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SOME LEADING ENGLISH CASES ON TRADE AND LABOR DISPUTES.

As a result of competition and rivalry in business, or as a result of the efforts of associations of laborers or associations of capitalists to advance the interests of their members, acts which injure others are constantly done by individuals or associations. We have an increasing number of cases in which the courts have attempted to distinguish between what a man may and what he may not lawfully do in the furtherance of what he believes to be his own business interests or the economic interest of the class to which he belongs. A convenient name for this class of cases, one at least which distinguishes them from those dealing with commercial law, is to speak of them as cases dealing with economic conflicts. Among the large number of cases properly falling under this class are those which relate to civil liability for interference in the trade relations of others. The means employed by the defendant to accomplish this interference may be a written or spoken statement defamatory of the plaintiff's character or methods of business. In such cases the civil wrong, if any, is slander or libel. With wrongs of this character this paper does not deal.

There are other means, however, which may be employed to injure the business of one's rival in trade or one's enemy in a labor dispute. Those with whom they deal may be persuaded not to deal any longer with them, or even to break their contracts with them, by other means than the libelous publication or the slanderous statement; they may also be persuaded by argument, by the offer of something of pecuniary value, by the threat of business loss, or by the threat of physical harm to person or property.¹ It is the object of this paper to examine those English cases, beginning with *Lumley v. Gye*, which discuss the civil liability of one person for injury to another, when the immediate cause of the injury is the refusal of some third person to deal with the plaintiff, or a breach of contract by a third person, the third person having been induced to act as he did, either by an offer on the part of the defendant of something of pecuniary value, or by the defendant's threat of business loss.

It will be noticed that within the limits indicated, four questions can be discussed.

First: Has A. an action against B., if B., by means of an offer to C. of something of pecuniary value, induces C. to break his contract with A.?

Second: Has A. an action against B. if B. induces C. to break a contract with A. by threats of business loss?

Third: Has A. an action against B., if B., by means of an offer to C. of something of pecuniary value, induces C. not to make a contract with A. that he would otherwise have made?

Fourth: Has A. an action against B., if B. induces C., by threats of business loss, not to make a contract with A. which he would otherwise have made?

The attempt to indicate how far these questions have been answered by the English courts, leads us to an examination of four cases well known to the profession in this country. The earliest is *Lumley v. Gye*,² which was afterwards con-

¹ This analysis of the methods of persuasion is not necessarily exhaustive.

² 2 E. & B. 215, 1853.

firmed by the Court of Appeal in *Bowen v. Hall*.³ The three other cases are: *Mogul Steamship Company v. MacGregor*,⁴ *Temperton v. Russel*,⁵ and *Allen v. Flood*.⁶ We will also have to examine the more recent case of *Quinn v. Leathem*,⁷ a case which may soon become almost as famous as any of the others.

The facts of *Lumley v. Gye* are simple. Miss Wagner was an opera singer. She contracted with Lumley to sing under his management for a period of three months. Gye, a rival operatic manager, persuaded her to leave Lumley, before the expiration of the term for which she was employed, and sing for him, Gye. For this persuasion, with its resulting injury, Lumley sued Gye. The Court of Queen's Bench declared by a vote of three to one that he had a cause of action. It will be noticed that this case involves the first of our four questions, and apparently answers it in the affirmative. There is the contract between Lumley and Wagner which Gye induces Wagner to break by the offer to her of something of pecuniary value, that is a position at his theatre. But a perusal of the case as reported shows us that the first question as we have stated it was not argued by counsel or considered by any of the four judges. At the time the case was decided the action for enticing a man's servant away from his service was well known. If Miss Wagner, under the decided cases of this class, could be regarded as the servant of Lumley, his cause of action was clear. One of the plaintiff's counts is drawn on this theory, and one of the three judges who voted for the plaintiff, Sir Charles Crompton, rests his opinion solely on this ground, while a second, Sir William Wightman, regards it as sufficient for the decision, and Sir John T. Coleridge, who dissented, devotes a considerable part of his opinion to proving that Miss Wagner was not the servant of the plaintiff. If from this point of view the decision is much narrower than the scope of our first question, the

³ 6 Q. B. D. 333, 1881.

⁴ 23 Q. B. D. 598, 1889; Aff. (1892) A. C. 21.

⁵ (1893) 1 Q. B. 715.

⁶ (1898) A. C. 3.

⁷ (1901) A. C. 495. The only other case of importance to be examined is *Lyons v. Wilkins* (1896) 1 Ch. 811.

plaintiff's second count and the way it was treated by at least two of the judges brings up a much wider question. The plaintiff declares: "That he had contracted and agreed with Johanna Wagner to perform in the theatre for a certain time. . . . Yet defendant, well-knowing the premises, and maliciously intending to injure the plaintiff . . . whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform. . . ."

It is evident from the language used that in the mind of the pleader, the intent to injure the plaintiff, the malice, is the element which gives to the defendant's act the character of a civil wrong. Given this malice the method employed to persuade Miss Wagner was unimportant. All the judges, except Sir Charles Crompton, agree with counsel at least to the extent of regarding the question before them as being, whether B. is civilly liable to A. if he induces C., with the desire to injure A., or to benefit himself at A.'s expense, to break his contract with A.? Two of the judges give unequivocal affirmative answers to this question. Thus, Sir William Erle regards the rule making one man liable for enticing the servant of another from his employment as resting "upon the principle that the procurement of the violation of the right is a cause of action,"⁸ and he further affirms that: "He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract."⁹ So also to the same effect is the opinion of Sir William Wightman. He says: "It was undoubtedly *prima facie* an unlawful act on the part of Miss Wagner to break her contract, and, therefore, a tortious act of the defendant maliciously to procure her to do so. . . ."¹⁰ Even Sir Charles Crompton, who put the case solely on the ground that Miss Wagner was the servant of Lumley, said that he by no means wished to be considered as holding "that the larger ground" is not tenable, "or as saying that in no case except that of master and servant is

⁸ Page 232.

⁹ Page 233.

¹⁰ Page 238.

an action maintainable for maliciously inducing another to break a contract to the injury of the person with whom such contract has been made."¹¹ It is to be noted that the intent of the defendant to profit by the plaintiff's loss is not stated as the sole ground of the action. The fact that the act procured to be done was illegal is emphasized. It is also true that the case before the court was a case in which the method used was the offer to Miss Wagner of "something of pecuniary value," or in other words a bribe; but this fact is not adverted to by any of the judges composing the majority. We must conclude, therefore, that in their minds they were deciding what the reporter states in his syllabus of the case: "That the action would lie for the malicious procurement of the breach of any contract . . . if by the procurement damage was intended to result and did result to the plaintiff." The two elements which make the act of Gye wrongful are his intent to injure, and the wrongful nature of the act which he persuaded Miss Wagner to do. Both elements seem to be equally essential. Yet Sir John T. Coleridge, in his celebrated dissent, assumes that the majority regarded the existence of the selfish intent to benefit himself as the sole element which made his act wrongful. In the course of his argument he puts three cases: "If a contract has been made between A. and B. that the latter should go supercargo for the former on a voyage to China, and C., however maliciously, persuades B. to break his contract, but in vain, no one, I suppose, would contend that any action would lie against C. On the other hand, suppose a contract of the same kind made between the same parties to go to Sierra Leone, and C. urgently and *bona fide* advises B. to abandon his contract, which on consideration B. does, whereby loss results to A.; I think no one will be found bold enough to maintain that an action would lie against C. . . . If so, let malice be added, and let C. have persuaded, not *bona fide* but *male fide* and maliciously, still, all other circumstances remaining the same, the same reason applies; for it is *malitia sine damno* if the hurtful act is

¹¹ Page 229.

entirely and exclusively B.'s, which last circumstance cannot be affected by the presence or absence of malice in C."¹²

The case of *Lumley v. Gye* was a decision of the Queen's Bench. In view of Sir J. T. Coleridge's dissent, and the discussion which the decision invoked among the profession, it was by no means certain that the larger principle contended for by Sir William Erle and Sir William Wightman would be adopted by the higher courts. In 1881, the case of *Bowen v. Hall*¹³ came before the Court of Appeal. The facts of this last case are almost identical with *Lumley v. Gye*, except that it was hardly possible to consider the person who was "persuaded" by the defendants to break his contract with the plaintiff as the servant of the plaintiff. In this last case, C. had exclusive knowledge of a certain process for making glazed bricks. C. contracted to supply A. with the bricks he needed for a period of five years, and not, during that period to supply anyone else. B. and the other defendant D. induced C. to break his contract with A. and manufacture bricks for B. Sir William Brett, afterwards Lord Esher, speaking also for Lord Chancellor Selborne, ignores the fact that the act which the third person was persuaded to do was a civil wrong to the plaintiff, and places the liability of the defendant solely on his selfish intent. In other words, he takes the same attitude towards the question involved, as that taken by Sir J. T. Coleridge in *Lumley v. Gye*, and comes to a diametrically opposite conclusion. He says: "Merely to persuade a person to break his contract, may not be wrongful in law or fact as in the second case put by Coleridge, J. But if the persuasion be used for the indirect purpose of injuring the

¹² Page 247. As illustrating the impropriety of drawing a line between an act done with an evil intent, and one which is done with a good intent, he points out that to distinguish between "advice, persuasion, enticement and procurement is practically impossible in a court of justice;" as "who shall say how much of a free agent's resolution flows from the interference of other minds, or the independent resolution of his own." See page 252. When he here speaks of advice, persuasion, etc., it is evident from the last sentence quoted that he is thinking only of argument, and it never occurred to him that, however ill founded as a legal distinction, there is no practical impossibility in drawing a line between persuasion by argument and persuasion by the offer of money or a thing of value.

¹³ 6 Q. B. D. 333, 1881.

plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and fact a wrong act." And he adds: "The act complained of in such a case as *Lumley v. Gye*, and which is complained of in the present case, is therefore, because malicious, wrongful."¹⁴ Lord Chief Justice Coleridge, the son of that Sir J. T. Coleridge who had dissented in *Lumley v. Gye* asserts in his dissenting opinion that he does not know except in the former case, "that it has ever been held that the same person for doing the same thing under the same circumstances with the same result is actionable or not actionable according to whether his inward motive was selfish or unselfish for what he did."¹⁵ Nevertheless, the case taken in connection with the opinion, unquestionably stands for the proposition, that in actions for inducing a breach of contract between the plaintiff and a third person, the law will combine a damage which is not in itself actionable to a motive which is not in itself actionable, and form a cause of action out of the combination.¹⁶

We next turn to the celebrated case of *Mogul Steamship Company v. MacGregor*.¹⁷ A number of steamship lines were in the habit of running regular steamers to Shanghai and other China ports. During the tea exporting season the China freights are larger and more remunerative than at other times in the year. The Mogul Steamship Company was in the habit of sending boats to Shanghai, and even to Hankow, six hundred miles up the Yangtse River, during the tea exporting season, but did not run a regular line to these ports. The other companies formed an association for the purpose of securing for themselves the monopoly of the China trade. In furtherance of this object they issued a circular, in which they stated that all shippers who confined their shipments to the boats belonging to the members

¹⁴ Page 338. In the last part of his opinion Brett, L. J., admits that the reasoning of Sir J. T. Coleridge in *Lumley v. Gye*, to the effect that Miss Wagner was not the servant of Lumley within the meaning of the old action for enticing my servant "is as nearly as possible, if not quite, conclusive." See page 340.

¹⁵ Page 344.

¹⁶ Restated from the opinion of Chief Justice Coleridge, page 343.

¹⁷ 23 Q. B. D. 598, Aff. (1892) A. C. 25.

of the association would receive a rebate of five per cent. on the published rates of freight. They also determined, that whenever any company, not in the association, sent a boat to Hankow, the association would also send one or more boats, and there offer to take freight at any rate low enough to prevent their rival from securing a cargo. The Mogul Company complained that this policy was carried out to their injury, for which injury they brought suit. The action was tried before Lord Chief Justice Coleridge without a jury. He gave judgment for the defendants on the ground that the plaintiff had no cause of action. This judgment was affirmed in the Court of Appeal by a divided court, but afterwards unanimously affirmed by the House of Lords.

It will be noticed that the case falls under our Third Question. The association, by means of an offer to shippers of something of pecuniary value, that is an offer to carry freight, induced shippers not to ship by the plaintiff's boat. The principal opinion is that of Sir Charles Bowen in the Court of Appeal. He practically starts with the following proposition: "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."¹⁸ He admits that in the case before him the defendants should be held liable unless they have this "just cause and excuse," which, however, he finds in the defendants' right to carry on their own trade in the manner which suits them best, subject to certain limitations. These limitations he confines to the use of fraud, violence or "the violation of individual rights, contractual or other."

In reply to the argument of the plaintiff's counsel, that the element of combination among the defendants made their acts wrongful even though they would not have been wrongful if committed by a single individual, he points out that you must either show an agreement to do an unlawful act, or an agreement to do a lawful act by unlawful means; and that to do this in the present case the plaintiff must prove that the defendants did something to the injury of the

¹⁸ 23 Q. B. D. 613.

plaintiff's business without just cause or excuse. What is just cause and excuse where many traders are acting together is, in his opinion, the same question, as what is just cause and excuse when the act which results in injury is the act of a single trader.¹⁹

Lastly, in reply to the argument that the defendants are liable because their acts are illegal, being in restraint of trade, he takes the position, that contracts in restraint of trade are not illegal, merely non-enforceable between the parties, and certainly no action at common law will lie by third persons against those who enter into such contracts.²⁰ This opinion in practically every particular was adopted by the members of the House of Lords,²¹ though there the judges start with the assumption, that as the object of the defendants in doing what they did was to advance their own trade, which is a legal object, the burden is on the plaintiff to show, not only that he was injured, but injured by an illegal act.

Lord Esher, the Master of the Rolls, in his dissent in the Court of Appeal, puts little weight on the fact that there was a combination among the defendants. We may, therefore, say that it was the unanimous opinion of the judges, that if the acts complained of when done by one would not be actionable, the fact that they were done by many in combination would not make them so. In Lord Esher's judgment the agreement between the defendants is important as showing an effort to restrain or monopolize trade by

¹⁹ Page 617. The idea that the element of combination to do an act does not make that act wrongful if the act if done by one would not be wrongful, is carried out by the Irish court, Exchequer Division, in *Kearney v. Lloyd*, 27 Ir. 268, 1890. In that case the defendants, who were members of a parish, agreed together that they would not subscribe, as they heretofore had done, to a certain voluntary fund for the support of the minister of the parish as long as the plaintiff was the incumbent. As a result of this action the plaintiff had to resign. The reason for the agreement among the defendants was their belief that the parish would be better with another minister. The court held that the plaintiff had no cause of action.

²⁰ 23 Q. B. D. 619.

²¹ Opinions were delivered by Lord Chancellor Halsbury and Lords Watson, Bramwell, Morris, Field and Hannen. Lord Macnaghten concurred, but delivered no opinion.

interference in the free course of trade of a trader who is not a party to the agreement. To explain this he advances the proposition that, it is the peculiar right of every trader to trade according to the free course of trade. Nowhere in his opinion does he make entirely clear what he means by this free course of trade, yet he does indicate with reasonable clearness a class of acts which are wrongful because they interfere with this free course. He regards an act which is done for the purpose of interfering with the plaintiff's trade as wrongful, and the act of the defendants in sending a ship to Hankow as such an act. He says: "It follows that the act of the defendants in lowering their freights far beyond any purposes of trade—that is to say, so low that if they continued it themselves they could not carry on trade—was not an act done in the exercise of their own free right of trade, but was an act done evidently for the purpose of interfering with, *i. e.*, with the intent to interfere with, the plaintiff's right to a free course of trade, and was, therefore, a wrongful act. . . ." ²²

As he says nothing about the illegality of the rebate offered in the defendants' circular, it may be presumed that he regarded this method of competition as legal. Indeed, applying the test above stated to the circular offering the rebate, it would seem to be unobjectionable. The circular offered to all those who would confine their business to the defendants a rate of freight which was a remunerative rate, though lower than that offered to shippers who did not send all their freight by the plaintiff's boats. It is true that the fact that the defendants were the only shippers sending regular lines to China ports made their offer more effective; but this additional persuasiveness of the offer was due to the fact that the defendants were offering a better service to the public than the plaintiff, as they sent regular boats to China throughout the year. It is true also that the effect of the circular was to injure the plaintiff, but if one sympathizes with Lord Esher's point of view, it may be argued, that an act done primarily to benefit the trade of the actor, does not become illegal because its incidental effect is to injure another trader, even though such incidental injury

²² 23 Q. B. D. p. 610.

was expected and regarded with favor by the actor, as it tended to drive his competitor out of business. But in the case where the boats of the defendant followed those of the plaintiff, with the sole object of making the adventure of the plaintiff unprofitable, it was an act, the sole immediate purpose of which was to injure the plaintiff; and such an act did not become legal, merely because there was no express malice towards the plaintiff, or because the ultimate object was to benefit the actor. For if we have rightly interpreted the opinion of Lord Esher, he would distinguish, at least in matters of trade rivalry, between the immediate and ultimate object of the actor whose act results in injury. If the immediate object is the injury of another, and injury results, an action will lie; but if the immediate object is economic benefit to the actor, the mere fact that it injures another does not of itself make the act unlawful. Rebates, therefore, are legal, unless illegal on some totally different theory, but to put down the price at which one sells his commodity in a particular locality far below its cost, not for the purpose of permanently making presents to the community, but for the sole purpose of preventing a rival from selling his wares, is illegal. In the game of competition, it is an act which according to Lord Esher should be considered as against the rules of the game. This opinion, however, did not find favor with the other judges. Lord Watson reflects the general trend of the opinion of his associates when he says: "I cannot for a moment suppose that it is the proper function of the English courts of law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them to damages."²³ The case, therefore, may be taken to indicate

²³ (1892) A. C. p. 43. It is, however, interesting to note that Attorney-General Knox in his recent letter to the judicial committees of both houses of Congress, expressly recommends that the lowering of prices for the immediate object of rendering it impossible for a rival to exist, *i. e.*, exactly what was done by the defendants in the Mogul case, when they sent a boat to Hankow, be by statute declared wrongful. This recommendation has been embodied in the bill now before Congress, known as the Littlefield Anti-Trust Bill; though at present writing the passage of this bill by the present Congress seems unlikely,

a negative answer to our Third Question, in all possible cases which might be considered as falling under it, except in the case of express malice; that is, where the sole motive of the offer of the thing of value to the third person is ill will towards the plaintiff. I make this exception because such an act is expressly said to be actionable by at least two of those who took part in the decision.²⁴

The contrast, between the way in which the question of motive as indicating the nature of the act is handled in *Bowen v. Hall*, and in this case, is striking. In the former case the selfish motive of the defendant, that is his desire for personal gain, is the essential element which makes his act illegal; in this case this same selfish element, the desire to advance their own trade at the expense of the plaintiff's is considered the very element which gives just cause and excuse for the injury inflicted. Sir Charles Bowen, however, from whom we have quoted so largely, in explaining why the defendants had just cause and excuse, refers to *Lumley v. Gye* and *Bowen v. Hall* with approval. The explanation of this apparent anomaly lies in the fact, that though he and the other judges who refer to the question, evidently approve of the decision of *Lumley v. Gye*, they do so on a really different ground from that taken by Lord Esher, then Sir William Brett, in *Bowen v. Hall*. He had the conception that if A., for malicious or selfish motives, induces C. to injure B., B. has an action against A. But Lord Bowen says: "Intimidation, obstruction, and molestation are forbidden; so is the *intentional procurement of a violation of individual rights, contractual or other*. . . ." As an example of this last he mentions "the inducing of persons under personal contracts to break their contracts."²⁵ To the same effect is the opinion of Lord Chancellor Halsbury:

it probably will not be long before the courts of this country will be called upon to determine the class of questions so strenuously objected to by Lord Watson and his associates as improper for a judicial tribunal.

²⁴ Per Lord Field (1892) A. C. p. 52, and per Sir Charles Bowen, 23 Q. B. D. 618. Other judges refuse to express their opinion as the case was not before them. See opinions of Lord Hannen (1892) A. C. p. 59, and Sir Edward Fry, 23 Q. B. D. p. 625.

²⁵ 23 Q. B. D. p. 614.

"Intimidation, violence, molestation, or the procuring people to break their contracts are unlawful acts."²⁶ The difference in attitude noted, though at first glance it may appear slight, changes, radically, the ground on which the earlier decision rests. The gist of the action in cases like *Lumley v. Gye* is declared to be the nature of the act which the defendant persuaded the third person to do; not the motive which caused him to persuade. The act caused by the persuasion being an unlawful act, the act of persuasion becomes unlawful. The scope of the principle for which *Lumley v. Gye* stands is thus in one direction widened, and in another narrowed. Whereas, according to Sir William Brett in *Bowen v. Hall*, the plaintiff must prove that the defendant acted from a selfish motive; under this last conception, the defendant would be liable to the plaintiff if, with the interest of C. at heart, he persuades C. to break his contract with the plaintiff. In other words, the second case put by Sir J. T. Coleridge in his dissenting opinion in *Lumley v. Gye* is an instance of an unlawful act. On the other hand, reading the opinion of Sir William Brett, one wonders whether every persuasion of one man to do an act to the detriment of another, where the motive of the persuasion is selfish, is an actionable wrong? If the attitude of the judges quoted in the Mogul case is to be persisted in, there is no doubt, that the act induced, irrespective of the motive of the defendant, must be more than an injury to the plaintiff—it must be an actionable wrong; one for which the plaintiff could sue the third person.

Within a year of the final decision of the Mogul case, *Temperton v. Russel*²⁷ came before the Court of Appeal. The defendants in this case were the presidents and secretaries of three trade unions in Hull. The plaintiff was a master mason in the same city. He sued for (1) unlawfully and maliciously procuring certain persons who had entered into contracts with the plaintiff to break such contracts, and (2) for maliciously conspiring to induce certain persons not to enter into contracts with the plaintiff.²⁸ The dispute which led up to this action was

²⁶ (1892) A. C. 37.

²⁷ (1893) 1 Q. B. 715.

²⁸ Page 716.

one in which the plaintiff had no interest. The trade unions of Hull desired that all employes in the building trades should conform to certain rules of employment. One firm refused, and in order to force this firm to comply with their wishes, the unions desired the plaintiff, who had business dealings with the firm, to cease dealing with them. This the plaintiff refused to do. One of the plaintiff's regular customers was a certain Brentano, a builder, and at the time of the dispute the plaintiff had a contract with Brentano, in which the latter had agreed to take certain building materials from the plaintiff. In support of his action the plaintiff introduced evidence to show that the unions threatened Brentano to bring on a strike among his workmen if he received any building materials from the plaintiff, and that, to avoid this strike, Brentano, not only broke his contract with the plaintiff, but had since, for the same reason, refused to enter into any further business relations with him. There was also evidence that other persons with whom the plaintiff formerly dealt had been threatened in the same manner, and had in consequence of these threats refused to give him any more orders. Sir Richard Collins, before whom the case was tried, directed the jury: "That to induce a person who had made a contract with another to break it, in order to hurt the person with whom it was made, to hamper him in his trade, or to put undue pressure upon him, or to obtain an indirect advantage, was in point of law to do it maliciously. . . ." ²⁹ He also directed the jury in substance, that a malicious conspiracy to prevent persons from entering into contracts with another, if followed by damage to the person conspired against, was actionable. The jury found in favor of the plaintiff on both counts, assessing fifty pounds damages on the first, and two hundred pounds on the second. Judgment was given for both amounts, and the Court of Appeal, through Lord Esher, Sir Henry Lopes and Sir Archibald Smith, dismissed the defendants' application for a new trial.

It will be noticed that the facts of the case and the first count bring up our Second Question. The defendants induced Brentano by the threat of business loss to break his

²⁹ Page 719.

contract with the plaintiff. The case, therefore, would appear to stand, and on its facts does stand, for an affirmative answer to the second question. When we turn to the opinions of the members of the Court of Appeal we find, at least in those of Lord Esher and Sir Henry Lopes, as we found the opinion of the former in *Bowen v. Hall*, great emphasis laid on the intent of the plaintiff, while the method used to persuade Brentano is merely mentioned. Thus Lord Esher, though in his re-statement of the facts he points out that the defendants tried to coerce Brentano, quotes, in his discussion of the law applicable to the case, at length from that part of his own opinion in *Bowen v. Hall*, in which he says, that if the persuasion is used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, and because malicious, wrongful.³⁰ So also Sir Henry Lopes places his opinion on *Bowen v. Hall*, which he understands has decided the broad principle, "that a person who induces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong;"³¹ and Sir Archibald Smith, though he also points out that the defendants used threats of business injury against the third person to accomplish their object, and to this extent emphasizes this element of the case, states that "there must be evidence that the intention of the inducer was by such breach to do harm to the other contracting party."³² From the point of view of these judges the first count in this case involves exactly the same question as that which arose in *Bowen v. Hall*; the difference in the method of persuasion is immaterial; in both we have the intent to injure the plaintiff, at least to the extent that there was a knowledge that the act would result in harm to the plaintiff. Indeed, in this last case there was even a desire that the persuasion would result in harm to the plaintiff; while in both cases harm did result. Thus the opinions on this part of the case stand for the proposition, that it is an actionable wrong for one person, with the

³⁰ Page 728.

³¹ Page 730.

³² Page 734.

intent to induce another to conform to his wishes, to persuade a third person to break a contract with such other person, even though the inducer was not actuated in what he did by personal ill-will towards the injured person. The fact that the defendants may have been moved to do the acts complained of by a desire to elevate the class to which they belonged, rather than themselves individually, was not considered by the court.

The second count was for conspiring to induce persons not to enter into contracts with the plaintiff. It brings up our Fourth Question, adding the element of combination among the defendants. Brentano was induced by threats of business loss to refrain from entering into contracts he would otherwise have made with the plaintiff. The decision, if not a general affirmative answer to our Fourth Question, at least seems to stand for the proposition: That a combination of two or more persons to induce C. by threats of business loss to refrain from entering into a contract with A., which he would otherwise have entered into, is an actionable wrong. The opinions of the two judges who deal with this part of the case, Lord Esher and Sir Henry Lopes, naturally lay stress on the intent to injure, not on the means used. Thus Lord Esher says,—comparing the claim for inducing persons to break contracts already entered into with the plaintiff, and that for inducing persons not to enter into contracts with the plaintiff: "I do not think the distinction can be maintained. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff."³³ So also Sir Henry Lopes: ". . . a combination by two or more persons to induce others not to deal with a particular individual, or enter into contracts with him, if done with the intention of injuring him, is an actionable wrong if damage results to him therefrom."³⁴ It will be noticed that Lord Esher strongly indicates his belief that the combination is not an essential element of the wrong, while Sir Henry Lopes deals only with the facts of the case under review, and these facts showed a combination. If the position

³³ Page 728.

³⁴ Page 731.

towards conspiracy taken by the House of Lords in the Mogul case,³⁵ is persisted in, it would appear that Lord Esher's practical assumption, that the element of conspiracy among the defendants was not the essential element which made the acts of the defendants wrongful, is correct.

The opinions of the judges in *Temperton v. Russel*, especially the opinion of Lord Esher, revert to the point of view towards the class of cases we are discussing, taken by the same court in *Bowen v. Hall*. We again have the action dependent primarily on the motive of the inducer, rather than on the act which he persuaded the third person to do. The point of view of Sir Charles Bowen, and the judges who follow him in the House of Lords in the Mogul case is ignored. There perhaps is a reason for this. As we have seen, in the Mogul case it was said that an action lay in cases like *Lumley v. Gye*, because the inducer persuaded the third person to do an illegal act. In the second count in *Temperton v. Russel*, the defendants are not charged with inducing Brentano to do an illegal act, but an act which he had a right to do; that is, refuse to have further dealings with the plaintiff. If the view of *Lumley v. Gye* which was taken in the Mogul case is correct, the conclusion is inevitable, that the only ground for upholding the second count in *Temperton v. Russel* is the element of combination among the defendants; yet the Mogul case itself was a positive decision to the effect that combination could not make an act illegal which would be legal without such combination. As a consequence of the decision and the opinions of the judges in *Temperton v. Russel*, it was inevitable that the House of Lords should take the first opportunity to discuss the extent to which intent in these cases made the acts of the defendant lawful or unlawful. This opportunity arose in the case of *Allen v. Flood*.

Before taking up this celebrated case a word should be said in reference to a case in equity, *Lyons v. Wilkins*, which first came before the courts in 1896.³⁶ This case arose out of a dispute between a union and a firm of leather bag manufacturers. One of the measures adopted by the

³⁵ See *supra*.

³⁶ (1896) 1 Ch. 811.

union to help on a strike of the firm's employees, was to threaten Schoenthal, who was a sub-manufacturer, that unless he ceased to work for the firm they would order a strike of his workmen. Such a strike was indeed ordered on Schoenthal's refusal to comply with their demands. The action was brought on upon motion by the manufacturing firm, J. Lyons & Sons, for an interlocutory injunction under the Twenty-fifth Section of the Judicature Act, to restrain the defendants, the secretary and a member of the executive board of the union, from "unlawfully and maliciously inducing or conspiring to induce persons not to enter into contracts with the plaintiffs."³⁷ Sir Ford North, before whom the case was tried, issued the interlocutory injunction in the terms prayed for,³⁸ largely on the ground that the intent of the defendants was to injure the plaintiff. The defendants appealed to the Court of Appeal. This court confirmed the injunction, but they altered its terms, so that the injunction should "restrain the defendants . . . from preventing Schoenthal or other persons from working for the plaintiff, by withdrawing his or their workmen from their employment respectively."³⁹ This change was made because, as Sir A. L. Smith expressed it, in the general form in which the injunction was granted by Sir Ford North, "everlasting difficulties would arise as to the carrying out of it."⁴⁰ In other words, the wording of the original injunction was too indefinite. The character of the changes made, however, is significant. Sir Ford North, in his wording, laid stress on the "malicious inducement." He did not mention any particular method which could not be employed, but apparently prohibited every form of persuasion by which third persons could be induced not to enter into contracts with the plaintiff, provided the persuasion was malicious. The Court of Appeal, on the other hand, omit all reference

³⁷ The 25th section (8) of the Judicature Act (1874) Stats. Ch. 66, provides that ". . . an injunction may be granted . . . by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made; . . ."

³⁸ (1896) 1 Ch. p. 818.

³⁹ Page 832.

⁴⁰ Page 835, 836.

to malice, and confine the persuasion of third persons which is prohibited to the withdrawing of workmen. The mere fact that in the wording of this injunction the judges of the appellate court saw fit to leave out all reference to malice, does not, of course, necessarily indicate that they did not regard malice, as Lord Esher had defined it in *Temperton v. Russel*, to be essential to the civil wrong. Such malice, the desire to injure the plaintiff, the defendants in this case were shown to have had. It was, therefore, unnecessary that it should be again proved in the violation of the restraining order. But it is significant that even with this malice proved they did not care to go further than to prevent the defendant from "persuading by threats of business loss." The case is of importance in our present discussion, in that it is the first case in which the judges lay any real emphasis on the method of persuasion employed by the defendants.⁴¹

Before *Lyons v. Wilkins* had arisen, the case which we now know as *Allen v. Flood*, under the name of *Flood v. Jackson*, had been decided by other judges of the Court of Appeal.⁴² There were two trade unions connected with the shipbuilding trade of England. The largest was the United Society of Boiler Makers and Iron Shipbuilders; the smaller, the Shipwrights' Provident Union. The members of the Shipwrights' Union worked both in iron and wood; the Boiler Makers worked only in iron, and regarded the shipwrights as trespassing on their trade. Flood and Taylor were shipwrights, who had been employed by a firm of shipbuilders, Mills & Knight. While in such employ they worked on iron as well as wood, and in so doing incurred the enmity of all the boiler makers. On leaving the employ of Mills & Knight, they secured employment with the Glengall Iron Company, where they were put at repairing the woodwork on a ship named the "Sam Weller." The majority of the workmen of the Glengall Company were members of the Boiler Makers' Union. They were all intensely interested in compelling the shipwrights to confine themselves to woodwork, and felt incensed at the intro-

⁴¹ For a further discussion of this case see, *infra*.

⁴² (1895) 2 Q. B. 21.

duction of the two strangers. They, of course, did not wish to leave the employ of the company permanently, but they did wish the company to discharge Flood and Taylor, and to accomplish this last result had determined informally to go on strike. The union to which they belonged, however, had a rule, that unless a strike was authorized by the Executive Council, the strikers would not be entitled to strike benefits. In order to obtain the consent of the Executive Council, it was first necessary, when a dispute arose at any yard, for the members to make it known to the officers of the nearest Branch. It then became the duty of these officers to try and settle the dispute, and if they could not, refer it to the Executive Council. Thus only the Council could order a strike. The boiler makers employed at Glengall's sent for Allen, an officer of the London Branch. Allen responded to the call, and on learning the nature of the dispute said that he would "try and settle the matter" with the company. He had an interview with the manager, a Mr. Hallett. At this point we reach an alleged element of doubt in the facts of the case. One version of the conversation is that Allen told Hallett that if he did not discharge Flood and Taylor, he, Allen, would call out the boiler makers; another version is that Allen merely stated that there would be a strike unless this was done. There is no doubt that Hallett believed there would be a strike, and to avoid this, discharged at the end of the day Flood and Taylor. In discharging Flood and Taylor the company did not break any contract, as both were employed by the day. At the same time, had Hallett not believed a strike imminent he would have re-employed both the next day. It should also be noted that it was apparently within the discretion of Allen, on having the cause of the trouble explained to him, to say that he did not approve of any action and refer the matter at once to the other officers of the Branch. A reading of the whole case leaves one with no doubt but that Allen sympathized with the desire of the men to get rid of the two shipwrights, and that he was willing to co-operate with them towards that end by seeing the officers of the company and "trying to settle the matter," by pointing out to them the results of keeping Flood and Taylor in their employ.

The action was brought by Flood and Taylor against Allen, the General Secretary of the Union, and the President of the Executive Council, "For maliciously and wrongfully, and with intent to injure the plaintiffs, procuring and inducing the Glengall Iron Company to discharge them from their employment, and not to engage or employ them again." There was no evidence against Allen's co-defendants and as to them the suit was dismissed. Sir William Kennedy, who tried the case, submitted three questions to the jury, all of which they answered in the affirmative: (1) "Did the defendant, Allen, maliciously induce the Glengall Iron Company to discharge the plaintiffs or either of them from their employment? (2) Did the defendant, Allen, maliciously induce the Glengall Iron Company not to engage the plaintiffs or either of them? (3) Was the settlement of this dispute a matter within the discretion of Allen?"⁴³ Judgment was given for the plaintiffs on these findings, and this judgment was unanimously confirmed by the Court of Appeal,⁴⁴ but finally reversed in the House of Lords by a vote of six to three.⁴⁵

In looking at the acts of Allen we may regard them in one of two lights. We may assume, that as the strike of the Glengall Company's employes was certain unless Flood and Taylor were discharged, Allen merely assumed the roll of mutual friend or lover of peace, who gave the company a knowledge of the true state of affairs. Or we may assume that, though Allen did not create the feeling against the plaintiffs on the part of the Glengall Company's employes, he not only sympathized with the feeling, but was willing to co-operate with them and add his efforts to theirs, to induce the Glengall Company to discharge the plaintiffs. If we look at his acts in the first light, we cannot think of holding him liable, and if we find that the final judgment of the House of Lords was reached because they put this interpretation on the evidence, a case of less importance was never taken to that tribunal. On the other hand, if we regard the acts of Allen in the second light indicated, before

⁴³ Page 24. The meaning of the last question is not clear. It is not discussed by the judges.

⁴⁴ (1898) A. C. 1.

⁴⁵ (1895) 2 Q. B. p. 28.

we can draw any conclusion as to the principle for which the case stands, we must ask ourselves: Did Allen, with a desire to injure the plaintiffs, induce the Glengall Company not to employ the plaintiffs by merely stating as a matter of argument the fact over which he had no control, namely, the threat of the strike; or did he do anything to make that threat more effective? If the former interpretation is to be put upon his acts the case stands for the proposition, that A. can have no action against B., though B., with a desire to injure A., persuaded C., by argument, not to deal with A., even though one of the arguments used was the recital of the fact that if he did not do as B. wished, others would injure him in his business. On the other hand, if we regard Allen as himself increasing the effectiveness of the threat, the case stands for the much wider proposition, that if B., with an intent to injure A., by threats of business loss which he himself will aid in inflicting, induces C. not to deal with A., A. has no action against B. In short, the case answers in the negative our Fourth Question, and in effect, though there was no combination charged, overrules *Temperton v. Russel*. The differences of opinion among the judges, and the mistaken conception of the scope of the decision which exists among the profession, is due in a large part to the fact, that some of those who took part in the decision regarded Allen as an arguer, while others regarded him as a threatener; that is one who himself was willing and had the power to effectually assist in inflicting the business injury, unless there was a compliance with his demands.

It will be seen that if the position taken by Sir William Brett, Lord Esher, in *Bowen v. Hall*, and in *Temperton v. Russel*, is adopted, and the emphasis in these cases of interference in trade, is to be placed on the intent of the inducer, it is an actionable wrong whether the inducer is a threatener or not. To induce a person by argument not to enter into a contract with another may not be actionable, but to induce him for the purpose of injuring that other in his business is actionable because done with a malicious intent. This is the position of Sir William Kennedy, the trial judge.⁴⁶

⁴⁶ Page 37.

It is immaterial from this point of view whether Allen merely used the imminence of the strike as an argument, or whether he actively assisted in making the threat a greater reality. In either event he persuaded with the intent to injure; with malice, and that is enough. The opinion of Lord Esher in the Court of Appeal practically takes the same position. Though he does say that Allen went to the masters "to put pressure on them,"⁴⁷ it is evident that whether Allen by his acts did or did not increase the force of the pressure is in his opinion immaterial. To him, the evidence of Allen's undertaking to help to secure the discharge of the plaintiffs is sufficient to maintain the action. "One person," he says, "has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice. But if the first person uses the persuasion with the intent to injure the person with whom he is going to make the contract, then the act is malicious, and the malice makes that unlawful which would otherwise be lawful."⁴⁸ Sir Henry Lopes agreed with this proposition. Sir John Rigby, the third judge in the Court of Appeal, while he did not say that he disagreed with the principle as stated, concurred without discussion because he considered the question settled by *Temperton v. Russell*.⁴⁹

As stated, the case was appealed to the House of Lords. After the first argument, eight judges, Hawkins, Mathew, Cane, North, Wills, Grantham, Lawrence and Wright, were summoned to attend a second argument. At the close of this second argument the following question was propounded to the judges, who had been summoned to assist: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to a jury?"⁵⁰

Six of the eight judges answered the question thus put in the affirmative, two in the negative. Only one, however, Sir Alfred Wills, distinctly affirms the proposition, that in these cases a desire to injure may make an act unlawful

⁴⁷ Page 38.

⁴⁸ Page 40.

⁴⁹ Page 41, 42.

⁵⁰ (1898) A. C. p. 11.

which without this motive would be lawful.⁵¹ Sir Ford North comes near to this idea by following the conception elaborated by Sir Charles Bowen in the Mogul case; namely, that the willful infliction of injury on another is actionable unless done with just cause and excuse, and then taking the position that the desire to injure the plaintiffs deprived Allen of this just cause, which in the Mogul case was supplied by the defendants' desire to advance their own business.⁵² From this point of view, the desire to injure—the malice—does not make the act wrongful. The doing of an act which leads to harm is the foundation of the action; the malice merely prevents an excuse which might otherwise be pleaded. The only possible practical difference, however, between this view and that expressed by Lord Esher and Sir Alfred Wills, is, that where malice is regarded as the element which makes the act wrongful no excuse is possible, while if malice is but a reason for not excusing an act which is wrongful unless excused, then other reasons may overcome the malice and make an act lawful even though done with the intent to injure. This was what happened in the Mogul case. There was an intent to injure, but there was also an intent on the part of the defendants to advance their own trade. In *Allen v. Flood* there was an intent to injure, but there was likewise an intent to secure for the boiler makers a monopoly of iron work on ships. Taking, therefore, Sir Ford North's own argument the conclusion from it would seem to be, that the desire to secure the monopoly of the export carrying trade is a lawful excuse for an otherwise actionable injury, but the desire to secure for others the monopoly of the trade of working on iron in ships, is not a lawful excuse for such an injury. It is fair to the learned judge to suppose that the distinction, not being of his own making, he really disagreed with the decision in the Mogul case. None of the other judges really make Allen's intent to injure the foundation of their belief that the plaintiffs had a cause of action. Sir Henry Hawkins thinks that the evidence showed that Allen had the power to bring on a strike, and that he threatened to do so unless the company

⁵¹ Page 49.

⁵² Page 42.

discharged the plaintiffs.⁵³ From this view of the evidence his opinion that the plaintiff showed a cause of action was merely applying the decision in *Temperton v. Russel* to a case which lacked the element of conspiracy, placing that decision however, not only on the intent to injure, but on the method employed to persuade the Glengall Company to discharge the plaintiffs.

Sir William Grantham and Sir John Lawrence show that they thought the plaintiffs' evidence proved that Allen willfully misrepresented his power to cause a strike, and caused the injury through this willful misrepresentation.⁵⁴ In this view of the evidence there could be no doubt of the liability of the defendant. Sir Lewis Cave, the remaining judge to answer the question put by the House of Lords in the affirmative, does so on the ground that the defendant had knowingly trespassed on that subdivision of the rights of property, known as the right to acquire property.⁵⁵ From this point of view it was alike unnecessary to discuss the means employed to induce the Glengall Company to discharge the plaintiffs, or the motive of Allen. Any act, the ordinary consequence of which would be to interfere with this right to acquire property, would be actionable. Thus this learned judge announced a principle more sweeping than any of his associates'. Under it, he who from a good motive by mere argument induced one man not to deal with another would seem to have committed an actionable wrong.

The two judges who gave negative replies to the inquiry, Sir Robert Wright and Sir James Mathew, did so on the express ground that they believed that a malicious motive, where there is not express malice, that is the desire to harm for harm's sake, can never make that unlawful which would otherwise be lawful.⁵⁶ Sir James Mathew, while he seems to have regarded Allen in the light of a man who merely used the imminence of the strike as a reason why the company should discharge the plaintiffs,⁵⁷ does by his illustrations seem to go so far as to assert that a

⁵³ Page 17, III.

⁵⁴ Page 53, 61.

⁵⁵ Page 29.

⁵⁶ Page 25, 62.

⁵⁷ Page 28.

combination of employes to strike, unless the employer discharged a co-laborer, would not give rise to a right of action in the party injured.⁵⁸ Sir Robert Wright also seems to take this position—a position which is directly opposed to the decision on the second count in *Temperton v. Russell*,—as he points out, that without malice the action of Allen is not actionable, as he did not persuade the company to break a contract with the plaintiffs, or do other unlawful acts.⁵⁹

Thus, with a multitude of learned advice, which only served to emphasize the different views which could be taken of the evidence, and the conflict in existing judicial opinion, not only as to the effect of the defendant's motive in making his act wrongful, but as to the limits of legal conduct in labor disputes, the case was taken up for final decision by the members of the House of Lords. As stated, of the nine judges who then took part in the decision, three voted to confirm and six to reverse the Court of Appeal. In order to ascertain exactly what the majority thought they were deciding, it is first necessary to know how they looked at the facts. An examination of their opinions shows that five at least did not look upon the defendant, Allen, as having either increased the feeling existing among the Glengall Company's employes against the plaintiffs, or as himself increasing the likelihood of a strike as a means of persuading the company to discharge the plaintiffs.⁶⁰ Lord Davey, the remaining member of the majority, probably looked at the facts in the same way;⁶¹ though as he did not restate them, as each of the other judges did, this cannot be positively asserted. Of course, the majority do not deny that Allen used the certainty of the strike as an argument why the two shipwrights should be discharged, or that he went to the officers of the company to use these arguments for the purpose of obtaining this discharge. In view of this interpretation placed by the majority on the

⁵⁸ Page 27.

⁵⁹ Page 62. See *supra*.

⁶⁰ The five judges are: Lords Macnaghten, pp. 147-148, 150-151; Lord Herschell, pp. 115, 142; Lord Watson, pp. 90, 91, 98; Lord Sand, p. 161; Lord James, of Hereford, p. 176.

⁶¹ Page 172.

evidence, the case, as one determining the limits of right conduct by persons engaged in economic contests, cannot stand for more than the proposition that: If B. persuades C. by argument to abandon a contemplated contract with A., even though B. intended to injure A., and harm does as a matter of fact result to A., A. has no action against B.

The case also stands for the principle that an act does not become wrongful merely because it was done with the intent to injure, unless perhaps the injury was the only object of the act. All of those composing the majority unite in maintaining this proposition, and for this cause, if for no other, the case will always remain one of the most important ever decided.⁶² It is practically impossible to state whether those who dissented would or would not have considered Allen's acts actionable, had they regarded the facts in the same light as the majority. To them, however, Allen did more than argue, he threatened and was himself an active agent in increasing the coercion which led to the discharge of the plaintiffs. In short, they regard the facts of the case as presenting our fourth question, the threat of business harm in order to prevent the third person dealing with the plaintiffs, and they answer this question in the affirmative.⁶³

Though there is nothing in the decision in *Allen v. Flood* which involves a negative answer to our fourth question, or a reversal of the judgment on the second count in *Temperton v. Russel*, three of the majority go beyond what was necessary in the case as they conceived the facts, to discuss the question of the liability of the defendant, supposing that he had created the threat of business loss which effectively persuaded the company to discharge the plaintiffs, and they come to the conclusion that even in this event the defendant

⁶² The proposition in respect to malice may almost be said to have received the unanimous opinion of the House of Lords. As two of the three judges who dissented seem to go no further than Sir Charles Bowen in the *Mogul* case, that is they regard malice, *i. e.*, the intent to injure, as taking away any just cause or excuse for the injury. For their discussions of this subject see Lord Chancellor Halsbury, pp. 84, 85; Lord Ashbourne, p. 114. Lord Morris, the remaining dissenting judge, does not discuss the question.

⁶³ See for this part of their respective opinions: Lord Herschell, pp. 129, 130; Lord Watson, p. 98; Lord Sand, 165.

would not be liable, because it is lawful to put pressure on a man to make him act in a legal manner, though the result of his act is to injure a third person, provided the pressure comes from threatening to do what you have a perfect right to do. Thus in this view, while it would be illegal for Allen to threaten physical harm to the property of the company unless they discharged the plaintiffs, and for the resulting injury to them the plaintiffs in that case might have had an action, merely to threaten to stop work, or that he would have other people not under contract stop work, would be to threaten to do what he or they had a right to do, and would not, under the principle announced, give rise to any cause of action. It will be seen that this is a direct negative answer to our fourth question. In announcing this principle and its application to the possible facts of the case, Lord Sand expressly states that he is not dealing with a combination to injure. This saving sentence prevents his opinion from being a direct assertion that the second count in *Temperton v. Russel* should have been decided in favor of the defendants.⁶⁴ Lord Herschell, however, makes no such reservation, and practically regards this part of *Temperton v. Russel* as overruled.⁶⁵

It will easily be perceived that if the case of *Allen v. Flood* really stood for the proposition contended for by at least one-half of the majority, it would be a case, not only of far-reaching importance on the subject of malice, but it would be an equally important case on the subject of the limit of right conduct in trade and labor disputes. The profession generally interpreted the decision through Lord Herschell's opinion. Thus the plaintiffs in *Lyons v. Wilkins*, having proved at the trial the allegations which in the motion for the preliminary injunction secured for them an order restraining the defendants from withdrawing or threatening to withdraw the workmen from a third person unless the third person ceased to deal with the plaintiffs, moved to make the judgment permanent. Sir E. W. Byrne, considered that the judgment in *Allen v. Flood* showed that the plaintiffs were not entitled to this injunction.⁶⁶ In

⁶⁴ Page 168.

⁶⁵ Page 143.

⁶⁶ 78 L. T. 618, 1898, 619; s. c., 67 L. J. Ch. 383.

*Huttley v. Simmons*⁶⁷ Sir Charles Darling held that, in view of the decision, a combination of cabmen to prevent another cabman from being employed as a cab-driver, did not give the injured cab-driver a right of action against the combination.⁶⁸ It was inevitable that the House of Lords would soon be given an opportunity to decide whether they cared to limit *Allen v. Flood* to the question actually decided on the facts, as the majority interpreted those facts, or whether they would extend the case to cover the larger principle maintained by Lord Herschell. The opportunity arose when the case of *Quinn v. Leathem*,⁶⁹ in 1901, was appealed from the Irish Court of Appeal.⁷⁰ In this case the defendants were the officers of a trade union of Belfast, registered as the Journeyman Butchers and Assistants' Association. By a rule of the association it was the duty of all members to assist their fellow-unionists to obtain employment. The plaintiff was a flesher, having a number of workmen in his employ who were not members of the union. A meeting of the union was called, at which the plaintiff was present. He offered to pay the dues and fines of his workmen, if they were admitted as members. He was told, however, by the defendants and other members present at the meeting, that they would not admit his workmen, and he was warned that he must discharge his journeymen. He could have complied with this request without breaking any contract, as he employed the butchers by the week; but he refused. To force him to comply, the union notified a person by the name of Munce, a butcher, or, as we would call him, a meat provision dealer, who had not any contract with the

⁶⁷ (1898) 1 Q. B. 181.

⁶⁸ So to the Scottish Court of Session, through Lord Kincairney, decided the case of the *Scottish Co-operative Wholesale Society v. Glasgow Fleshers' Trade Defence Association*, 35 Scottish, L. R. 645, 1898, on the Mogul case and *Allen v. Flood*. In the Scottish case the defendants, who were an association of butchers, indicated to the cattle salesmen that they would not buy at their sales if the salesmen permitted persons representing the Co-operative Society to bid. The salesmen in consequence refused to receive bids from the Co-operative Society, and the latter brought an action against the Fleshers' Association for the consequent injury. The case was dismissed.

⁶⁹ (1901) A. C. 495.

⁷⁰ (1899) 2 I. R. 667, reported under the name of *Leathem v. Craig*.

plaintiff, but who was accustomed to take some thirty pounds of meat every week from him, that if he continued to deal with the plaintiff his workmen would go on strike. In consequence of this threat, Munce stopped taking beef from the plaintiff. The action was brought by the plaintiff against the defendants as officers of the union for wrongful interference in his business. A verdict in favor of the plaintiff was confirmed by the Irish courts, and finally, on appeal by the defendant Quinn, by the unanimous judgment of the House of Lords.⁷¹

It will be observed that this case is indetical with that made out on the second count in *Temperton v. Russel*,⁷² and that the court refuse to follow the apparent drift of *Allen v. Flood* towards the reversal of the earlier case. There would appear to be at least three possible grounds for distinguishing the case before the court from *Allen v. Flood*. This case contained the element of a combination to injure; *Allen v. Flood* contained no such element. Again, the majority in *Allen v. Flood* did not regard Allen as creating the condition which practically coerced the Glengall Company into discharging the plaintiffs; while in this case there was no doubt that the defendants had conspired to put pressure on Munce so as to force him not to deal with the plaintiff. Lastly, in *Allen v. Flood*, Allen, though he was not employed by the Glengall Company, acted for those who were employed, because they believed that the

⁷¹ The action was brought in 1896 and tried before Fitz Gibbon, L. J. He told the jury that there must be proved a common purpose among the defendants, a conspiracy to injure (1899) 2 I. R. p. 673. The jury found a verdict for the plaintiff. The defendants moved to set this verdict aside. In the Queen's Bench Division, Andrews, J., held that *Allen v. Flood*, had decided that the acts of the defendants, if done by an individual only, were not actionable, but that this was a case of conspiracy (see *ibid.*, p. 680). To the same effect, O'Brien, J. (see p. 690), and Sir P. O'Brien, L. C. J. (see p. 726). Palles, C. B., dissented because he felt himself coerced by the judgment in *Allen v. Flood* (see p. 701). The defendants appealed to the Irish Court of Appeal. There the lords concurred in the opinion that the case could be distinguished from *Allen v. Flood* on the ground of conspiracy. (Lord Ashbourne, C., p. 751; Porter, M. R., p. 760; Walker, L. J., 766; Holmes, L. J., p. 774.) Only the defendant Quinn appealed to the House of Lords

⁷² (1893) 13 B. 715.

presence of the defendants was an objectionable condition of their employment, while in this case the defendants and their associates had nothing to do with the plaintiff or his workmen. In reference to the last distinction, though Lord Macnaghten and Lord Lindley both refer to the fact that Leathem had no dispute with his men, none of the court can be said to lay emphasis on this as the real basis for distinguishing the case before them from *Allen v. Flood*.⁷³ The judges really distinguish this case on one or both of the other grounds of distinction which we have mentioned. Thus Lord Macnaghten takes the position, though he does not discuss the proposition at any length, that a conspiracy to injure, resulting in damage gives rise to civil liability.⁷⁴ Lord Brampton maintains the same proposition, pushing it to the logical conclusion that, once you have a conspiracy to injure, an act done in the furtherance of the object of the conspiracy becomes wrongful, though had it not been for the conspiracy it would have been lawful.⁷⁵ It need hardly be pointed out that this position is directly contrary to that taken by Lord Bowen in the *Mogul* case. As we pointed out, Lord Bowen there took the position that the combination to be illegal must be a combination to do some act which would injure the plaintiff without just cause or excuse, and whether there is just cause or excuse is the same question whether you have the act of one or of many.⁷⁶ This opinion was as we have seen at the time approved by the House of Lords. Thus it may be said that the position of those who placed *Quinn v. Leathem* on the ground of

⁷³ For Lord Macnaghten's reference to this phase of the case, see page 511; for Lord Lindley's, page 536. Lord Shand does say, on page 514, that the vital distinction between *Allen v. Flood* and the present case, is that in the former "the purpose of the defendant was by the acts complained of to promote his own trade interest;" while in the present case there was a combination to injure "as distinguished from the intention of legitimately advancing their own interests." In view of the facts of *Allen v. Flood*, the language of the learned judge is almost unintelligible, unless we assume that he had in his mind the existence in *Allen v. Flood* of a dispute between the Glengall Company and their employes and that the act of Allen was in furtherance of the employes' side of the dispute.

⁷⁴ Page 510.

⁷⁵ Page 529.

⁷⁶ 23 Q. B. D. p. 617, 1889.

conspiracy to injure was directly contrary to the decision in the *Mogul* case. There the acts of the defendant being legal, were according to the majority legal, if done by one, and the court held that they did not become illegal because the immediate object was to drive the plaintiff out of business, or because of a combination towards that end. Again, if the position of Lord Brampton is to be persisted in, the principle for which *Allen v. Flood* stands in respect to intent is much curtailed. While the intent to injure may not make an act of one illegal, which would be otherwise legal, according to Lord Brampton's position, the intent of many combining to do an act will make the act done legal or illegal according to the nature of the intent.

All the judges, however, as we have intimated, did not rest the case on the element of combination. Lord Chancellor Halsbury points out that in *Allen v. Flood* "the defendant neither uttered nor carried into effect any threat at all," while in the case before the court, "there was conspiracy, threats, and threats carried into execution, so that loss of business and interference with the plaintiff's rights are abundantly proved."⁷⁷ Lord Lindley expands the same general idea. He points out that the plaintiff "had a right to earn his own living in his own way," and that the defendants in what they did, interfered in the liberty of action of the plaintiff's customers by putting the customers to all the inconvenience they could without using violence.⁷⁸ He disregards the element of combination, pointing out that though it is improbable that one man could have done what the defendants did, had he done so, "he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action."⁷⁹ In other words, he would here appear to make the action depend on the infringement of the plaintiff's right, and the infringement depend on the coercion of the will of the plaintiff's customers by threats of business loss. This part of the opinion of Lord Lindley is clear and shows apparently that he would answer our fourth question in the affirmative.

⁷⁷ Page 507.

⁷⁸ Pages 534, 536, 537.

⁷⁹ Page 537.

In a subsequent part of his opinion, however, he throws doubt on the inference that he regarded the coercion of the will of the defendant's customers as the element, the existence of which made the act of the defendants wrongful. We have in a note referred to the Scottish case of *Co-operative Society v. Glasgow Fleshers' Association*.⁸⁰ The plaintiffs and defendants in that case were in a sense competitors in trade. Lord Lindley himself states the essential facts. He says: "In this case the butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen."⁸¹ And he adds: "There was nothing unlawful in this;" his reason being that no one's right was infringed, apparently because it was an act done in competition. Though Lord Lindley does not pursue the matter further, it would seem that he here reverts to the idea of Sir Charles Bowen in the *Mogul* case; namely, that where a deliberate injury is inflicted in the course of competition, no fraud or violence being used, it is done with just cause and excuse. This attitude makes him support the action in the case before him on the theory, that where there is no competition between the plaintiff and the defendant, a deliberate injury inflicted, is inflicted without this just cause or excuse. Or we may put the point in another way. The plaintiff in *Quinn v. Leathem* had a right to be protected from deliberate injury through interference with the free will of his customers, unless this deliberate injury was inflicted with just cause and excuse. Competition would supply this just cause; but Leathem was not competing in business with the defendants, and the defendants had no other just cause and excuse for their acts. If we are correct in this interpretation of Lord Lindley's opinion, he does not answer our fourth question in the affirmative, without serious qualification. He practically maintains that A. has a right of action against B., if B. by threats of business loss induces C. not to enter into a contract he would otherwise enter into with A., unless A. and B. are com-

⁸⁰ See *supra*, note.

⁸¹ Page 539.

petitors in business or labor, in which case, under the circumstances indicated, A. does not have an action against B.

In view of the differences noted in the points of view of the judges who decided *Quinn v. Leathem*, it is improper to assert that the case stands for any principle other than that necessarily induced from the facts. We can say no more than that a combination of two or more persons to injure another who is not a business rival, by threatening to inflict business harm on third persons if they continue to deal with him, gives rise to a legal cause of action by the person injured against the combination.

In conclusion it may be profitable to sum up the extent to which the cases we have discussed have answered our four questions, and to indicate the principal points still unsettled. That our first question, whether A. has an action against B. if B. by the offer of something of value induces C. to break a contract with A., is answered in the affirmative, there can be no question. But it is interesting to note that whether it is actionable if B. accomplishes his object by mere argument is yet doubtful. Though no case has answered our second question, viz., whether A. would have an action, if B. induced the breach by threats of business loss, there would appear to be no doubt that an action for an injury inflicted in this way could be maintained; indeed, this is assumed in *Quinn v. Leathem*. Our third question, which raised the case of B. persuading C. by the offer of something of value not to deal with A., the *Mogul* case seemed at the time to decide in the negative. But the recent opinion of Lord Lindley, and indeed perhaps the opinion of Sir Charles Bowen in the case itself, would tend to confine the negative answer to cases where A. and B. were competitors in business, and we may, therefore, fairly consider it doubtful whether or not A. has an action against B. if B., not being a competitor in business of A.'s, offers C. "something of value" if C. will not make the contract which he contemplates making with A.⁸² The extent to

⁸² There may of course be other just causes beside "competition." The desire to benefit C. might be a just cause. The desire to injure A. would not be a just cause; but it will be readily seen that if this line of development is pursued there will soon be nothing left of *Allen v. Flood* as an authority on malice.

which *Quinn v. Leathem* answers our Fourth Question in the affirmative need not be restated, but it may be pointed out that under this question the following cases have yet to be determined: If B., not in combination with others, threatens C. with business loss if he makes the contract which he expects to make with A., has A. an action against B., (1) Where A. and B. are competitors? (2) Where A. and B. are not competitors? (3) Where B. has combined with others, A. and B. being competitors? Again, in view of the fact that in *Quinn v. Leathem* there was no dispute between Leathem and his own employees, and that this fact was adverted to by more than one of the judges, it may yet be considered doubtful whether a combination of a number of a man's employees to strike unless he discharges a co-employee, by which combination the co-employee is discharged, gives rise to a legal cause of action in the discharged employee, against the members of the combination, the employer, not having been induced to commit a breach of contract?

It is not, however, the number of important and perfectly possible states of fact, the legal import of which has not been determined, which makes the subject of responsibility for the interference in the trade relations of others one of doubt and difficulty; it is rather the fact that in the solution of each case which has arisen there are several distinct tendencies, or methods by which this class of cases can be decided, no one of which has as yet become dominant. In Lord Esher, for instance, we have the tendency to ascertain the legality or illegality of the act of the defendant by the character of his intent. This tendency received a most decided check in *Allen v. Flood*, but the opinion of Lord Brampton in *Quinn v. Leathem* shows that the tendency is not finally eradicated. The opinion of Lord Bowen in the *Mogul* case, exhibits two other tendencies; one, that towards testing the legality of the defendant's act by ascertaining the nature of the act which he induced the third person to do, whether it was or was not itself a civil wrong to the plaintiff; the other, the tendency to ascertain the extent of the rights of the plaintiff as a trader, and then to ask whether the defendant trespassed on these rights. This

last attitude is usually modified by treating the rights of a trader, as a sort of *quasi* property right; that is, as a right which cannot be trespassed on, except with just cause and excuse, the just cause or excuse being found in the exercise by the defendant of similar rights. Lastly, we have the tendency to test the legality or illegality of the interference, by the method employed to induce the third person to break off his business relations with the plaintiff. This attitude is seen in Lord Herschell's opinion in *Allen v. Flood*, where he declares that Allen's threat, if he made a threat, cannot give rise to an action, because in striking, the Glengall Company's employes would not have done a civil wrong to the company. It is seen also in Lord Lindley's and Lord Chancellor Halsbury's opinions in *Quinn v. Leathem*, where they regard the coercion of the wills of the plaintiff's customers as a test of the wrongfulness of the defendants' acts.

As stated, we cannot yet tell which tendency will prevail. Until one tendency does prevail, it will be impossible to foretell with any certainty what will be the decision in any case, in which the adoption of one principle or test of legality rather than another would lead to different results. It is the opinion of the writer that in time the test of legality will be the last one indicated, that is the character of the methods employed to induce. He reaches this conclusion principally because it appears to him to be the marked characteristic of the development of the law of torts, that it always shows a tendency to reach out towards an objective standard of right conduct, and that the only other test besides the last which meets this requirement,—the nature of the act persuaded,—fails to meet any form of coercion which stops short of threatened violence to person or property; and it will probably be generally admitted that the capacity which the modern man has for industrial organization of all kinds would seem to indicate, that persuasion by business pressure is a new form of coercion from which the law must protect all classes of society.

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