TORTS:
PRIVILEGE TO INTERFERE WITH CONTRACT RELATIONS

I

A striking decision of the California Supreme Court[1] takes us back to the famous English case of *Lumley v. Gye*.[2] When Mr. Gye successfully persuaded Mr. Lumley's singing star, Miss Wagner, to desert his service in violation of her agreement, a suit followed which resulted in a new doctrine. The Queen's Bench decided that the malicious procuring of a breach of contract for personal services was actionable. The principle has been generally accepted and extended to protect almost all contracts from unjustified interference.[3]

California at first refused to recognize liability for inducing breach of contract by means not otherwise unlawful. *Boyson v. Thorn*[4] conceded that liability should be imposed for interference with employment contracts involving the relation of master and servant, but the general doctrine that malicious procurement of a breach of any contract gives a right of action was denied. *Imperial Ice Co. v. Rossier*[5] repudiated the language of *Boyson v. Thorn* which rejected liability for interference with contractual relations generally. A few prior cases have moved in that direction,[6] but the *Imperial Ice Co.* case is the first to give clear expression to the modern doctrine. Coker owned an ice distributing business. He sold it, promising not to sell ice as long as the vendee or any purchaser of the good will remained in business. Plaintiff bought the business from the vendee and with it the right to enforce the covenant not to compete. Later Coker breached his agreement by selling ice within the forbidden territory. Plaintiff sued to restrain Coker from violating his agreement and to restrain defendants, who supplied the ice to Coker, from inducing Coker to continue in the business. A demurrer to the

[1] Imperial Ice Co. v. Rossier (April 29, 1941) 18 A. C. 3, 3 Cal. Dec. 607, 112 P. (2d) 631.

[2] (1853) 2 E. & B. 216, 118 Eng. Rep. 749.

[3] Hitchman Coal & Coke Co. v. Mitchell (1917) 245 U. S. 229; Meyer v. Washington Times Co. (App. D. C. 1935) 76 F. (2d) 988; R An W Hat Shop, Inc. v. Sculley (1922) 98 Conn. 1, 118 Atl. 55; Dunshee v. Standard Oil Co. (1911) 152 Iowa 618, 126 N. W. 342; Moran v. Dunphy (1901) 177 Mass. 485, 59 N. E. 125; Posner Co. v. Jackson (1918) 223 N. Y. 325, 119 N. E. 573; Flaccus v. Smith (1901) 199 Pa. 128, 48 Atl. 894; Brown Hardware Co. v. Indiana Stove Co. (1903) 96 Tex. 453, 73 S. W. 800.

[4] (1893) 98 Cal. 578, 33 Pac. 492.

[5] *Supra* note 1.

[6] California G. C. Bd. v. California P. Corp. (1935) 4 Cal. App. (2d) 242, 40 P. (2d) 846; see Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 603, 98 Pac. 1027, 1036; Note (1936) 24 CALIF. L. REV. 208.

count for procuring breach of contract was sustained by the trial court. The supreme court reversed, holding that plaintiff was entitled to legal protection from intentional and unjustified invasion of his contract rights.

II

How far the liability should be extended is not certain. Some limits have developed in the form of conditional privilege, as in slander and libel. The theory is that the conflicting interests of the parties must be balanced and the interference will be justified if the defendant is promoting an interest which is considered equal to or more important than the contract rights of the plaintiff.[7] The scales have favored justification, for example, when the defendant seeks to protect his own contract or property rights,[8] to remove dangers to the public health, safety or morals,[9] or to perform a duty which he owes to a third person.[10] Although the promotion of business interests by way of competition justifies interference with business expectancies, the law has treated it as insufficient to excuse interference with contract relations.[11]

In any case in which recovery for interference with contract relations is not allowed the decision may mean that there is no right of action for interference at all or that the defendant successfully claimed a privilege which excused interference. *Boyson v. Thorn* was long supposed to have established that there is no right of action for an intentional or even a malicious interference with contracts. Plaintiff had been living in the Palace Hotel in San Francisco under a contract made with the owner. Defendant, the hotel manager, induced the owner to put the plaintiff out. An order sustaining a general demurrer was affirmed, despite allegations of malice and ill will, on the ground that a person is not liable for procuring a breach of contract with good motives and that "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent".[12] The language of the decision is certainly inconsistent with the later *Imperial Ice Co.* case. But in the *Imperial Ice Co.* case,

[7] Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728; Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663.

[8] Quinlivan v. Brown Oil Co. (1934) 96 Mont. 147, 29 P. (2d) 374; Williams v. Adams (1937) 250 App. Div. 603, 295 N. Y. Supp. 86; O'Brien v. Western Union Telegraph Co. (1911) 62 Wash. 598, 114 Pac. 441.

[9] Legris v. Marcotte (1906) 129 Ill. App. 67; Brimelow v. Casson [1924] 1 Ch. 302.

[10] Caverno v. Fellows (1938) 300 Mass. 331, 15 N. E. (2d) 483; Braden v. Perkins (1940) 174 Misc. 885, 22 N. Y. S. (2d) 144.

[11] TORTS RESTATEMENT (Am. L. Inst. 1939) §§ 766, c, 768; Note (1936) 24 CALIF. L. REV. 208, 211.

[12] *Supra* note 4, at 583, 33 Pac. at 493.

Boyson v. Thorn was distinguished on the ground that the relationship between the manager and owner of the hotel justified the manager in procuring the breach. Because the privilege was "absolute", the presence of ill will or improper motives would not destroy it.

A. *Privilege for an agent or director.* Ample support can be found for the dictum that there is a privilege to induce a breach of contract in some confidential relationships.[13] Authority for a privilege for the ordinary agent or employee is scarce,[14] but a representative should be permitted to act for the economic interests of his principal or employer without having a threat of liability hanging over his head if he happens to interfere with a contract. The principal may choose to violate an agreement, and, while he will be liable on the contract, no tort liability is incurred. The same freedom of choice should be given to the agent, to be exercised within the scope of his authority. The argument applies with equal force to directors of a corporation. To deny a privilege for them would mean that in no case could directors advise a breach of a corporate contract, no matter how ruinous to the corporation performance might be, without becoming personally liable in tort.

Granting the existence of a privilege for directors and other agents, there is the further problem of its extent. Justice Traynor's dictum in the *Imperial Ice Co.* case, distinguishing *Boyson v. Thorn*, indicates that the agency relationship furnishes an absolute privilege.[15] In other words, a claim of privilege as an agent or director will give the defendant complete immunity; even if he acts with actual malice and wrongful motives, the agent or director will not be liable so long as his conduct can be said to be within the general scope of his authority.[16]

The privilege is frequently said to be conditional or qualified—its protection is lost if it is not exercised with a proper motive.[17] Per-

[13] Vassardakis v. Parish (S. D. N. Y. 1941) 36 Fed. Supp. 1002; Morgau v. Andrews (1895) 107 Mich. 33, 64 N. W. 869; Lukack v. Blair (1919) 108 Misc. 20, 178 N. Y. Supp. 8; Hicks v. Haight (1939) 171 Misc. 151, 11 N. Y. S. (2d) 912; Braden v. Perkins, *supra* note 10; G. Scammeill & Nephew, Ltd. v. Hurley [1929] 1 K. B. 419.

[14] Caverno v. Fellows, *supra* note 10; Greyhound Corp. v. Commercial Casualty Ins. Co. (1940) 259 App. Div. 317, 19 N. Y. S. (2d) 239; Said v. Butt [1920] 3 K. B. 497.

[15] 18 A. C. at 7, 3 Cal. Dec. at 609, 112 P. (2d) at 634: "It is clear that the confidential relationship which existed between the manager of the hotel and the owner justified the manager in advising the owner to violate his contract with plaintiffs. His conduct thus being justified, it was lawful despite the existence of ill-will or malice on his part."

[16] By "malice" here is meant actual spite or ill will. In some cases malice is said to be a necessary allegation to state a cause of action, and in that context the word is taken to mean only an intention to induce a breach of the contract.

[17] Sidney Blumenthal & Co. v. United States (C. C. A. 2d, 1929) 30 F. (2d) 247; Lee v. Fisk (1915) 222 Mass. 418, 109 N. E. 833; Caverno v. Fellows, *supra* note 10; Morgan v. Andrews, *supra* note 13; Said v. Butt, *supra* note 14.

haps most courts take this view. New York cases have given directors and agents full freedom. The first hint at discussion of the point came in *Lukack v. Blair*.[18] The court there refused to distinguish between acts of interference done with a pure motive of performance of duty and those done in the course of employment, but with "ulterior motives". *Greyhound Corp. v. Commercial Casualty Insurance Co.*[19] held an insurer's adjustment agent not liable for procuring a repudiation of a policy by the principal. It was alleged that the insurer had accepted responsibility for the claims involved and that settlements had been attempted by the defendant agent. The repudiation was claimed to have been secured by "maliciously and falsely representing"[20] to the insurer that a provision in the policy, making it inoperative in the event of a violation of law by the insured, was not complied with. A motion to dismiss the action against the agent was granted. The court adopted the view that an agent is not liable for inducing a breach of contract by his principal in the course of his employment if the means used do not constitute a separate tort. A later case involving an inducement of a breach of a partnership contract by one of the partners, *Braden v. Perkins*,[21] described the privilege as absolute, although it was unnecessary for the decision.

The nature of the privilege in New York may still be unsettled. A federal district court, applying "New York" law, denied a motion for a summary judgment against defendant on a count alleging inducement by him of a breach of a contract of employment between plaintiff and a corporation.[22] Defendant was general manager of the corporation. He was charged with "acting solely through spite, malice and vindictiveness".[23] The court made it an express requirement, in order to gain the protection of a privilege, that the acts be done in good faith. This is in agreement with the English cases[24] and those in other American jurisdictions[25] which make strong assertions about the conditional character of the privilege.

If we assume that the action for interference with contracts is rested on sound premises and is, therefore, not to be narrowed and restricted, justification should end where the reasons for granting the privilege in the first place do not apply. The director or agent is protected in his representative activity to allow him to give good faith

[18] *Supra* note 13.

[19] *Supra* note 14, criticized in (1940) 54 HARV. L. REV. 131.

[20] *Ibid.* at 319, 19 N. Y. S. (2d) at 240.

[21] *Supra* note 10.

[22] Vassardakis v. Parish, *supra* note 13.

[23] *Ibid.* at 1004.

[24] Said v. Butt, *supra* note 14; G. Scammell & Nephew, Ltd. v. Hurley, *supra* note 13.

[25] Cases cited *supra* note 17.

advice on the advantages and disadvantages of performing contracts and generally to act freely in the honest promotion of the interests of his corporation or principal. When the motive for his interference with the contract is primarily to injure someone, the relationship should not be a ground of justification. The absolute privilege gives too wide a freedom for venting spite. Without requirements of honesty and good faith, the protection of contracts developed out of *Lumley v. Gye*, as applied to directors and agents, will be unduly limited. A good case might be made for using some objective standard as well. Good faith should not be enough; the activity of the director or agent should be required to bear some reasonable relation to the actual interests of the corporation or principal. However, most courts talk only of subjective limitations.

California has now accepted the broad doctrine of liability for interference with contracts. By keeping *Boyson v. Thorn* alive, the court was forced to make the privilege for directors and agents absolute. A straight repudiation of it would permit adoption of the preferable view on the nature of the privilege, that is, allow it only when the director or agent interferes with a contract in an honest performance of duty.

B. *Privilege for labor organizations.* A dictum in *Imperial Ice Co. v. Rossier* stated that "The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer."[26] The statement must be considered prophetic. The privilege for labor has not been favored. To begin with, there is a horde of confusing cases on the basic issue of the lawfulness of the various methods used by labor in industrial disputes.[27] The strike[28] and picket,[29] carried on without intimidation or violence, seem to

[26] 18 A. C. at 5, 3 Cal. Dec. at 608, 112 P. (2d) at 632.

[27] Early cases considered labor activity a criminal conspiracy. Nelles, *The First American Labor Case* (1931) 41 YALE L. J. 165; Sayre, *Criminal Conspiracy* (1922) 35 HARV. L. REV. 393. The difficulty of conspiracy was overcome in Commonwealth v. Hunt (1842) 45 Mass. 111, and the principal source of difference today lies in the proper purpose requirement. There is substantial agreement on the more obvious points, such as higher wages, shorter hours and better working conditions. A closed union shop, reinstatement of discharged workmen, union materials upon which to work, etc., have not received the same near-unanimity of treatment. Eskin, *The Legality of "Peaceful Coercion" in Labor Disputes* (1937) 85 U. OF PA. L. REV. 456.

[28] Parkinson Co. v. Building Trades Council, *supra* note 6; Pierce v. Stablemen's Union (1909) 156 Cal. 70, 103 Pac. 324; Kemp v. Division No. 241 (1912) 255 Ill. 213, 99 N. E. 389; Exchange Bakery & Restaurant, Inc. v. Rifkin (1927) 245 N. Y. 260, 157 N. E. 130.

[29] Of great importance is the holding of the United States Supreme Court that freedom of speech includes picketing. Thornhill v. Alabama (1940) 310 U. S. 88; Carlson v. California (1940) 310 U. S. 106. The legality had been decided on other grounds in

have emerged at last from the unlawful *per se* class. The primary boycott has apparently fared as well,[30] although a good deal of conflict remains on the legality of the secondary boycott.[31] Only within the past few years has the idea become prevalent that workmen and their representatives should have a privilege to invade ordinary business relations under any circumstances. A condition to obtaining this privilege, in addition to legality of these weapons, is that a proper purpose be pursued,[32] and some fine distinctions are drawn on what is proper and what is not.[33]

In jurisdictions in which the means employed in the labor dispute are held unlawful, discussion is at an end.[34] The case is then the same as that in which one business man interferes with the contract of another by fraud or violence. But even in states where the position of labor has been aided by a recognition of the validity of strikes, pickets and boycotts, at present the law does not seem to grant any privilege to labor leaders to cause a breach of contract for a definite term no matter what their purpose may be.[35] Where the contract relation invaded is one between the employer and employee, whether for employment[36] or a yellow dog contract,[37] most cases have gone against the labor organization. In suits involving agreements between an employer and a customer or supplier, the contract interest has

McKay v. Retail Auto. S. L. Union No. 1067 (1940) 16 Cal. (2d) 311, 106 P. (2d) 373; Lund v. Auto Mechanics' Union No. 1414 (1940) 16 Cal. (2d) 374, 106 P. (2d) 408; Sherry v. Perkins (1888) 147 Mass. 212, 17 N. E. 307; Steffes v. Motion Picture M. O. U. (1917) 136 Minn. 200, 161 N. W. 524.

[30] Pierce v. Stahlemen's Union, *supra* note 28; Truax v. Bisbee Local No. 380 (1918) 19 Ariz. 379, 171 Pac. 121; Lindsay & Co. Ltd. v. Montana F. of L. (1908) 37 Mont. 264, 96 Pac. 127; (1920) 6 A. L. R. 909.

[31] The secondary boycott may be a withdrawal of labor from patrons of the employer, or it may be a withdrawal of patronage. Permitting such a boycott are Parkinson Co. v. Building Trades Council, *supra* note 6; McKay v. Retail Auto. S. L. Union No. 1067, *supra* note 29; C. S. Smith Met. Market Co. v. Lyons (1940) 16 Cal. (2d) 389, 106 P. (2d) 414; Bossert v. Dhuy (1917) 221 N. Y. 342, 117 N. E. 582. *Contra*: O'Brien v. Fackenthal (C. C. A. 6th, 1925) 5 F. (2d) 389; Armstrong Cork & Insulation Co. v. Walsh (1931) 276 Mass. 263, 177 N. E. 2.

[32] PROSSER, TORTS (1941) 1004; TORTS RESTATEMENT, *op. cit. supra* note 11, § 775.

[33] For example, a strike to compel other workers to join the union is unlawful. Plant v. Woods (1900) 176 Mass. 492, 57 N. E. 1011. But a strike, the purpose of which is to obtain employment for members of the union is legitimate, although it will result in forcing other workers to join the union or give up their jobs. Pickett v. Walsh (1906) 192 Mass. 572, 78 N. E. 753.

[34] R An W Hat Shop, Inc. v. Sculley, *supra* note 3, adversely criticized in Note (1922) 32 YALE L. J. 171.

[35] PROSSER, *op. cit. supra* note 32, at 1002.

[36] Iron Moulders' Union v. Allis-Chalmers Co. (C. C. A. 7th, 1908) 166 Fed. 45; Cook v. Wilson (1919) 108 Misc. 438, 178 N. Y. Supp. 463; South Wales Miners' Federation v. Glamorgan Coal Company [1905] A. C. 239.

[37] Hitchman Coal & Coke Co. v. Mitchell; Flaccus v. Smith, both *supra* note 3. Many states have now outlawed this type of contract. CAL. LABOR CODE § 921.

been held to prevail.[38] And where one union attempts to persuade an employer to disregard a closed shop agreement with another union, an injunction has usually been available.[39]

The rules of the *Restatement of Torts* may aid in attaining a solution. Section 775 gives workers a privilege to inflict losses on an employer, including those resulting from interference with his contracts, if the means used are valid, and if the purposes of the action are legitimate.[40] The propriety of various purposes—whether they justify interference—is discussed at some length.[41] The other party to the contract is considered in section 809,[42] which provides that workers are not liable for loss caused a third person when their action was not directed against that person and was privileged against the person at whom it was directed. By this section, labor is immune from liability for incidental injury to contracts between employers and customers, suppliers or employees of the employer, provided the pressure is exerted for a proper purpose. The dictum[43] in the *Imperial Ice Co.* case seems to go further. It apparently states a privilege for labor intentionally to interfere with contracts of an employer and does not require that the injury to the third party be merely incidental. Thus legitimate interests promoted by labor in an industrial dispute are put on the same level as the interest which a person has in protecting another property or contract right. It is a conditional privilege to invade contracts, dependent upon the use of peaceful tactics and the existence of a proper object.

A principal aim of labor activity is to effect a change in wages or hours or working conditions—to improve the economic condition of workers. The welfare of any particular individual or group is undeniably a proper end for its activity, and the welfare of labor is no exception. The question is how far the individual or group should

[38] Beattie v. Callanan (1903) 82 App. Div. 7, 81 N. Y. Supp. 413; Wall Paper Co. v. Local Union (1921) 87 W. Va. 631, 105 S. E. 911. *Contra*: Parkinson Co. v. Building Trades Council, *supra* note 6.

[39] Hotel, Etc. Local Union v. Miller (1938) 272 Ky. 466, 114 S. W. (2d) 501; Goyette v. C. V. Watson Co. (1923) 245 Mass. 577, 140 N. E. 285. New York is apparently the only jurisdiction which permits this type of activity. Stillwell Theatre, Inc. v. Kaplan (1932) 259 N. Y. 405, 182 N. E. 63.

[40] "Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper."

[41] TORTS RESTATEMENT, *op. cit. supra* note 11, §§ 784-796.

[42] "When concerted action by workers against another causes economic loss to a third person through the effect of the action on the other, the workers are not liable for such loss if their action was not directed against the third person and is privileged as to the other against whom it was directed."

[43] *Supra* note 26, and text thereto.

be permitted to go in pursuing that interest. The answer depends upon the importance of the interest. Labor's struggle has received general recognition as a fight for a desirable equality, a movement by a large and underprivileged group for a better position in the economic system. This group should not be deprived of the only weapons with which it can combat those of the employer. The yellow dog contract was a common device for checking labor advances. Without a privilege to interfere with contractual relations the hands of workers are legally tied by a contract, the only purpose of which is to prevent the employees from selecting another bargaining agency less friendly to the employer. A contract for a definite term of employment is frequently used for the same purpose. In most industrial disputes it is almost inevitable that interference with contracts will occur. A concession by the courts to the extent of a conditional privilege for labor to interfere with contractual relations is necessary to equalize the bargaining power of the parties.

The dictum in *Imperial Ice Co. v. Rossier* is in harmony with other recent California cases recognizing rights of labor in the advancement of its economic interests.[44] Extension of these rights to include a privilege to act in the interests of the workers despite injury to contracts is a long jump forward, but organized labor is properly entitled to the same protection given agents and directors and parties to other contracts.

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[44] McKay v. Retail Auto. S. L. Union No. 1067, *supra* note 29; E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. (2d) 369, 106 P. (2d) 1; Lund v. Auto Mechanics' Union No. 1414, *supra* note 29; Shafer v. Registered Pharmacists Union (1940) 16 Cal. (2d) 379, 106 P. (2d) 403; C. S. Smith Met. Market Co. v. Lyons, *supra* note 31; Fortenbury v. Superior Court (1940) 16 Cal. (2d) 405, 106 P. (2d) 411.