UNLAWFUL INTERFERENCE WITH CONTRACTUAL RELATIONS

By J. G. STARKE*

'THE very strength of our common law, its cautious advance and retreat a few steps at a time,' said Benjamin Cardozo in his 1923 Yale lectures,[1] 'is turned into a weakness unless bearings are taken at frequent intervals, so that we may know the relation of the step to the movement as a whole'.

The great American scholar-judge was there making express reference to the common law, but his remarks were as apposite to equity as to the common law, and to doctrines requiring the application of both legal and equitable rules.

It seems now an appropriate time to take bearings for the principles of common law and equity which confer a cause of action, in certain circumstances, for unlawful interference with contractual relations. A period of just over a century has elapsed since the decision in *Lumley v. Gye* in 1853,[2] which gave birth to the tort of actionable interference with contract. Since that decision, there have been numerous refinements and developments, and indeed shifts in principle, in relation to the rudimentary doctrine formulated by the judges who sat in the case, culminating in the relatively recent decision of the English Court of Appeal in *Thomson & Co. Ltd. v. Deakin*.[3] The doctrine has been shaped and reshaped in a succession of decisions by distinguished common law and equity judges. The joint contribution and, in truth, joint interest of courts of law and equity in the subject are marked by the fact that the first important decision, *Lumley v. Gye,* was given by the Court of Queen's Bench upon demurrer to a common law declaration, and the most recent significant decision, *Thomson & Co. Ltd. v. Deakin,* upon a motion for equitable relief by way of injunction.

Between and outside these two major decisions there are a multitude of authorities, both in the case-law of the British Commonwealth and in that of the United States – to which the germinal doctrine of *Lumley v. Gye* emigrated in the latter part of the nineteenth century, and where it has received a native development by the Courts of most States.[4] Besides, there has been considerable

* B.A., LL.B., B.C.L. (Oxon).

[1] Lectures. 'The Growth of the Law', in Margaret E. Hall, *Selected Writings of Benjamin Nathan Cardozo,* 186, 187.

[2] (1853) 2 E. and B. 216.

[3] [1952] 1 Ch. 646.

[4] See F. B. Sayre, 'Inducing Breach of Contract,' (1923) 36 *Harvard Law Review* 663, 671.

juristic commentary upon the subject, inevitably, because of the uncertainties created by inconsistent judicial *dicta*.

So far as is known, no complete critical exegesis of this vast material has yet been attempted, nor is this the object of the present article.

History:

A first step is briefly to trace the various advances by which the character and scope of the doctrine of unlawful interference with contract became enlarged.

It is necessary to begin with *Lumley v. Gye*, because the decision cannot, or at least can only faintly be regarded as the application of existing principles of the common law to a new matter; rather, it was the starting point of a new distinct stream of legal development.[5] Shortly, it was decided by the Court of Queen's Bench that if a third person 'maliciously' were to 'entice and procure' an artiste to break a contract of exclusive employment with that artiste's impresario or entrepreneur, and special damage were to result to the impresario or entrepreneur, the latter might sue the third person for damages at common law. This result is extracted by comparing the three common law counts of the plaintiff's declaration with the principles stated by the judges (one of whom, Coleridge J., dissented) in deciding the matter upon demurrer; necessarily, this is less satisfactory than if there had been a decision of law upon all the facts, proved or admitted. In all three counts it was alleged that the defendant 'enticed and procured' the artiste, but only in the first and third counts was it alleged that the enticement and procurement had been 'malicious'. Counsel for the defendant argued cogently but unsuccessfully that 'if the action does not lie without malice, it does not lie with it.'[6]

It thus emerges that immediately after 1853, the new wrong of actionable interference was not only limited to contracts of exclusive personal service, but had to satisfy the following requirements:

(a) malice on the part of the defendant,
(b) an act or acts of direct enticement and procurement,
(c) an actual breach of the contract directly brought about by the enticement and procurement, and

[5] This is made clear by the High Court of Australia and the Judicial Committee of the Privy Council in *A.G. (N.S.W.) v. Perpetual Trustee Co. Ltd.*, where the principles underlying the older, historic action *per quod servitium amisit* (for loss of services) are distinguished from the novel doctrine of *Lumley v. Gye;* see (1955) 29 *Australian Law Journal* 74, 77-78 (Privy Counicl) and 85 C.L.R. (1952) 237, 296-7. (High Court).

[6] *Ibid.*, 220.

(d) special damage proved to have been suffered,
before a cause of action was established.

The subsequent history of the subject is best epitomized by describing it as a process of eliminating or whittling down the rigidity and stringency of these various requirements. The doctrine came to embrace all contracts and not merely those of exclusive personal service; malice as an essential ingredient of the wrong disappeared; under the modern authorities the doctrine encompasses all acts of interference, and is not limited to those of enticement and procurement; it may be sufficient if such interference is against the wills of both parties to the contract, without one party being caused to break the contract; and it is even enough now to show that the act complained of was done in such a way as to be likely to cause damage, though proof of actual specific damage be not given.[7] In the perspective of time, the radical innovations by which the boundaries of the doctrine were so extensively widened appear as a progression of steps in natural evolution, but they were none the less striking advances.

In 1881, *Lumley v. Gye* received affirmation in the decision of *Bowen v. Hall*,[8] again in relation to a contract of personal service. The Court of Appeal which gave the decision was divided, another Coleridge, Lord Coleridge C.J., dissenting, and upholding the dissent of his namesake in *Lumley v. Gye*. *Bowen v. Hall* established that wrongful acts of 'persuasion' to cause a person to break his contract are as actionable as an enticement or procurement operating directly upon the mind of such contract breaker, and that the requirement of 'malice' is fulfilled if there be an indirect purpose on the defendant's part to injure the plaintiff or to benefit himself at the plaintiff's expense. The majority judgments also sanctioned the granting of equitable relief by way of injunction in a proper case; interim injunctions against the contract breakers and the third party had indeed been granted at an earlier stage in the proceedings.

In 1893 the decision of the Court of Appeal in *Temperton v. Russell*[9] extended the newly developed tort to cover interference with *all* contracts, and not merely those of personal service; the subject contract in that case was one for the supply of building materials. The requirement of 'malice' was again toned down, and it was made clear that the motive of coercing one party to the con-

[7] See *Exchange Telegraph Co. v. Gregory & Co.* [1896] 1 Q.B. 147, 153, *per* Lord Esher.

[8] (1881) 6 Q.B.D. 333.

[9] [1893] 1 Q.B. 715.

tract by persuasion of the proposed contract-breaker is enough to fulfil the mental element in the tort.

It is not unkind to the English judges of the end of the nineteenth and beginning of the twentieth century to say that they took advantage of the *Lumley v. Gye* doctrine to curtail the activities of trade unions, or moves by, or combinations of workmen, for any militant purpose to secure better or more uniform conditions of employment. *Temperton v. Russell* was such a case. The defendants were trade unionists, and the alleged objectionable conduct was their pressure on different persons not to furnish materials to the plaintiff who in his turn supplied a building firm that had set itself against obeying trade union rules. Lord Esher was even prepared to hold that pressure upon a person *not* to enter into a contract was as actionable as pressure to cause a person to break a valid, existing contract.[10] Later, in *Allen v. Flood*,[11] Lord Herschell was to pour cold water upon this suggestion by crushingly speaking of the 'chasm' between procurement of a breach of contract and procurement of non-contracting.[12]

The point remains that a new spurt and a new emphasis were bestowed to and upon the doctrine at the turn of the century because the Courts had to grapple with the new field of industrial disputes. So, it is that in a trinity of House of Lords decisions, dealing with this domain, *Allen v. Flood, Quinn v. Leathem,*[13] and *South Wales Miners Federation v. Glamorgan Coal Co. Ltd.*[14] the law of actionable interference with contract received authoritative confirmation and exposition. In the United States, where the principle of *Lumley v. Gye* had also been cultivated in a multiplicity of State jurisdictions, it was not only labour disputes that impelled development of the law on the subject, but also the field of business contracts and relationships, under the need for protecting contractual advantages from injury by third parties (not necessarily combinations of employees). American Courts were vitally concerned with the sanctity of business arrangements, whereas English Courts – at least at the turn of the century – looked primarily to the potential dangers of coercive combinations, in disrupting trade and industry.

Allen v. Flood made it clear that 'malice', as a combination of a cause of action upon the *Lumley v. Gye* principle is a misnomer; all that is called for is the knowing and wilful procurement of a breach of contract, and this was confirmed in the *South Wales Miners'* case, in unmistakable terms.

[10] *Ibid.*, 728. [11] [1898] A.C. 1. [12] *Ibid.*, 121.
[13] [1901] A.C. 495. [14] [1905] A.C. 239.

In *Quinn v. Leathem* there was a major pronouncement by Lord Macnaghten, in which the *Lumley v. Gye* principle was extended from 'enticement and procurement' to the general area of interference with contractual relations, and in which, also, the possibility of justification for such interference was referred to. To quote the passage:

> Speaking for myself, I have no hesitation in saying that I think the decision[15] was right, not on the ground of malicious intention – that was not, I think the gist of the action – but on the ground that a violation of legal right committed knowingly is a cause of action, and that *it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.*[16]

If the *Lumley v. Gye* rule failed to commend itself to Coleridge J. in 1853 and to Coleridge C.J. in 1881, it can be imagined how startling Lord Macnaghten's formulation of the much wider doctrine would have been for the common lawyers of the preceding generation. It is fair to say that the words italicized above in Lord Macnaghten's statement have caused judges in subsequent cases considerable difficulty.

The question of justification raised in this passage came up for special consideration in the *South Wales Miners'* case where a miners' union in South Wales was sued by a number of colliery firms for causing miners, in breach of the terms of their employment, to cease work on certain days, in order to keep up the price of coal and protect wages. The House of Lords while admitting the possibility of moral or other duties of protection (e.g. of a parent or guardian) where a person might be privileged to exhort another to break a contract, refused to agree that any duty on the part of the union, or any interest on the part of the miners, would justify the union's action, or exempt it from liability.

From 1905 onwards, following upon these three decisions of the House of Lords there were a series of decisions illustrating the variety of acts which may constitute unlawful inducement of breach of contract, or unlawful pressure upon contracting parties. It is unnecessary to list the decisions in the present article; with only one or two exceptions, the cases will all be found cited or referred to in the arguments of counsel and in the judgments in *Thomson & Co. Ltd. v. Deakin.* From time to time, there was judicial hesitation in applying the width of the principles referred to in the above-

[15] I.e. *Lumley v. Gye.*
[16] (1901) A.C. 495, 510 (my italics).

mentioned judgments.[17] On the whole, English Courts required clear proof of the elements of the tort. But it was significant to find the doctrine applied recurrently to the field of commercial enterprise,[18] as distinct from the area of incidence of industrial disputes.

In 1926 it was recognized in *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.*[19] – not in every respect a satisfactory case – that unlawful interference with contractual relations might be actionable where no breach of contract resulted, but the interference was against the will of both contracting parties.

In 1949 it was sought to use the doctrine to protect commercial enterprise by preventing, by way of injunction, certain persons from acts of interference designed to affect detrimentally price of resale maintenance agreements in the motor trade. Such injunction was granted by Roxburgh J. in *British Motor Trade Association v. Salvadori.*[20]

Finally, in 1952 in *Thomson & Co. Ltd. v. Deakin,* the English Court of Appeal was obliged to undertake a thorough, searching investigation of the whole field of unlawful interference with contractual relations. The facts in that case are somewhat complicated, but, shortly, plaintiffs complained that they were denied paper supplies because the defendants, trade union executives, had persuaded the drivers and loaders employed by the Bowater organization, paper manufacturers and distributors, to break their contracts by refusing to drive or load lorries with paper for the plaintiffs, thereby causing the Bowater organization to break its contract for supplying paper to the plaintiffs. Relief was refused to the plaintiffs on three principal grounds:

(i) that the breach of the paper contract did not ensue as a necessary consequence of the defendants' acts;
(ii) that there had been no direct invasion by the defendants of the plaintiffs' contractual rights; and
(iii) that the defendants had not used unlawful means to bring about the denial of paper supplies.

The Court of Appeal confirmed and clarified, in a modern setting, the principles formulated half a century earlier by the House of

[17] See, e.g. *Said v. Butt* [1920] 3 K.B. 497, and *De Jetley Marks v. Greenwood* [1936] 1 All E.R. 863. For Australian decisions showing reluctance to apply the doctrine, see *O'Brien v. Dawson* (1942) 66 C.L.R. 18, and *Rutherford v. Poole* [1953] V.L.R. 130, 133-6.

[18] See *National Phonograph Co. Pty. Ltd. v. Edison-Bell Consolidated Phonographic Co. Ltd.* [1908] 1 Ch. 335, and *Jasperson v. Dominion Tobacco Co.* [1923] A.C. 709.

[19] (1926) 42 T.L.R. 376, and 593. [20] [1949] Ch. 556.

Lords. Summing up the results of this fresh and radical review of the doctrine, it may be said that the Court made clear the following:

(a) Interference with contractual relations, to be actionable, may be direct or indirect, and indirect interference may be adequately constituted by persuasion or pressure bearing upon non-parties to the contract, such as servants of the contracting parties.

(b) Knowledge of the contract, and the intention injuriously to impair the contractual relations of the parties affected, are of the gist of the cause of action; there must be something equivalent to an intention directly to invade the plaintiff's contractual rights.

(c) The resultant injury may be represented either by actual breach of the contract or prevention or impairment of the performance thereof.

(d) Dealings by the defendant, inconsistent with the contract between the parties, and continued by the defendant with one of the contracting parties *after* notice of the contract may represent an actionable interference.

(e) It is always necessary to consider problems of causation and remoteness of liability; the breach of the subject contract must be directly attributable to the defendant's wrongful acts, and not be a merely incidental result.

The judgments of the Court of Appeal, though denying the plaintiffs' right to relief, are remarkable for the width of the charter given to litigants who may in the future desire to have recourse to this modern remedy of actionable interference with contract. It is a far cry from *Lumley v. Gye* in 1853 to *Thomson & Co. Ltd. v. Deakin* in 1952, so far, that the latter case is almost unrecognizable as a descendant of its ancestor.

It is indeed to the more modern twentieth century decisions, including *Thomson & Co. Ltd. v. Deakin,* rather than to *Lumley v. Gye* and the later nineteenth century cases, that one must turn for basic enlightenment on the doctrine of unlawful interference with contractual relations.

Elements of the Cause of Action for Actionable Interference with Contract

For the sake of clarity and convenience the following terminology, which is based partly on that used in *Thomson & Co. Ltd. v. Deakin,* is adopted: The third party procuring or inducing a breach of contract, or interfering with contractual relations is called 'the intervener', the party breaking the contract, 'the contract-breaker', the

party injured by the breach of contract, 'the contractee', and the contract itself, 'the subject contract.'

To constitute an actionable interference with contractual relations, there must be:

(a) Knowledge, on the part of the intervener, of the subject contract.[21] *Semble,* there need not be knowledge of the precise terms of the contract,[22] but merely of its broad essential provisions, so that the intervener is sufficiently fixed with notice that he interferes at his own risk.

(b) Intention to induce, or procure, or by pressure, or other wrongful means (e.g. fraud, intimidation) to bring about a breach of the contract by the contract-breaker, or an intention to interfere against the wills of both contracting parties and produce an injury to one or both parties, affecting the performance of the contract.[23] In the latter event, where no breach of the contract ensues, the intended interference, according to Jenkins L.J.,[24] must be such, that if done by one of the contracting parties, it would be a breach of contract, but *quaere* whether the alleged interference should have to satisfy this test. Mere negligent interference is not actionable, either because to allow a remedy for negligent acts would enlarge beyond reasonable bounds the scope of the doctrine, or because this would impose too heavy a duty upon citizens.[25] Of course, in many instances, the injured party will have his remedy directly in negligence, negligence being the primary cause of action, while the interference with contractual relations is only an incidental result, or is to be regarded as one element in the assessment of the quantum of damages; e.g. if the alleged intervener negligently destroys materials which had been promised by one contracting party to another.

Recklessness is, in principle, equivalent to an intention to induce, etc., and a man is presumed also to intend the natural and probable consequences of his acts.

Although 'malice' has ceased to be an essential element of the tort, ill-will towards or motive to injure the contractee may be a factor to be weighed in account, in order to determine whether there be an intention to interfere, without lawful justification, with contractual relations.

(c) Actual pressure, or acts of inducement, procurement or per-

[21] See *Thomson & Co. Ltd. v. Deakin* [1952] 1 Ch. 646, 678, 694-7, 702-3.
[22] *Ibid.,* 702-3.
[23] *G. W. K Ltd. v. Dunlop Rubber Co. Ltd.* (1926) 42 T.L.R. 376.
[24] [1952] 1 Ch. 646, 694.
[25] See Fowler V. Harper, 'Interference with Contractual Relations', (1953) 47 *Northwestern University Law Review* 873, 883 *et seq.*

suasion, brought to bear upon the contract-breaker, or acts of interference against the wills of both parties. As already mentioned, according to *Thomson & Co. Ltd. v. Deakin,* such pressure, etc. may be: (i) direct, or (ii) indirect, as where it operates not upon the contractee directly, but upon servants of the contractee. Such acts of interference may include physical restraint of a contracting party, provided it operates to prevent due performance by the latter of the contract.[26] Inconsistent dealings[27] between the intervener and one contracting party may constitute unlawful interference, but there must in all cases be something akin to a direct invasion by the intervener of another's contractual rights.[28]

(d) An actual breach of the contract, or a prevention, or impairment of, or burden upon the performance of the contract,[29] and this must have followed, according to the chain of causation, as a necessary consequence of the acts of interference under (c) above.[30] Or to adopt the negative test suggested by an American writer,[31] the breach or impairment of performance must not have resulted 'incidentally' from the acts of interference.

Two points need to be noticed.

First, as to the breach of contract, contrary to Porter J.'s views in *De Jetley Marks v. Greenwood*[32], it is not necessary that the breach be of a kind which goes to the root of the contract or which in effect amounts to an anticipatory repudiation of its terms. In *Thomson & Co. Ltd. v. Deakin*[33] Evershed M.R. expressly cast doubt upon Porter J.'s opinion.

Second, it would seem that, as a result of *Thomson & Co. Ltd. v. Deakin,* the English law on actionable interference with contract may move more completely in the direction of the American authorities, and generally allow a mere impairment of performance or of enjoy-

[26] In *Thomson & Co. Ltd. v. Deakin,* both Evershed, M.R. at 678 and Jenkins, L.J. at 694-5 expressed the view that physical restraint or detention of one contracting party, preventing performance by him, might be an actionable interference. But in *A.G. (N.S.W.) v. Perpetual Trustee Co. Ltd.* (1955) 29 *Australian Law Journal* 74, 78, the Judicial Committee of the Privy Council appears to imply that the plaintiff in *Lumley v. Gye* would have had no cause of action if the artiste in that case had been by 'battery' prevented from serving him.

[27] See *Thomson & Co. Ltd. v. Deakin,* at 694, and cf. *De Francesco v. Barnum* (1890) 45 Ch. D. 430. See also, H. Lauterpacht, 'Contracts to Break a Contract' (1936) 52 *Law Quarterly Review,* 494.

[28] *Thomson & Co. Ltd. v. Deakin* at 695.

[29] Cf. Fowler V. Harper, *op. cit.,* 883 *et seq.*

[30] *Thomson & Co. Ltd. v. Deakin* at 696.

[31] F. B. Sayre, *op. cit.,* at 678.

[32] [1936] 1 All E.R. 863.

[33] At 689-90.

ment of the contract, without actual breach by a party, to be an actionable injury.

(e) Special damage or likelihood of special damage, flowing from the breach of contract or the impairment of performance or burden upon performance of the contract.[34] As to the measure of damages, this need not be identical with the measure of damages (for breach of contract) that would have been due to the contractee from the contract-breaker; curiously enough, there is authority for this point in *Lumley v. Gye* itself.[35] Hence, it follows that if the contractee has already recovered damages for the same breach of contract from the contract-breaker, he is not necessarily precluded from next suing the intervener for damages for actionable interference with contract. On the other hand, there may theoretically be cases in which, where the measure of damages both for the breach of contract and for the tort are identical, and the contractee has first recovered damages upon the contract, the intervener will have a good defence to a subsequent action for unlawful interference with contract, because the plaintiff cannot establish damage which is the gist of the tort.

On the whole, it seems illogical that the contractee should in certain cases be able to recover more from the intervener than from the contract-breaker, for the identical breach of contract.

The competition or concurrence of remedies for damages on the one hand, between contractee and contract-breaker, and on the other hand, between contractee and intervener, raises some interesting and difficult questions. For instance, suppose that the contractee in the first instance recovers in tort against the intervener, is he then precluded from recovering upon the contract in proceedings against the contract-breaker? In particular, could any amounts recovered in tort diminish the measure of damages in contract?

Justification for Interference with Contract:

So far as the English case-law goes, there is not enough authority providing adequate guidance. In truth, the English Courts do not seem to have fully considered the different circumstances in which there might be a justification for interference which no civilized society could reject. Pure self-interest,[36] and even defence of one's own solvency,[37] have been rejected as legitimate excuses for the

[34] See *Exchange Telegraph Co. v. Gregory & Co.* [1896] 1 Q.B. 147, 153.
[35] At 233-4.
[36] See *De Jetley Marks v. Greenwood*, at 873, and the *South Wales Miners' Case.*
[37] *De Jetley Marks v. Greenwood*, at 873.

invasion of contractual relations between others. There has been emphasis upon the justification of moral duties, or duties of protection of a parent or guardian, including the well-known case of the righteous father persuading his daughter not to become betrothed to a scoundrel or profligate – a case on which there appears to be a *consensus omnium* on both sides of the Atlantic.[38] It is agreed that such duties may legitimately warrant an interference with contract.

But surely these situations of moral duty or parental protection do not exhaust all possible justifications. An American writer has suggested that we should denominate the justifications as 'privileges'.[39] This appears to be a derivation by analogy from the law of actionable defamation, where pleas of absolute and qualified 'privilege' have for long played a considerable role. Possibly, certain of the grounds of privilege in defamation are capable of importation into the law of actionable interference with contract, but the terrain here has not been judicially explored. For example, might not a Member of Parliament, acting under a sense of public duty, be privileged if he exhorted certain of his constituents not to proceed with contracts which, though valid, were unwise and not in the public interest?

Courts may, in this connection, have to weigh in the balance the various social and public interests involved. In the United States, for instance,[40] it seems to be agreed that if a third party succeeds in breaking up an engagement between a couple, and becoming in turn engaged to one of these persons, the victim of the broken engagement will not have a cause of action for interference with contract, for otherwise the Courts would be deluged with proceedings by disappointed lovers against successful rivals. Again, where the actual health of the contract-breaker is involved, disinterested, *bona fide* advice by the intervener, especially if he be a doctor, that the contract should be repudiated in order to avoid further impairment of health, is also, according to American opinion, a lawful justification.[41]

Bars to Relief

The possibility of bars to relief has also not been fully investigated either by judges or by the writers.

So far as equitable relief is concerned, the plaintiff may be

[38] Compare Viscount Simon L.C. in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch* [1942] A.C. 435, 442, and F. B. Sayre, *op. cit.*, at 682.

[39] Charles E. Carpenter, 'Interference with Contract Relations' *Harvard Law Review* (1928) 41 728, 745 *et seq.*

[40] *Ibid.*, 750-1.

[41] Cf. *Brimelow v. Casson* (1924) 1 Ch. 302.

debarred from a remedy if he comes into court with 'unclean hands', or his conduct is such that a court of equity ought in the right exercise of judicial discretion to deny him relief. Other equitable defences, e.g. delay, and acquiescence, may be applicable where equitable relief only is sought.

It is conceivable that, on grounds of public policy, courts might refuse to entertain an action for unlawful interference with contract, just as they refuse on similar grounds to enforce a contract contrary to public policy. Possibly, here, the distinction between a justification or privilege on the one hand, and a bar to relief on the other, may need to be clarified; e.g. the case of proceedings by a disappointed lover against a successful rival (mentioned above) may more properly be treated as involving a bar to relief on grounds of public policy, than a 'privilege' of the successful rival to procure a breach of the engagement.

It is, of course, clear that if the subject contract is itself illegal or invalid, no action will lie.

Rationale of Doctrine of Unlawful Interference with Contract:

Various suggestions have been made as to what is the true basis of the present law of interference with contractual relations.

In *Lumley v. Gye*,[42] it was suggested that the new remedy was necessary because the compensation for breach of contract against the contract-breaker might be inadequate.

In *Quinn v. Leathem*, in the passage quoted above, Lord Macnaghten founded the remedy upon the principle that a 'violation' of a legal right committed knowingly gives a cause of action, and contractual relations constitute a legal right. But this seems to go too far, as in reality English law gives no general recognition to any doctrine of *ubi jus, ibi remedium.*

Morris L.J. in *Thomson & Co. Ltd. v. Deakin*, suggested that the basis was – '. . . a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so'.[43] This is not apt or adequate enough where no wrongful or coercive pressure is applied to the contract-breaker, but the intervener offers an inducement which the contract-breaker *freely* accepts, and the intervener's intention is to procure the breach of the contract for his own advantage. For in such a case, the contract-breaker at all material times remained perfectly free to continue dealing with the contractee, if he so chose, and not to break his agreement.

[42] At 233-4. [43] At 700-1.

What Morris L.J. had in mind was perhaps more accurately put by an American writer when he suggested that the doctrine of unlawful interest with contractual relations is conditioned by a public interest of high social importance. namely the preservation of the security and integrity of contractual relations as between the parties.[44] This is placing the doctrine, broadly speaking, upon a business or economic basis, in accordance with public interest. Hence, the cause of action would be narrowed in measure as public interest allowed the possibility of impingement upon the contract, either in order to permit freedom of competition or economic rivalry, or to protect some public purpose of superior importance, e.g. the health of the contract-breaker, the duty of a parent or guardian to watch over the welfare of the contract-breaker, and – in the case of contracts with local or governmental authorities – the untrammelled privilege of disinterested persons to advise breach on the ground of public advantage.

But there is undoubtedly some weight of opinion to the effect that the contractual relationship is of the nature of a 'property' right, to be protected against third party interference. A modern American text-book on Equity,[45] referring to equitable remedies for interference with contractual relations, states:

> Not only is the right to carry on a lawful business free from wrongful interference a right of property or a substantial right in the nature of a property right, but the contract, with rights thereunder, is a property right. Accordingly the property element is more than adequately present to justify equitable consideration.

This view has also been adopted by Professor Lauterpacht (now Judge Lauterpacht of the International Court of Justice) who has described the *Lumley v. Gye* doctrine as marking 'another step in the recognition of the property character of the contractual right'.[46] One American writer[47] has treated unlawful interference in order to appropriate another's contractual advantages as equivalent in effect to the appropriation of that other's 'property'.

But how can a contract right, a right *in personam*, be converted in this manner to a right of property, a right *in rem*? A distinguished equity judge[48] has resolved the paradox by declaring that the conception underlying the doctrine of unlawful interference with contract –

[44] Fowler V. Harper, *op. cit.*, at 873-5.
[45] De Funiak, *Handbook of Modern Equity* (San Francisco, 1950).
[46] Lauterpacht, *op. cit.*, at 506. [47] Fowler V. Harper, *op. cit.*, at 881.
[48] Kitto J., of the Australian High Court, in *A.G. (N.S.W.) v. Perpetual Trustee Co. Ltd.* 85 C.L.R. (1951-2) 237, 296-7.

may be said to be that a person has a right, a right *in rem,* in respect of the contractual rights, the rights *in personam,* which he possesses as against the other party to his contract.

Remembering the contribution to the doctrine of equity judges since 1853, it is not surprising that the limited personal remedy created by *Lumley v. Gye* should have been moulded and adapted so as eventually to end in creating rights of property, in effect.[49] Sir Raymond Evershed, the Master of the Rolls, has indeed treated one modern decision on interference with contract, *British Motor Trade Association v. Salvadori,* as a specific instance of the general tendency of modern equity to move from personal remedies to the conferment of proprietorial rights.[50]

Since the remedy for unlawful interference with contractual relations will lie in an appropriate case where the subject contract is terminable at will, and is not to endure for any prescribed period, the attitude here of a Court of equity is consistent with the approach in the modern decision of *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.*,[51] where an injunction was granted at the instance of a licensee to protect his interest under a terminable licence.

Difficult questions of principle are none the less involved in the application of equitable relief. The authorities suggest that an injunction may be granted against an intervener seeking to procure a breach of contract, although the breach be one of the *positive* stipulations of a contract, and although on that account an injunction might not be granted at the instance of the contractee against the intending contract-breaker. What, however, if the alleged threatened interference be against the wills of both contracting parties, as in *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.*? In principle, an injunction ought not to be granted if the threatened interference would amount to a breach only of a positive term and not of a negative term of the contract. The plaintiff should in such event be left to his remedy for damages at law. Otherwise, there would in relation to a contract be a more stringent obligation in equity upon a third party than upon a contracting party.

There is nothing to stop injunctions being granted against both the intending contract-breaker and the intending intervener where the threatened breach is of a negative stipulation in the contract.[52]

[49] See remarks by Lord Parker in *Sinclair v. Brougham* [1914] A.C. 398, 442.

[50] See 'Equity is Not to be Presumed to be Past the Age of Child-Bearing', *Sydney Law Review* (1953) vol. 1, 1, 12.

[51] [1948] A.C. 173.

[52] See *Bowen v. Hall* (1881) 6 Q.B.D. 333, and cf. *Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1900] 2 Ch. 352, and [1901] 2 Ch. 37.

The extent to which the incidence of equitable relief has contributed to the moulding of the law of actionable interference with contract is frequently overlooked. That is perhaps due to the fact that the judges and text-books have treated the cause of actions as being for a 'tort'. This raises a further point. It is true that the tort concept has been used to develop the remedy for unlawful interference with contract, but is not that akin to the historical process of earlier centuries whereby the originally tortious remedy of *assumpsit* was employed to develop the law of contract, and contractual remedies? In a similar way, is not the present cause of action for interference with contractual relations one essentially for the protection of contract, despite the use of the machinery of an action in tort? The concurrence of legal and equitable remedies, and the undoubted enlargement of the doctrine under equitable influences, rather serve to confirm that the cause of action is for something more than a bare 'tort'.

So far as the cause of action has been influenced by equity, it can be said that in this field equity has indeed tempered and supplemented the common law rules as to privity. For obligations in regard to a contract are, by the doctrine of interference with contract, imposed upon third parties, and the significant result of cases such as *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.* where the interference was against the will of both contracting parties and there was no breach by either contracting party, is that a third party may be under an obligation not to commit a breach of a contract between others.

The remedy of actionable interference with contract is capable of further extension, in cases where the common law rules of privity of contract might preclude relief. Applied as it was in *British Motor Trade Association v. Salvadori* to price of resale maintenance agreements, it may yet become available to enforce against sub-purchasers the type of restrictions attached to chattels which were held unenforceable in *Taddy & Co. v. Sterious & Co.*[53] and *McGruther v. Pitcher*[54] provided that such restrictions hinge in the first instance upon some contractual arrangement.

That is not the only domain where the remedy can fill gaps and provide redress. A recent case, *Statnigros v. Storhaug & Partners.*[55] albeit the decision of the Mayor's Court, London, illustrates the use of the remedy in tenancy matters. There it was held that a third party who prevented access of a tenant to the subject premises could

[53] [1904] 1 Ch. 354.
[54] [1904] 2 Ch. 306.
[55] [1953] Current Law Year Book, s. 3556.

be restrained by injunction from interfering with the contract of tenancy between the landlord and the tenant. The potentialities of such a remedy in these days when tenanted premises are frequently subject to the law of the jungle, will be best appreciated by practitioners in tenancy jurisdictions. Another possible field of application of the doctrine is in the law of passing-off. As the law is at present,[56] an agent having the exclusive right to import and market goods of a foreign manufacturer, which bear a respected trade name or reputation, is not as a rule entitled to bring a passing-off action against another importer or distributor who passes off other goods under that foreign name. The reason is that the foreign name or reputation is associated with the foreign manufacturer, and not with the local agent. But may there not be circumstances in which the agent may be entitled to restrain such other importer or distributor from thus interfering with his agency contract with the foreign manufacturer?

These examples are by no means exhaustive. They suggest that the doctrine of unlawful interference with contractual relations may yet be further extended and developed in useful directions.

As the doctrine has developed in the past in Anglo-American law, there is no exact parallel to it in other legal systems. The English common law practically stumbled upon the *Lumley v. Gye* rule, almost as if by historical accident. The discovery passed practically unnoticed for years until the new rule, the new expedient were in the next phase moulded in order to deal with the militant activities of trade unions and employee combinations, and – in the United States – to protect contract rights for the advancement of business enterprise. In French law, on the other hand, the equivalent doctrine of interference with contract was derived logically from a principle precluding one contracting party from entering into inconsistent contractual relationships, while in German law this was deduced from the obligations of contracting parties not to act *contra bonos mores*.[57] If the French and German solutions are more logical and more scientific, it has yet to be established whether they are more just or more appropriate to modern conditions than the Anglo-American doctrine.

There are none the less still a number of uncertainties surrounding the doctrine in English law. The *dicta* of the Court of Appeal in 1952 in *Thomson & Co. Ltd. v. Deakin* may have to be reconsidered

[56] See *Dental Manufacturing Co. Ltd. v. De Trey & Co.* [1912] 3 K.B. 76.

[57] See Lauterpacht, *op. cit.*, 524-8, for a brief outline of the French and German law on the subject.

when applied to concrete facts, either by the Court of Appeal itself, or by the House of Lords. Certain of the *dicta* allowing a remedy for 'indirect' interference with contractual relations are open to criticism as amounting to over-protection of contract rights, and as weakening the sound principle of the common law that there should be primary recourse against the party in breach of the contract.

Hence the final position in our legal system of the doctrine of interference with contract is still far from being positively ascertained.

In 1923, the action for interference with contractual relations was described[58] as 'an *ingénue* in the law', whose 'characteristics and limitations . . . . have not yet been determined or agreed upon'. Now, over thirty years later, the same general description applies, and the cause of action is a long way from being a sophisticate.

[58] F. B. Sayre, *op. cit.*, 663.