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Is Malicious Interference with Contract
an Actionable Wrong?

A T H E S I S

-by-

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Presented for the Degree of Bachelor of Laws.

Cornell University

School of Law,

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C O N T E N T S .

CHAPTER I.

The Character and Scope of the Inquiry.

CHAPTER II.

The Origin and Extent of the English Doctrine.

CHAPTER III.

The Attitude of the American Authorities on the Question.

CHAPTER. IV.

What is the True Doctrine?

CHAPTER I.

The Character and Scope of the Inquiry.

The subject which this article discusses involves a question which has not been directly raised before the courts with much frequency. If the amount of litigation is the measure of importance,, as it is apt to be considered in these times when every one is so intensely practical, then the writer's choice of a subject may be criticised as being one of not very great practical value. But this criticism, will be found, upon reflection, to be somewhat unjust and superficial. The infrequency of litigation on the subject is due chiefly, to the fact that there has been a hesitancy in this country to adopt the English doctrine, and answer the question affirmatively.

Whether practical or not, however, a question upon which able jurists like Lord Campbell, Lord Justice Brett,

Lord Selborne, Mr. Justice Crompton and Erle, on the one side, have differed from Mr. Justice Coleridge and Lord Chief Justice Coleridge on the other hand, and concerning which the highest courts of various states have reached directly opposite conclusions, must indeed be a close and interesting one, the study of which cannot be entirely without profit.

But the writer ventures to suggest that the question is a very practical one; one, in fact, which vitally concerns both the commercial and the labor interests of our country. This would be quickly noticable if the answer was universally in the affirmative, on account of the litigation which it would give rise to, and the limitations which it would place upon the freedom which now reigns comparatively undisturbed in the commercial world; and because the soundest and best authorities, as the writer attempts herein to show, have answered the question in the negative, and thus protected that commercial freedom from unwise restraint, shall we say that the question is any the less practical?

A word also as to the scope of this article. The limits set by custom upon similar productions forbid the discussion herein of the very live topics of the legality of

strikes and boycotts. But the question here discussed arises, and should be rightly determined, before one enters that domain of legal controversy. The fact that this is so is emphasized by the ill-advised dicta which are to be found frequently in judicial opinions rendered in cases arising out of such labor troubles. The latest and most prominent illustration of this is to be found in the recent opinion of United States Circuit Judge Taft, in the Ann Arbor Railroad strike case, which decision created great furor in labor circles and has been the subject of much newspaper comment. In the course of his opinion (See 54 Fed. Rep., 730, at page 740) after referring briefly to the English cases and the Massachusetts case, which it is attempted to show herein are not based upon sound principles of law, and to the two New York cases--- which are shown herein to be not in point at all --- Judge Taft says,- "If a person, with rights secured by contract, may, in case of loss, recover damages from one not a party to the contract, who, with intent to injure him, induces a breach of it, a fortiori can one whose rights are secured by statute recover damages from a person who, with intent to injure him, procures the violation of those rights by another

and causes loss." By way of parenthesis, it might be noted that the real intent --- the primary motive --- of the striking engineers, was not to injure any one, but instead it was a noble and philanthropic purpose to benefit their fellow-engineers by enabling them to obtain better compensation for their labor. Had Judge Taft carefully investigated all the authorities both pro and con, it is safe to predict that he would not have made this statement regarding the existence of a right of action for malicious interference with contract at common law. As the case which he was considering arose under the statute known as the Inter-state Commerce law, the above statement may be dismissed as a mere dictum. But it suffices to illustrate the necessity of a correct understanding of the principle involved, for incorrect dicta are often a source of much annoyance, and are liable to prove dangerous stumbling blocks in future years.

It will thus be seen that it is the purpose of this discussion to lead up to, but not across, the threshold of the labor problems. And it is only after this preceding inquiry is properly answered that one is prepared to enter upon an intelligent consideration of the legal questions which labor disturbances give rise to.

CHAPTER II.

The Origin and Extent of the English Doctrine.

In the year of our Lord, the one thousand eight hundred and fifty-first, and of the reign of her Gracious Majesty, Queen Victoria, the fourteenth, there lived in the city of London, England, a good and loyal subject bearing the name of Benjamin Lumley. Mr. Lumley was the lessee and proprietor of her Majesty's Theatre, in the said city of London, wherein he caused to be produced from time to time, entertainments of an elevating and ennobling nature, from which his patrons derived great pleasure, and himself great profit. In order to add to both the pleasure and the profit, in November, 1851, he entered into an engagement with Mademoiselle Johanna Wagner, of Berlin, cantatrice to the Court of His Majesty, the King of Prussia, and a singer of evident great renown, by which she bound herself to sing at her Majesty's Theatre in London for three months from April 1, 1852, for the

modest remuneration of 400 pounds sterling per month, and further agreed that during said time she would not use her talents at any other theatre or concert without the express consent of Mr. Lumley. But there was in the great city of London another theatre, known as the Covent Garden Theatre, the proprietor of which was Mr. Frederick Gye. Mr. Gye somehow conceived the notion that it would be a nice thing to have Miss Wagner sing at his theatre, or, at any rate, that it would grieve his soul to have his business rival, Mr. Lumley, reaping a harvest of wealth because of her talents. So he, with full knowledge of the existing contract, and with a deliberate purpose to injure his rival and better himself, made the primadonna a better offer to come and sing at his theatre instead of at Mr Lumley's. Artists are not of necessity philanthropists, and as the Mademoiselle was singing for lucre as well as for fame, she accepted the proposition, deliberately broke her contract with Lumley, and proceeded to delight the audiences at the Covent Garden Theatre with the rare and exquisite richness of her melodious voice. Mr Lumley felt that he had been deeply wronged, and although Miss Wagner's notes did not ring through the arches of his

theatre, there was music in the air all about there, nevertheless, for he forthwith caused the courts of justice to "hum", so to speak, in his efforts to protect his rights and redress his wrongs. And out of the litigation which followed there arose two great leading cases in English jurisprudence. In one of them, the doctrine was established that a court of equity will by means of an injunction restrain the breach of a contract for personal services, containing both a positive and a negative agreement, even though it cannot enforce the specific performance of the entire contract. (Lumley v. Wagner, 1 Deg.M.& G., 604.)

Having obtained such an injunction restraining Miss Wagner from singing at the Covent Garden Theater, and enjoining Gye not to employ her there, Lumley next turned his attention more particularly upon Gye, and sued him in a court of law to recover damages for his malicious interference with the contract that had been made between himself (Lumley) and Miss Wagner, and for maliciously enticing and procuring her to break such contract. Gye demurred to Lumley's declaration on the ground that the facts stated did not constitute a sufficient cause of action, but upon the argument of such

demurrer, the Court of Queen's Bench overruled the same, and held that malicious interference with a contract was an actionable wrong. (Lumley v. Gye, 2 Ellis & Blackburn, 216) It is the doctrine laid down for the first time in the latter case, which it is the purpose of this article to consider. As this case is therefore the corner stone upon which we shall either erect our superstructure of a legal wrong and the remedy therefor, or else reject as being unfit to build upon because it is laid in the quicksands of false and erroneous reasonings, neither time nor space can be deemed misspent which is devoted to examining somewhat at length the ratio decidendi of that case.

Lumley v. Gye, as already intimated, was a case of the first impression. It was conceded on both sides that a right of action had for a long time existed in favor of a master against a person who enticed away his servant. But here the common legal pathway divided, and the opposing counsel went in different directions, each, of course, asserting that his road was the right one. It was urged on the part of the defendant that the principle was an anomalous one, which had become engrafted upon the law in the days of slavery,

when the servant was considered the property of the master, and that it should not be enlarged, but should be confined to those cases in which the strict relation of master and servant existed, and was not applicable to the case of a dramatic artiste. On the other hand, it was contended that the master's right of action above alluded to was but a branch of the general rule laid down Comyn's Digest, Action on the Case (A), that "in all cases, where man has temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages;" and that under that principle the malicious and intentional procurement of the breach of any contract was an injury for which a cause of action would lie. While a majority of the court decided in favor of the plaintiff, they differed somewhat as to the basis of the decision, and each one wrote an opinion. Crompton J., held that the principle of giving a cause of action for enticing away a servant was applicable to a case where the defendant maliciously procures a party under contract to render exclusive personal service for a specified time, as was Miss Wagner, to refuse to give such service; but he declined to hold the broader doctrine that an action would lie for malicious in-

interference with any contract, as being unnecessary to the decision of the case, although he evidenced a strong leaning in favor of that view. Erle J., took the broad view that "he who procures maliciously a damage to another by a violation of his right, ought to be made to indemnify; and that whether he procures an actionable wrong, or a breach of contract." Wightman J., took a position about midway between the other two, and in favor of the plaintiff. But Sir John Coleridge, J. wrote a very strong, able, and learned dissenting opinion, which has been much admired, and the reasoning of which seems to the present writer to be conclusively convincing. He maintained with great force that it was a general rule of law that the remedy for breach of contract is confined to the contracting parties; that the parties enter into the contract with that understanding; that as man is a free moral agent, the breach of contract is the act, not of the third party, but of the party to the contract himself; that an interference with the contract if not malicious, is concededly not actionable; and that "to draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice; who shall say how

much of a free agents resolution flows from the interference of other minds, or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is it for the jurymen." He then goes on to point out that the right of action by the master for entieing away his servant is an admitted exception to the above rule, which had its origin in the famous historical Statute of Laborers, passed in 1349, in the twenty-third year of the reigh of Edwand the Third. This statute was enacted in consequence of the great mortality which prevailed among the lower classes on account of the ravages of the Blach Death, with the result of producing a great scarcity of menial labor. This occurred during the transition period from serfdom to free labor, and the statute had a most important bearing on the great social revolution which was then in progress. (See Green's History of the English People, Vol. I., p. 405 et seq.) The Statute of Laborers itself impresses one who reads it now, in this day of freedom, as a most tyrannical and oppressive measure; and is a striking land mark of the barriers which have been placed from time to time in the pathway of progress and enlightened freedom. In the preable to the statute it is said:

"Many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather beg in idleness, than by labor to get their living; we considering the grievous incommodities, whitch of the lack especially of ploughmen and of such laborers may hereafter come, have ordained,," etc. It was then enacted that "every man and woman, of whatsoever condition, free or bond, able in body, and within the age of three score years ----- not having of his own whereof he may live, nor lands of his own about the tillage of which he may occupy himself, and not serving any other, shall be bound to serve the employer who shall require him to do so, and shall take only the wages which were accustomed to be taken in the neighborhood where he is bound to serve" two years before the plague began. It was further made an offense punishable by imprisonment, for any mower, reaper, or other laborer or servant to depart from service before the expiration of the time of service agreed on; and no one is to re-ceive or retain, any such offender in his service under like pain of imprisonment.

After recounting this Statute, Judge Coleridge by

a careful examination of the cases arising thereafter goes on to show that this statute was the foundation of the action for the enticing away of a hired servant; and reaches the conclusion that such right of action, being an exception to the general rule of law, should be limited rather than extended, and was not applicable to the case at bar. But Judge Coleridge's able opinion was after all only a dissenting one, so the demurrer was overruled, the defendant was allowed to plead, and the case went to trial. The doctrine of law thus established by this case was very seriously questioned, but as the defendant recovered a verdict upon the trial (see Smith's Leading Cases, 8th Ed., Vol. I., p. 508) there was no opportunity for carrying the case to the Court of Errors, and the highest authority upon the proposition could not be obtained.

After a lapse of nearly three decades, however, the doctrine of *Lumley v. Gye*, came up squarely for consideration in 1881, in the Court of Appeals in *Bowen v. Hall*, L.R. 6 Q.B.Div., 333. This was an action for persuading a skilled workman, who, with a few others, possessed a secret process for manufacturing glazed bricks, to break his contract with the plaintiff for exclusive service for five years. The

decision in Lumley v. Gye, it will be noticed, rested upon two propositions, viz.:-

(1) That an action will lie for the procuring the breach of any contract, when the same is done with a malicious intent;

(2) That the exceptional rule applicable to contracts between master and servant was equally applicable to any contract for personal services; although the majority of the court leaned more strongly on the second proposition than on the first. But in Bowen vs. Hall, the court repudiated the second and adopted the first principle as the basis of its decision, and laid down the broad doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the other, does that other an actionable wrong. Particular stress is laid on the point that to be actionable, the interference must be malicious. Speaking of the second proposition, Brett, J. in Bowen v. Hall, states in effect that Mr. Justice Coleridge was right in maintaining that the master's action for seduction of his servant was based upon the Statute of Laborers, and should not be extended, and adds that "if, in order to support Lumley v. Gye,

it had been necessary to adopt this (second) proposition, we should have much doubted, to say the least.-----
But we think the case is better supported upon the first and larger doctrine." In Bowen vs. Hall there was also a dissenting opinion, and the judge who wrote it was also a Coleridge, being none other than the Right Hon. John Duke, Lord Coleridge, the then and now Lord Chief Justice of England. With great force and clearness, he lays down the doctrine that "an action does not and ought not to lie against a third person for maliciously and injuriously enticing and procuring another to break a contract in a case where the relation of master and servant in a strict sense does not exist." He then goes on to say,÷ "It is I believe admitted that if a man maliciously endeavors to persuade another to break a contract, but fails in his endeavor, the malicious motive is not in itself a cause of action. It is, I believe, also admitted ----- that if a man endeavors to persuade another to break his contract and succeeds in his endeavor, yet if he does this without what the law calls 'malice' the damage which results, however great, is not in itself a cause of action; I mean, of course, a cause of action against him. But if

the damage which is not in itself actionable be joined to a motive which is not in itself actionable, the two together form a cause of action. This seems a strange conclusion." Then after meeting the arguments that the actions for libel and conspiracy are analogous to this by showing that in each of these cases there is a wrongful act as well as a malicious motive he adds,- "I do not know, except in the case of Lumley v. Gye, that it has ever been held that conduct of 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. I think the inquiries to which this view of the law would lead are dangerous and inexpedient inquiries for courts of justice; judges are not very fit for them, and juries are very unfit. I think, therefore, that Lumley v. Gye, should be overruled." In the case again, however, logic and sound reason were overcome by votes, and so the conclusions of Lord Chief Justice have passed into history, not as an authoritative exposition of the law, but merely as the individual opinion of a dissenting judge. The result and effect of these two cases is that, in English law, where the

decisions are of binding force, while a contract does not impose a positive obligation upon a person who is not a party to it whereby he can be compelled to do some act or thing, yet it does impose upon him a negative duty as a result of which he must refrain from doing things which he might otherwise do freely; that is, he must respect the contractual tie and not intermeddle therewith; and if he does so, from a selfish motive, he can be mulcted in damages therefor. In other words the obligation created by contract, not merely for personal services, but of any kind or nature whatsoever, is a res which is the subject of ownership, and the obligee will be protected as owner of the same. It is as if that vague, intangible and metaphysical contact, known in the law, as the meeting of minds, aggregatio mentium, which brings a contract into being, at the same moment erected about such contract a sort of invisible barbed-wire fence, within the bounds of which no third person can venture save at his peril.

In Lumley vs. Gye, the court apparently limited the principle to the case of contracts for exclusive personal services. In Bowen vs. Hall, the contract for procuring the breach of which the defendant was sued was also a contract

for such service. But the reasoning of the court was not confined to such cases, and the principle as laid down by the prevailing judges and as opposed by Lord Chief Justice Coleridge is applicable to the whole field of contracts. It seems therefore, that it would make no difference whether the contract were for personal services, for the sale of goods, for the payment of money upon a promissory note, a promise to marry, or any kind of contract; in any and all cases if a third party interferes and procures a breach and does so maliciously, a right of action will lie against him. In passing, it may be of interest to note that while *Bowen vs. Hall* settles the principle of law conclusively, and leaves it no longer an open question in England, yet it does not meet with unanimous approval even by loyal Britons. That eminent English law writer, Sir William R. Anson, in his admirable work on the Law of Contracts gives the doctrine an apparently reluctant endorsement, while the able and brilliant Sir Frederick Pollock characterizes the decision in *Lumley vs. Gye* as "anomalous at best" and swallows it with a wry face as if it were a bitter pill. (See Anson on Contracts, Knowlton's edition, p. 277; Pollock on Torts, p. 451). And the doc-

trine of Lumley vs. Gye has been questioned in a very recent article by Judge W.E.Ormsby on "Malice in the Law of Torts" In Law Quarterly Review, Vol. VIII., p. 145.

CHAPTER III.

The Attitude of the American Authorities on the Question.

Having considered the English doctrine, we next naturally inquire, what position have the American Courts taken on this question? The right of action for enticing away a menial servant had, as has already ^{been} pointed out, become a settled principle of law long before the American Revolution, and in a large majority of the states the doctrine seems to have been received and accepted as part of our inheritance from the mother country, much of it good, and some of it bad, but all of which came in without questioning, as to its origin or soundness under the protecting folds of that sacred heirloom known as the "Common Law." This principle has been so generally recognized that but a few leading cases need be cited. (See *Woodward vs. Washburn*, 3 Denio, 369; *Bixby vs. Dunlap*, 56 N.H., 456; same case, 22 Am.Rep., 475, and note

following; Noice vs. Brown, 39 N.J.L., 569; Amos vs. Railway Co., 117 Mass., 541).

But when we come to the broad doctrine of the English courts that a right of action lies for malicious interference with any contract, we find the American courts in inharmonious discord; a few follow it to its full extent, others reject it in toto, and still others take a position, which is neither logical nor graceful, about half-way between the two.

Let us examine the principal authorities. Probably the leading case cited as supporting the English doctrine is Walker vs. Cronin, (107 Mass., 555,) decided in 1871, which was before the English Court of Appeal had passed upon the case of Bowen vs. Hall. In this case the plaintiff, who was a shoe manufacturer, sued the defendant for, unlawfully and without justifiable cause, inducing several shoemakers employed by him to break their contracts, and leave his service. It was held that he could recover, Wells, J., stating the principle involved as follows,- "Every one has the right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from

malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it comes from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." And further on in speaking of the general^{ly} conceded right of action for enticing away a servant, he says, "It has sometimes been supposed that this doctrine sprang from the English Statute of Laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant; and that it applies to all contracts of employment, if not to contracts of every description." He cites in support of his view *Lumley vs. Gye*, and several old cases of one kind or another where damages were allowed for the wanton interference of one person with the affairs of another, as for example, slander, enticing wife to remain away from her husband, etc., etc. But in all of the latter cases, it seems to the present

writer, there can be found not only a wrongful motive, but a wrongful act as well. In an able article on "The Boycott as a Ground for Damages" published in 1887 (21 Am. Law Review, 509) Mr. John H. Wigmore, of Boston, speaking of Walker vs. Cronin, says, -at page 519, that it "is a much quoted case, and emphasizes a distinction between a violent or fraudulent interference and ordinary persuasion. The court goes further, however, and held that even truthful persuasion, when malicious, is actionable. This, I venture to say, was incorrect. Of the decisions cited therein for this point not one supports it. The distinction must rest, not upon the quality of the motive, but upon the nature of the outward act. There is no more persistent and yet no more unfounded notion, than that motive --- I do not say intention --- can become the turning point of civil liability --- no notion more fitted to reverse legal relations and to make chaos out of definite principle."

In Dudley vs. Briggs, 141 Mass., 582 (1886), the plaintiff had for several years published biennially a directory of Bristol County, and was preparing to issue another in due season, when the defendant came upon the scene, represented to the patrons of the plaintiff that he had purchased the

plaintiff's business, and sold them a directory bearing the same name as that usually issued by the plaintiff. He sued for damages, invoking the authority of Lumley vs. Gye and Walker vs. Cronin, but while the court expressed its approval of those cases, it decided against the plaintiff's right to recover, because there was no actual contract between him and his patrons. And yet, here was not only malice, but an independent wrongful act, to wit, false representations !

The Supreme Court of North Carolina in 1871 in Haskins vs. Royster, 70 N.C., 601, applied the doctrine of Lumley vs. Gye, to a case where the defendant induced several "croppers" that is, farm laborers working land on shares, to break their contract with the plaintiff, and in so doing overruled the decision of that eminent jurist and able writer, Judge Albion W. Tourgee, in the lower court. Rodman, J., who wrote the opinion, after stating that the principle is settled that malicious interference with a contract for personal services is actionable, follows it with a sentimental and rhetorical flourish, thus,- "it need scarcely be said that there is nothing in this principle inconsistent with personal freedom, else we should not find it in the laws of the freest

and most enlightened States in the world. It extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers. It is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons." He then follows with an extensive quotation from the opinion in Walker vs. Cronin, which he heartily endorses.

In 1877 the question again came before the Supreme Court of North Carolina in Jones vs. Stanley, 76 N.C., 357. The plaintiff had made a contract with a railroad company of which the defendant was President and Superintendent by which said company agreed to transport from various points on their road to Morehead City, a large number of cross-ties, which the plaintiff had contracted to deliver in Cuba. After the contract had been partly performed, the defendant maliciously, and for the purpose of injuring the plaintiff, that is, to vent a personal spite, refused as an official of the Railroad Company to complete the contract. The plaintiff sued him individually, and was allowed to recover. Rodman,

J., the same judge who wrote the opinion in Haskins vs. Royster, after referring to that case, disposes of this one very briefly as follows,- "The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service." While the principle as stated in the cases heretofore considered has been broad enough to cover any kind of a contract, this is the first, and furthermore, the only case where the principle has been actually applied to a contract other than for personal services. Be it said to the credit of North Carolina, therefore, that, having adopted the principle, it has had the courage to apply it logically to its fullest extent!

The position thus taken by the North Carolina court is in ~~contradistinction~~ to that taken by the Supreme Court of Maine in Haywood vs. Tillson, 75 Me., 225 (1883) where a right of action was denied the plaintiff against the defendant for inducing, with gross malice, and almost by actual coercion, the tenant of the plaintiff to break his contract for the lease of a dwelling house, Peters, J., in the course of his opinion, after approving of Lumley vs. Gye and Bowen

vs. Hall as applied to service contracts, says,- "Any man may advise another to break a contract, if it be not a contract for personal services. He may use any lawful influence or means to make his advice prevail. In such a case, the law deems it not wise or practicable to inquire into the motive that instigates the advice. His conduct may be morally and not legally wrong." But the learned court fails to explain why it is any more legally wrong to interfere with a contract for personal service than it is with any other kind of contract. This position is almost ludicrously illogical.

In Chipley vs, Atkinson, 1 South.Rep., 934, the Supreme Court of Florida in 1837 changed the personal service contract shoe over to the other foot, so to speak, by holding that a malicious interference with a contract whereby an employee loses his position, gives a right of action by such employee against the party so interfering.. If the English doctrine be deemed at all worthy of approval which, however, we deny, this case must be considered as good law, for it is a clear application of the homely old saying that "what is sauce for the goose is sauce for the gander."

Strange to say the doctrine under discussion seems

to have never been considered by one of the leading courts in America, namely, by the New York Court of Appeals. This must be due to the fact that the lawyers in this state have not had faith enough in the principle to bring an action under it. In a recent case at Special Term, however, growing out of the Binghamton cigar strike of a year or so ago, a well considered and able opinion was delivered by Hon. Walter Lloyd Smith, Justice of the Supreme Court, in the course of which, speaking of the so-called common law action for enticing away a servant he says,- "But this doctrine, although never overruled, has never, to my knowledge, been explicitly held in the courts of this state. I am not satisfied with the reason of the rule. In the case of no other contract does a man render himself liable as for tort by inducing its violation by persuasion. I can see no reason why the contract of service should be made an exception. The servant is the equal in law of the master. He contracts with the master upon equal footing. Under the common law, the servant's position was quite different. His position was more that of a slave. With the advance in civilization the reason for the rule has entirely passed away. It is, at

least, a matter of grave doubt whether such right of action will ever be sustained in this state." Rogers vs. Evarts, 17 N.Y.Supp., 264 (Dec. 1891). Judge Smith's ^{decision}~~opinion~~ in this case has recently been affirmed by the General Term in Reynolds vs. Everett, 22 N.Y.Supp., 306 (March, 1895). If that be the attitude of the New York courts, it may be asserted with confidence that the doctrine of Lumley vs. Gye, which, as we have seen, had its fountain head in the master's action for the enticing away his servant, will not meet with any approval here, should any ambitious litigant attempt to have it applied.

But in two recent cases in the Court of Appeals of Kentucky, the entire English doctrine as established by Lumley vs. Gye and Bowen vs. Hall has been squarely up for consideration, and has been disapproved and rejected absolutely and completely in two able opinions which, it seems to the present writer, must commend themselves as remarkably careful and convincing to every earnest student who is impartially seeking for the true doctrine, without a preconceived prejudice or bias either to the one view or the other.

The first case was Chambers vs. Baldwin, 15 S.W.Rep.,

57, which was decided Jan'y. 13, 1891. The question before the Court was whether a right of action would lie for maliciously inducing a person, who had contracted to sell his crop of tobacco to the plaintiff, to break said contract. The answer was, as indicated, in the negative. This was followed just a week later by a decision in a case^{which} was the exact counterpart of Lumley vs. Gye, being an action to recover damages for maliciously inducing the noted actress, Mary Anderson, to break her contract to appear at the Masonic Temple Theatre in Louisville. Following out the reasoning of the prior case, the court held that there was no logical distinction between service contracts, and those of any other nature; that even the so-called common law action for enticing away a servant had no foothold in that state, except so far as provided by statute; and, therefore, that the plaintiff could not recover. (Boulier vs. Macauley, 15 S.W.Rep., 60).

Turning to the law writers, as distinguished from judicial decisions, we find here also a lack of harmony. The English doctrine is repudiated in effect by Judge Cooley (see Cooley on Torts, 2nd Ed., p. 581); while it is vigorously upheld by Lyne S. Metcalfe, Jr., the editor of the Central Law

Journal in a note which he appends to the report of the case of Chambers vs. Baldwin (Cent.L.J., Vol. 52, p. 275). Mr. Bishop, evidently without having given the matter much serious consideration, virtually approves the English doctrine (Bishop on Non-Contract Law, Sec. 495). Aside from these authorities there are several magazine articles which discuss the effect and application of the doctrine, but as they assume at the outset that the doctrine is good law, they throw no particular light upon the present discussion.

Briefly to review the American authorities, then, it will be seen that while North Carolina on the one hand endorses the English view, Kentucky goes to the other extreme and rejects it, while Massachusetts and Maine may be said to take a position about midway between the two and hold that it is at least applicable to contracts for personal services. It may also be fairly inferred from Burgess vs, Carpenter, 2 Rich, S.C., 7 (1870) that that state would reject the English view. And Jones vs. Blocker, 43 Ga., 331, which is frequently cited as supporting such view is purely a case of master and servant, and therefore not in point.

The law in America may therefore be considered as

unsettled, with perhaps a slight weight of authority favoring the granting of a right of action for malicious interference with contracts for personal services only.

CHAPTER IV.

What is the True Doctrine?

Should a right of action be allowed for malicious interference with contract or not? It must be admitted that the question is a close one, and a nice one. Ethically, morally, and sentimentally, probably, the answer is naturally in the affirmative. There is a popular notion, especially in the minds of the laymen, that the law will compel every person to "mind his own business" or suffer for not doing so. But when we come to analyze the question, and test it by the application of fixed legal principles, we are almost inevitably forced to answer the question in the negative. Let us briefly consider the reasons why this is so.

At the outset, let us put aside all cases where there is any fraud, deception, misrepresentation, or coercion, as a result of which the intermeddler produces a breach of the

contract. Here there is not only malice, but a concededly wrongful act. Here the breach is not the voluntary act of the party to the contract, but his real purpose is overcome by the deception or coercion of the third party. Such cases are clearly distinguished from the one under discussion, and a right of action obviously lies against the wrong doer. (Benton vs. Pratt, 2 Wend., 385; Rice vs. Manley, 66 N.Y., 82) Yet, curiously enough, these two cases are to be found frequently cited as supporting the English doctrine of Lumley vs. Gye, and Bowen vs. Hall, when in fact they do not do so at all.

But the question which we are considering is whether the mere truthful persuasion of one party to a contract to break it, if malicious, is actionable. As pointed out by Coleridge, J., in Lumley vs. Gye, if the persuasion be from good motives, the interference is clearly not actionable. But whether the motive be good or bad, the outward act is the same in each case. Hence if in one case the act is not illegal it cannot be illegal in the other case either. It is plain then that the bad and malicious motive, the inward and secret workings of the mind, must be the test as to whether

the action shall lie or not. The pivotal question around which the whole matter revolves is, therefore, can a man be made to answer in a court of law solely for a bad motive? Right in this connection an interesting treatise might be written upon the evolution of the doctrine of malice in the law of torts, but space, of course, will not permit. Suffice it to say that in the early days, when the courts were rudimentary affairs, and when the juries were composed of the neighbors who were called in to settle local quarrels and disputes, the good or bad motive with which an act was done was always the chief object of inquiry. But as civilization has progressed, and the present system of jurisprudence began to shape itself, the constant tendency has been to measure legal liability and responsibility by external standards, rather than internal purposes. Courts have recognized that they were finite, and therefore, fallible, and that attempted judgments of motives alone would often be wrong, and were therefore dangerous. (See Article on Malice as an Element of Torts, 6 N.Y. Bar. Assn., 135). The principle that a malicious motive will not transform an act, otherwise lawful, into a legal wrong has been frequently applied in other classes of

cases. Thus, it has been held that a malicious and willful diversion, by the defendant, of subterraneous water on his own land from adjoining lands of the plaintiff, being an exercise of a lawful right, is not actionable. *Phelps vs. Nowlan*, 72 N.Y., 39; *Forzier vs. Brown*, 12 O.St., 294; *Chatfield vs. Wilson*, 33 Vt., 49. And the same general principle is sustained by the decided weight of authority throughout the United States. *Adler vs. Fenton*, 24 How., 412; *Benjamin vs. Wheeler*, 8 Gray, 410; *Jenkins vs. Fowler*, 24 Pa.St., 308. In the latter case, Mr. Justice Jeremiah S. Black thus aptly expresses the doctrine,- "Malicious motives make a bad act worse; but they cannot make that wrong which, in its own essence, is lawful. When a creditor who has a just debt brings a suit or issues execution, though he does it out of pure enmity to the debtor, he is safe. In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff by proclaiming his infamy, will not defeat the justification. One who prosecutes another for a crime need not show, in an action for malicious prosecution, that he was actuated by correct feelings if he can prove that there was good reason to believe the charges well founded.

In short, any transaction which would be lawful and proper if the parties were friends, cannot be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart."

Malice, revenge, and spite, when unaccompanied by any unlawful act, cannot be considered wrongs which a court of law will redress; unquestionably they are wrong morally, but the punishment for such wrongs can only be safely meted out in the final judgment day by the All-wise and Infallible Judge. The allowance to any man, or set of men, of the right to judge by what internal purpose action is, in a given case, controlled, places in their hands a dangerous engine of power, and it is the policy of the law to limit, rather than increase, such authority.

But there are other reasons why this right of action should not be granted.

One of them is, that when two parties enter into a contract, each looks to the other, and only to the other for any damages that may result from a breach of the same. If

A., after having made a contract with B., had a right to erect a high stone wall around B., and keep him shut in there until he had carried out his part of the contract, then there might be some reason for giving A. a right of action against C. for leaping over such wall and asking B. to depart from the enclosure before he had completed the contract. But no such right exists. C., after B. has made his contract with A., has just as much right to talk with him as he had before; and if he talks of the contract and says something which causes B. to make up his own mind to break the contract, the breach is clearly the act of B., and B. alone should be held responsible.

Further, A's right to sue and recover from B. his damages for the breach of contract is everywhere recognized and admitted. Now, if he also has a right to sue C., ~~in~~ in effect, gives him two causes of action, one in tort and the other in contract, for precisely the same damage. Inasmuch as the two causes of action are entirely distinct, there is no reason why the plaintiff should be compelled to elect between them, and the fact that he had recovered in one action would be no bar to the other action; the obvious result of

this situation would be, therefore, that the plaintiff could recover double compensation for his injury. Under such a state of affairs it would be a positive advantage to the plaintiff to have some outsider maliciously interfere with the contract; and in this age of scheming and artifice, we might be treated to the spectacle of some bright financier deliberately quarreling with his hot-headed and revengeful fellow citizen, for the express purpose of provoking him to a malicious interference with the contracts of the former, in order that he might reap his double damages as a result thereof. But perhaps it may be urged in defense of the English doctrine that double compensation in damages is contrary to the policy of the law, and that a recovery in one action would be a bar to a recovery in the other, or would be admissible in evidence to reduce damages in the other. If that be so, how shall the matter be apportioned? Which judgment shall have preference over the other? Shall it be left merely to the caprice of the plaintiff as to which action he shall bring first? These suggestions are sufficient to show some of the fallacies of the English doctrine, and where it would lead to, if adopted.

Finally, we must repudiate the entire doctrine of Lumley vs. Gye and Bowen vs. Hall, and the cases following them, as being contrary to the spirit and customs of our times. Even the old action by the master for enticing away his servant has outlived its purpose and its usefulness, as indicated by Mr. Justice Smith in Rogers vs. Everts, ante, and would have long since been swept away as a relic of slavery and of barbarism, were it not for the conservatism and tenacity with which the courts cling to established precedents. The most extenuating thing that can be said in favor of its retention is that it has been used as a sort of peg on which to hang the very righteous cause of action by a parent for the seduction of his daughter, and perhaps this is enough to entitle it to toleration in its present state of comparatively "innocuous desuetude." But to any attempt to extend it beyond its narrow confines, as the English authorities have done, there is every reason for determined opposition. This is the age of freedom --- freedom of person, freedom of thought, freedom of speech, and freedom of business. We have advanced from the era of status to the era of contract, and the spirit of competition is recognized

and encouraged on every side. To concede this cause of action is to hamper this spirit, to foster, to a certain extent, the spirit of monopoly, and to place uncalled for limitations upon legitimate business rivalry.

The conclusion of this speculative discussion is, therefore, that malicious interference with contract, when unaccompanied by fraud, false representations, or coercion, is not a legal wrong for which an action will lie. And a fitting end is to be found in the following quotations from the opinions of Lewis, J., of the Kentucky Court of Appeals in the two cases previously referred to, 15 S.W.Rep., 57, 60.

"Competition frequently engenders, not only a spirit of rivalry, but enmity; and, if the motive influencing every business transaction that may result in injury or inconvenience to a business rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered."

"It is not the policy of the law to restrict or discourage competition in any business or occupation, whether concerning property or personal service, there being no good

reason for making more stringent regulations, in respect to the latter, except where some one of the domestic relations exist, than the former; for if, in order to have sale and exchange of property free and unrestrained, a person may lawfully and without legal inquisition of his motive, buy what another offers for sale, and has a right to sell, it is no less just and expedient that, in order to have fair remuneration for labor, a person be allowed to hire the service of any one sui juris who offers to be hired. And in every case, the employer should be required to look alone to the person employed for breach of the contract, just as the seller must look to the buyer, and the creditor to the debtor, in default of payment; for to enforce a doctrine making the hirer responsible for breach, by the person hired, of a previous contract with another involves legal recognition of personal dominion, bordering on pure servitude, which is neither in harmony with our form of government nor well for those who labor for subsistence."

Jas. D. Rogers.