cases acts "lawful in themselves" are complained of as having been so calculated as to produce intentional injury to the plaintiff. In each the question is, was it lawful, under the circumstances (not absolutely), for the defendant to employ these means for the infliction of intentional harm. Is it lawful for one hundred dealers to threaten not to deal with X, if X deals with plaintiff? Is it lawful for one employer to threaten to discharge all workmen who deal with plaintiff? Is it lawful for one person to persuade X to discharge plaintiff? The answer must depend upon the presence or absence of justification, the reasonableness of the conduct according to the circumstances and in the light of sound public policy. In each case "malice" is charged. But malice, as has been said, is itself shown by the absence of justification. "Maliciously" and "without lawful justification," are identical terms. In most of the cases considered the grounds of justification, if any, must be sought in the exercise of the right of competition, not competition in the narrow sense, but in the broader sense indicated by Mr. Justice Holmes.[4] Reluctant as the courts have been to enter into a consideration of this right and a determination of its just limits, it is daily becoming clearer that they cannot escape their responsibility, and that unless the law is to settle into the narrow groove fixed by the terms of the first proposition above they must steadily build up a consistent doctrine upon this point. Whatever of absolute uniformity of results might be sacrificed by the rejection of the first view would be compensated by the approximation to moral standards that follows upon the adoption of the second. Instead of shutting the door against plaintiffs intentionally injured or ruined by defendants, the courts would be open to

[1] 11 East, 574 n.
[2] 40 S. W. 843.
[3] 167 Mass. 92.
[4] 167 Mass. 107, 108.

an investigation of the issue whether such injury or ruin was inflicted in the proper exercise of a common right or was inflicted without any justification that commends itself to existing views of public policy or social utility. Differences and fluctuations there would doubtless be as to what view of public policy ought to be taken, but better that than to ignore the existence of patent facts and fashion the law into a mould unsuited to the rapidly changing conditions of modern industrial life.

IV. *Summary.*

The result of the decisions may be thus stated:

I. It is unlawful for B to induce X to break an existing contract with A; but it must be noted that,—

(1) the House of Lords reserves its opinion upon the point whether it is unlawful unless unlawful means are used, and

(2) some American cases have decided it not to be unlawful unless unlawful means are used (except, perhaps, in the case of enticing away servants), and

(3) no attempt has yet been made to determine whether any grounds of justification may be set up.

II. It is unlawful for B to induce X to terminate (without breach) an existing contract with A, or to refrain from entering into a contract with A, either (1) by the use of intrinsically unlawful means, or (2) probably, by combination or conspiracy with others unless such combination can be justified.

III. Whether it is unlawful for B to induce X to terminate (without breach) an existing contract with A, or to refrain from entering into a contract with A, where no intrinsically unlawful means are used or combination or conspiracy exists, there are two views:

(1) that it is not unlawful;

(2) that it is unlawful, unless B can justify his interference on some principle of industrial or social utility.

IV. These questions must be regarded as open:

(1) What are intrinsically unlawful means, and, particularly, what acts constitute intimidation?

(2) What constitutes justification, and, particularly, what constitutes fair competition?

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