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TRADE ORGANIZATIONS FOR THE COLLECTION OF DEBTS DUE MEMBERS BY MEANS OF BOYCOTT.

In the course of his opinion in the case of *Bohn Mfg. Co.* v. *Hollis*,[1] decided in 1893, Justice Mitchell, of the Supreme Court of Minnesota, observed:

"This is the age of associations and unions in all departments of labor and business for purposes of mutual benefit and protection. Confined to proper limits, both as to ends and means, they are not only lawful but laudable. Carried beyond these limits they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations cannot go without interfering with the legal rights of others is the problem which, in various phases, the courts will doubtless be frequently called to pass upon."

Two cases decided during the current year, namely, *Weston* v. *Barnicoat*[2], in the Supreme Court of Massachusetts, and *McIntyre* v. *Weinert*,[3] in the Supreme Court of Pennsylvania, furnishes illustrations of a lately developed scheme of combination among traders, which, in one phase,

[1] 55 N. W. Rep. 1119.
[2] 56 N. E. 619.
[3] 195 Pa. 52.

gives rise to the legal problem mentioned by the learned judge in the language just quoted, and these cases may serve as a text for a brief discussion of the subject of this article.

In each case the plaintiff based his action on the ground that the defendant had resorted to unlawful methods for the collection of a debt alleged by the defendant to be due him from the plaintiff; the methods being the "black-list" and "boycott" (using the terms in their popular sense), made effective through the agency of an organization of which the defendant was a member. The scheme of the organization was to bring about a combination of all wholesale dealers in a particular branch of trade in a given locality so that retail dealers, of which plaintiff was one, in the same branch, and carrying on business in the same place, would be dependent for their supplies upon members of the combination. When a retail dealer was reported by any member of the organization as having refused after a certain time to pay a debt alleged to be due the latter, his name was entered upon a list known as the "black-list," which was sent to all members of the combination, who, after receiving it, were obliged under the rules of the association to thereafter refuse to sell supplies to the alleged delinquent, either on credit or for cash, until notified that his indebtedness had been discharged.

The effectiveness of this boycott system of collecting debts, where the combination is strong enough to establish a monopoly in a particular branch of trade, is perfectly apparent, and it is not surprising that the plan has been widely adopted by wholesale dealers in the various commodities, which are the subjects of modern commerce. The tendency of the times is towards the concentration of each branch of trade in a few hands, and the monopoly, which is necessary to the success of the plan, is thus the more easily established.

To what extent, if at all, the plan itself should receive the approval of the courts is therefore a question of present importance, and if the decisions cited give any aid in its solution, they are worthy of careful study.

The facts of the Massachusetts case of *Weston* v. *Barnicoat* are well stated in the report of the case as follows:

"This is an action of tort brought against a member of an association of the type considered in *Hartnett* v. *Associa-*

tion (169 Mass. 229) for using the machinery provided by the Association's by-laws. The defendant made a claim against the plaintiff for the price of a granite monument, which the plaintiff declined to pay. The defendant thereupon notified the plaintiff that if the plaintiff did not pay he should report the plaintiff's name to the Association, to be placed upon its records of those who did not pay their honest debts. The plaintiff not paying, the defendant notified the local secretary, and thereupon the plaintiff received a letter from the Association, urging him to settle or explain, with the threat of placing his name upon the record if he did not. The consequence of placing a name upon the record or black-list was a boycott by the Association, as the plaintiff was notified by a copy of the following by-law: 'No member of this Association shall quote prices or do any work, either directly or indirectly, for any person or persons whose name appears on the list.' The plaintiff did not pay, and a little later his name was placed upon the list with the anticipated result, and with the effect of serious damage at least to the plaintiff's business. The plaintiff thereupon brought this action for causing the circulation of the report and had a verdict."

The case was treated as an action of libel, the defamatory publications being the notice, that plaintiff refused to pay a debt due defendant, sent by the defendant to the Association, and the "black-list" containing the name of plaintiff among the names of those persons "who did not pay their honest debts."

The defendant set up as a defence the truth of the alleged libel and also that the communications complained of were under the circumstances privileged. The exact issues of fact, which were determined by the jury, did not appear from the record, and the Court of Appeal therefore discussed the several grounds on which the verdict could be justified. The truth of the alleged libel having been set up, it became a controverted question at the trial whether or not the plaintiff was actually indebted to defendant, but the Appellate Court, in sustaining the verdict, did not rest its conclusion on the assumption that this question of indebtedness had been determined by the jury in favor of the plaintiff. On the contrary, the court in its opinion said:

"Even if there was a debt, however, the plaintiff might have recovered upon one of several grounds, that the publication imported a general habit on the part of the plaintiff of not paying his debts (whether it had that meaning was one question to be left to the jury) or that although there was a debt there was a counter-claim in recoupment, which manifestly justified the plaintiff in not paying until it was adjusted, or that the publication was caused with malicious intention."

It should be noted that while defendant had only one claim against plaintiff, as appeared from the evidence, his name at the instance of defendant had been placed on a record of those "who did not pay their honest debts." The court might therefore have held, if it concluded that the plaintiff must recover, if at all, on the ground of libel, that if the alleged libelous notice had been confined to an exact statement of plaintiff's indebtedness, which the jury believed to be true, the verdict should have been in favor of the defendant, the communication being in the judgment of the court not privileged. On the question of privilege the court said:

"Several rulings were asked on the question of privilege. As we have seen, the case is to be considered solely on the footing of libel. From this point of view it is perfectly apparent that the judge could not have ruled that the communication was privileged as matter of law. The jury might well have found facts that would cut at the roots of such a ruling. They might have found not only that the proposition, that the plaintiff was a man who refused or neglected to pay his honest debts, was false, as they have found, but also that it was known by the defendant to be false. They might have found that it was volunteered from malevolent motives. They might have found that the whole organization was a mere scheme to oust the courts of their jurisdiction and to enforce colorable claims of the members by a boycott intended to take the place of legal process, and that there was no pretense of any duty about the matter. Indeed, it is hard to see how the by-laws, or any understanding of the defendant about the by-laws, could have afforded him a justification, as the by-laws merely expressed the terms on which he saw fit to enter into a voluntary organization. A

man cannot justify a libel by proving that he contracted to libel. More specifically, a false statement of a kind manifestly hurtful to a man in his credit and business and intended to be so, is not privileged because made in obedience to the requirements of a voluntary association got up for the purpose of compelling by a boycott the satisfaction of its members' claims by the exclusion of a resort to the courts."

"We do not assume that the character of this organization was what we have described. We only say that the jury might have found it to be such, and the requests for rulings do not exclude that possible view of the facts. Of course, we do not mean to say that the statement might not have been privileged, if believed to be true, and if the purpose of the Association and publication was, and was understood to be merely to give information to all parties concerning the credit of people with whom they might deal, but none of the requests were limited to such a state of facts. The difficulty in supposing it is that the by-laws expressly require the members to have no dealings with any person whose name is on the list."

A point was made by the defendant that as the publication of the "black-list" was made by the Association he was not responsible for its action; but the court refused to sustain this view and held, on the contrary, that the defendant having, by his notice of indebtedness sent to the Association, pursuant to an understood plan, set in motion its machinery of boycott and black-list as against the plaintiff, was responsible for the consequences to the latter.

The case may therefore be regarded as authority for the propositions:

First. The publication by means of a "black-list," such as described above, of the name of a trader as a delinquent debtor, is libelous *per se* and actionable without proof of special damage if the allegation of indebtedness be false in fact.

Second. Such publication does not become privileged by reason of the fact that it is made in accordance with the rules of an association designed for the purpose of enforcing the payment of debts due members through boycotting or refusing supplies to their alleged delinquent debtors.

Third. The individual member of an association organized for the collection of debts, in the manner described, is responsible in damages to any trader, whose name, by a false statement that the latter is indebted to him, he causes to be placed on the "black-list" of the association.

Having regard to the first two propositions as stated, the case may, on hasty consideration, appear to have departed from earlier authorities on the law of libel; since it has generally been held that to falsely allege of a trader that he is indebted, without imputing insolvency, is not libelous *per se,* and that one trader may directly, or through an association of which both are members, impart information concerning the credit of a third, without incurring liability by reason of the falsity of such information, if it were given in good faith, with an honest belief in its truth, and for the purpose of enabling the person receiving it to determine whether or not credit could be safely extended to the third party. It is submitted, however, that the decision, instead of advancing new theories on the law of libel, is in thorough accord with principles already well established. The court undoubtedly treated the "black-list" libelous *per se,* not simply because it contained a false allegation of indebtedness, but, for the further reason, that the extrinsic circumstances surrounding the publication necessarily tended to make it injurious to the trade or calling of the person named as the delinquent debtor.

It has always been held actionable without proof of special damage to falsely impute insolvency to a trader, because the ability to obtain credit and carry on trade is thereby presumptively impaired; and when the same effect is necessarily produced by the publication in a particular way of a false allegation, that a trader owes a debt, it is only logical that the law should attach the same consequence to such a publication, as if the fact of insolvency were falsely alleged. It is indeed difficult to conceive a plan better calculated to inflict injury and damage on a trader than to circulate among dealers, upon whom he is dependent for supplies, a statement, the effect of which is to prevent their selling to him upon any terms; and if such statement is false it should, upon well-established principles, be regarded as an actionable libel

without proof of special damage. It is not unfair to the person giving the false information to presume that the damage intended by him and his association was in fact suffered.

The second proposition stated above upon the authority of the case under discussion is equally sound, and in harmony with the principles, to which the courts have always relied, in determining whether or not a communication, otherwise libelous, was justifiable and excusable on the plea of privilege.

Odgers on "Libel and Slander," page 238, states the rule to be that where the defendant has an interest in the subject matter of the communication, and the person to whom the communication is made has a corresponding interest, in such case every communication honestly made in order to protect such common interest is privileged by reason of the occasion. He further says: "Such common interest is generally a pecuniary one; as that of two customers of the same bank, two directors of the same company, two creditors of the same debtor." And again: "To be within the privilege the statement must be such as the occasion warrants, and must be made *bona fide* to protect the private interests both of the speaker and the person addressed."

Chief Justice Holmes, of the Massachusetts court, recognized these principles when, in the opinion already quoted, he said:

"Of course we do not mean to say the statement might not have been privileged, if believed to be true, and if the purpose of the Association and publication was, and was understood to be merely to give information to members concerning the credit of people with whom they might deal."

In such a case the legitimate object of the communication being to protect the interest of the person or persons to whom addressed, would bring it within the exception to the general rule, and make it privileged. As pointed out by the court, however, protection to the members of the Association, to whom the black-list notice was sent, was not the object sought to be accomplished thereby, for the reason that, after receiving it, not only were they bound to refuse credit to the alleged debtor, but according to the rules of the

Association must decline to trade with him on any terms. The object of the communication was to enforce, by the coercive process of boycott, the collection of a debt due one member of the Association, and was therefore in his interest alone, and not made in a common interest, which would give it a privileged character. It is no answer to say that a common interest arose by reason of membership in an association, whose by-laws required the notice to be sent, for to quote again from the language of the court: "A man cannot justify libel by proving that he contracted to libel."

The Pennsylvania case of *McIntyre* v. *Weinert* (*supra*) also sustains the proposition that a false notice of indebtedness sent by one member to other members of an association, in accordance with its by-laws, for the purpose of causing them to boycott or refuse supplies to the alleged debtor until he pays the claim, is libelous without proof of special damage; but the court in that case was not under the pleadings called upon to decide whether such a notice could be regarded as a privileged communication, by reason of the fact that it was confined to members of an association organized for mutual benefits and protection. The issue was raised by a demurrer to the declaration or plaintiff's statement of claim, which alleged not only that the allegation of indebtedness was false but maliciously made, and the court held that the facts of the statement, being admitted by the demurrer, the plea of privilege could not be raised, since the malice in making the communication complained of would destroy any privileged character which it might otherwise have possessed. The facts of this case, which may be of interest, are briefly as follows:

The plaintiff brought suit for injury to his business, that of a retail produce dealer, by the act of defendant, a wholesale produce dealer, in falsely notifying the members of an association of wholesale produce dealers known as the "Philadelphia Produce Credit and Collection Bureau," that plaintiff was indebted to him in a certain sum, which plaintiff had refused to pay. In consequence of this notice plaintiff's name was placed on a debtor's list or "black-list" of the Association, and all its members thereafter, in accordance with its rules, as defendant intended they should, refused to sup-

ply plaintiff with supplies either on credit or for cash. It was alleged in the statement of claim that the Association was composed of all of the most prominent wholesale dealers in Philadelphia, and that plaintiff was almost entirely dependent upon them for his supplies.

It will be noted in this case that the communication complained of simply alleged that the plaintiff was indebted to defendant in a certain sum, differing in this respect from the Massachusetts case, wherein the "black-list" notice was to the effect that the plaintiff in the latter case did not "pay his honest debts."

The Supreme Court of Pennsylvania, however, held the false notice of indebtedness, considered in connection with the extrinsic circumstances alleged in the statement, libelous *per se* and actionable without proof of special damage. The court, through Justice Mestrezat, said:

"In support of his demurrer, it is claimed by the defendant that the writing is not libelous. Standing alone, possibly that may be true. But in considering this writing we must consider not only the writing itself, but the inducement laid in the statement. 'It is the office of the inducement to narrate the extrinsic circumstances, which, coupled with the language published, affects its construction, and renders it actionable; where standing alone and not thus explained, the language would appear not to affect him injuriously.' (Townsend on 'Slander and Libel,' Sec. 308.) The publication complained of, considered in the light of the extrinsic matters averred in the statement, clearly tends to injure the plaintiff in his business as a retail produce dealer, and is therefore actionable."

If in addition to being libelous *per se,* the "black-list" notice cannot be regarded as a privileged communication, as held by the Massachusetts court, then it is clear that the members of a debt-collecting association, based upon the plan already described, must assume full responsibility for the truth of any allegation of indebtedness, circulated in this manner among them in accordance with its rules; and even though the allegation be made in good faith, and with an honest belief in its truth, and yet should be judiciously determined false in fact in an action brought against them, or

any of them, by the alleged debtor, the latter would be entitled to a verdict. The importance of this proposition is plain when it is considered that actions for black-listing alleged debtors will most frequently arise in cases where there exists some dispute over the claim alleged to be due and the debtor regards himself in a position to deny the indebtedness.

As we have seen, the court did not in either of the two cases discussed consider whether, eliminating the element of libel, the action could be sustained on other grounds. In these debt-collecting associations the "black-list" is simply the method employed to institute the boycott, which is the principal and direct source of injury to the delinquent debtor, and the question therefore arises, Can he secure redress for this injury even though the debt, to enforce the collection of which it is inflicted, is actually due as alleged in the black-list notice?

This question may be considered in a twofold aspect; first, whether the person injured by the boycott has a right of action against the member for whose benefit and at whose instance it is instituted, and, secondly, whether the Association, through which the boycott is enforced, incurs liability for the damage inflicted.

When a creditor institutes a boycott against his debtor through means of an association, such as above described, for the purpose of enforcing payment of the debt, he simply puts into operation a pre-existing agreement between himself and the other members of the association, that they will not deal with any person indebted to one of them until the debt is paid. If therefore this agreement in its operation constitutes an invasion of any legal rights of the debtor, the creditor is employing unlawful methods to collect debts due him, and, if loss is inflicted thereby, he becomes responsible. If, on the other hand, the agreement is in all respects legitimate, the damage resulting from acts done in pursuance of it is not the subject of an action, and would fall under the designation *damnum absque injuria.*

It must be admitted that one person may refuse to sell to another on any pretext whatever, and cannot be held to account for his conduct. Is it equally within his right to per-

suade or induce another to exercise the same privilege and refuse to trade with a third person for the purpose of injuring the latter?

The authorities bearing on this question are by no means harmonious. In England the earlier cases sustain the proposition that an act, otherwise lawful, might become unlawful by reason of the motive with which it was done. Thus in *Keeble* v. *Hickeringill,* cited and followed in *Carrington* v. *Taylor,*[4] it was held actionable for the plaintiff to fire off his gun on his own premises, with the malicious intent of frightening wild ducks from a decoy owned by his neighbor.

The same principle was recognized in the case of *Flood* v. *Jackson* (1895)[5] and *Bowen* v. *Hall,*[6] but the more recent case of *Allen* v. *Flood*[7] reversed *Flood* v. *Jackson,* and may be regarded as departing from the earlier doctrine as stated in *Bowen* v. *Hall.* The syllabus in the case of *Allen* v. *Flood* reads as follows:

"An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

"Discussion of the cases in which evil motive is said to be an essential ingredient in a civil cause of action, such as malicious persecution. See per Lord Watson, Lord Herschell, and Lord Davey, at pages 92, 93, 125, 126, 173.

"The respondents were shipwrights employed 'for the job' on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the ironwork of the ship objected to the respondents being employed, on the ground that the respondents had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. The appellant, who was a delegate of the union, was sent for by the ironworkers and informed that they intended to leave off working. The appellant informed the employers that unless the respondents were discharged all

[4] 11 East, 573.
[5] L. R. (1895), 2 Q. B. 21.
[6] L. R., 6 Q. B. D. 333.
[7] L. R., Appeal Cases (1898), 1.

the ironworkers would be called out or 'knock off' work (it was doubtful which expression was used); that the employers had no option; that the iron men were doing their best to put an end to the practice of shipwrights doing ironwork, and that wherever the respondents were employed the iron men would cease work. There was evidence that this was done to punish the respondents for what they had done in the past. The employers, in fear of this threat being carried out, which (as they knew) would have stopped their business, discharged the respondents and refused to employ them again. In the ordinary course the respondents' employment would have continued. The respondents having brought an action against the appellant, the jury found that he had maliciously induced the employers to discharge the respondents and not to engage them, and gave the respondents a verdict for damages.

"Held, reversing the decision of the Court of Appeal (1895), 2 Q. B. 21 (Lord Halsbury, L. C., and Lords Ashbourne and Morris dissenting), that the appellant had violated no legal right of the respondents, done no unlawful act, and used no unlawful means in procuring the respondents' dismissal; that his conduct was therefore not actionable, however malicious or bad his motive might be, and that, notwithstanding the verdict, the appellant was entitled to judgment.

"*Carrington* v. *Taylor* (1809), 11 East. 571, overruled, and *Keeble* vs. *Hickeringill* (1706), 11 East. 574 n.; *Lumley* v. *Gye* (1853), 2 E. & B. 216; *Bowen* v. *Hall* (1881), 6 Q. B. D. 333; and *Temperton* v. *Russell* (1893), 1 Q. B. 715, commented on."

Lord Morris, in dissenting from the judgment pronounced in the case, said that in his view it overturned "the overwhelming judicial opinion of England."

The majority of the judges in their several opinions drew a distinction between the procurement of the breach of an enforceable contract, and the mere persuasion of another not to enter into a contract with a third person, holding, to use the language of Lord Herschell, "that in one case the act procured was the violation of a legal right, for which the person doing the act, which injured the plaintiff, could

be sued as well as the person who procured it, whilst, in the other case, no legal right was violated by the person who did the act from which the plaintiff suffered."

Lord Chancellor Halsbury, in an able dissenting opinion, vigorously combated this view, and argued that the legal right of a man to be allowed free to contract for his labor was recognized and protected by the law. To quote from his opinion:

"The first objection made to the plaintiffs' right to recover for the loss which they thus undoubtedly suffered is that no right of the plaintiffs was infringed, and that the right contended for on their behalf is not a right recognized by law, or at all events, only such a right as everyone else is entitled to deprive them of, if they stop short of physical violence or obstruction. I think the right to employ their labor as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong.

"Very early authorities in the law have recognized the right; and, in my view, no authority can be found which questions or qualifies it. The schoolmaster who complained that his scholars were being assaulted and brought an action, the quarry owner who complained that his servants were being menaced and molested, were both held to have a right of action. And it appears to me that the importance of those cases, and the principle established by them, have not been sufficiently considered. It is said that threats of violence or actual violence were unlawful means; the lawfulness of the means I will discuss hereafter. But the point on which these cases are important is the existence of the right. It was not the schoolmaster who was assaulted; it was not the quarry owner who was assaulted or threatened; but, nevertheless, the schoolmaster was held entitled to bring an action in respect of the loss of scholars attending his school, and the quarry owner in respect of the loss of workmen to his quarry. They were third persons; no violence or threats were applied to them, and the cause of action, which they had a right to insist on, was the indirect effect upon themselves of violence and threats applied to others.

"My Lords, in my view these are binding authorities to

show that the preliminary question, namely, whether there was any right of the plaintiffs to pursue their calling unmolested, must be answered in the affirmative. The question of what is the right invaded would seem to be reasonably answered, and the universality of the right to all Her Majesty's subjects seems to me to be no argument against its existence. It is, indeed, part of that freedom from restraint, that liberty of action, which, in my view, may be found running through the principles of our law."

Having thus determined that the plaintiffs had certain rights not arising from contract, in which the law would protect them, Lord Halsbury relied upon the earlier decisions already quoted for holding that if these rights were infringed by defendant, by acts malicious in law, the plaintiffs were entitled to recover. He cited with approval the rule laid down by Lord Justice Bowen in *Mogul Steamship Company* v. *McGregor,*[8] in deciding whether, when intent to harm and actual harm has been proved, malice is present, in the following language:

"In cases like this, when the element of intimidation, molestation or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others, then comes the question 'was it done with or without just cause or excuse.' If it was *bona fide* in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish and unreasonable. But such legal justification could not exist where the act was done merely with the intention of causing temporal harm without reference to one's own lawful gain or the lawful enjoyment of one's own rights."

I have referred at some length to the dissenting opinion of Lord Halsbury because it appears to be more nearly in accord with the decisions in this country than the judgment of the court. Indeed Lord Halsbury himself observed that the case of *Keeble* v. *Hickeringill* (*supra*), which was in effect

[8] L. R., 21 Q. B. D. 544.

overruled by the judgment in *Allen* v. *Flood,* had been generally recognized and acted upon in the American courts, and cited as instances the cases of *Walker* v. *Cronin*[9] and *Angle* v. *Chicago, Etc., Ry. Co.*[10] In these cases the principle was recognized that malice in the procurement of an act could be the basis of an action of tort, although the act in itself could not be regarded as actionable.

Justice Brewer, of the Supreme Court of the United States, in the case of *Angle* v. *St. Paul Ry.* (*supra*), cited with approval the case of *Rice* v. *Manley,*[11] wherein the plaintiff had made an agreement with one Stebbins to purchase from him a quantity of cheese, to be delivered at a future day. The contract was not binding by reason of the statute of frauds. The defendant knowing of this, by means of a fictitious telegram, persuaded Stebbins that the plaintiff did not want the cheese and would not take it, and thus himself secured a purchase of it. The plaintiff having brought his action for his failure due to the connivance of the defendant to obtain the cheese from Stebbins, the defendant set up the plea that he had not procured the breach of any contract which could be enforced against Stebbins for the sale and delivery of the cheese; but the court overruled the objection, saying: "Plaintiff's actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of contract."

Among other cases in this country wherein the principle of the earlier English decisions was followed are *Lucke* v. *Clothing Cutters' Assembly, K. of L.,*[12] wherein it was held actionable to procure the discharge of "non-union" employes by threatening to require "union" employes to quit work; *Jackson* v. *Stanfield,*[13] wherein the plaintiff was made the victim of a boycott by retail lumber dealers, and the case

[9] 107 Mass. 555.
[10] 151 U. S. 1 (1893).
[11] 66 N. Y. 82.
[12] 77 Md. 396 (1893).
[13] 36 N. E. 345 (Ind.).

of *Moore & Co.* v. *Bricklayers' Union Trade et al.*[14] In the last-mentioned case the subject was discussed at considerable length by Judge Taft, of the Ohio court. The action was based on a boycott circular issued against the plaintiff with the object of inducing bricklayers not to work on buildings for which plaintiff furnished any materials. It was held that this boycott was unlawful as being in the sense of the law malicious, and apart from the element of conspiracy, would constitute a ground of action. Judge Taft, after discussing the authorities, cited *Bowen* v. *Hall* (*supra*), saying:

"It follows from this case that generally where one induces another to do a legal injury to a third with the intent to benefit himself or to injure such third person, the act of inducement is without cause and malicious. It must also be conceded from the authorities cited that if the material men from whom Parker Bros. purchased the necessities of trade, for no reason at all but to injure Parker Bros., combined and refused to sell them anything and drove them out of business, Parker Bros. would have had a cause of action against such material men."

While there are a few authorities opposed to those just quoted, as for example the case of *Bohn Mfg. Co.* v. *Hollis*, Minnesota Supreme Court (1893), cited at the beginning of this article, yet these are sufficient to show that the weight of judicial opinion in this country is in favor of the views expressed by the dissenting opinion of Lord Halsbury in *Allen* v. *Flood*. Wherever these views obtain, it would in all probability be held that a man, who persuades another not to trade with a third person, for the purpose thereby of coercing the third person into paying him a debt alleged to be due him, becomes liable to such third person in an action of tort on the ground of malice in the procurement of the act which caused the injury. As we have seen in the case of *Bowen* v. *Hall* (*supra*), an act causing injury is in the sense of the law malicious when it is without justification or excuse, and it will hardly be contended that a creditor is justified in inflicting the injury, which must result from a boy-

[14] 7 Ry. Inc. L. J. 108 (1890).

cott, because of the existence of a debt due from the person thus injured. The creditor has the ordinary means of enforcing the collection of a claim through resort to the courts, and any injury which the debtor may suffer through this lawful method cannot be the ground of complaint. Where the creditor, however, pursues the extraordinary plan of boycott for the collection of his claim, he is, according to the principles stated by Lord Halsbury in the case of *Allen* v. *Flood,* inflicting a legal injury by interfering with the debtor's rights to make contracts necessary to the prosecution of his trade or business, and the procurement of the boycott being for the purpose of inflicting this legal injury, is a malicious act; because without legal justification, and is therefore actionable.

On the other hand, where the principle established by the court in *Allen* v. *Flood* prevails, namely, that malice in the procurement of an act, which is lawful in itself, will not constitute a ground of action as against the person procuring it to be done, however great the injury inflicted, it would necessarily be held that as a merchant may legally refuse to deal with another on any ground whatever, the act of persuading him to exercise this privilege, however malicious, is not actionable.

Having reference to the modern conditions of trade, there would seem little justification for drawing a distinction, on the ground of lawfulness or unlawfulness, between an act which brought about the breach of an existing contract to the detriment of one of the parties thereto, and an act which deprives a man of the opportunity of making contracts necessary to the conduct of his trade and business.

A trader such as the plaintiff in the Pennsylvania case of *McIntyre* v. *Weinert* (*supra*), being a retail produce dealer, would find it absolutely necessary to the conduct of his business that he should be able from day to day to make contracts for supplies; and if his doing so is unjustifiably interfered with, the injury sustained is certainly as great as if he were deprived of the benefit of contracts actually made. Indeed, the injury as pointed out in the New York case of *Rice* v. *Manley* (*supra*) is greater, because for the breach of a contract he would have a right of action as against the

other party thereto. That there is a legal right involved in the freedom to enter into contracts of buying and selling is, it is submitted, beyond question, and an injury, consisting of the deprivation of this right, should logically be regarded as the subject of legal redress.

In addition to the grounds of libel and malice, which have been already discussed, the plaintiff in the Pennsylvania case of *McIntyre* v. *Weinert* (*supra*), stated as an additional ground of his action the fact that defendant had inflicted the injury complained of through means of an unlawful combination. In the case of *Allen* v. *Flood,* Lord Watson, in his opinion sustaining the judgment of the court, expressly recognized that conspiracy affords in certain cases a special ground for action to recover damages. In discussing the case of *Temperton* v. *Russell,*[15] he used the following language:

"I do not think it necessary to notice at length *Temperton* v. *Russell,* in which substantially the same reasons were assigned by the Master of the Rolls and Lopes, L. J., as in the present case. It is to my mind very doubtful whether in that case there was any question before the court with regard to the effect of the *animus* of the actor in making that unlawful which would otherwise have been lawful. The only findings of the jury which the court had to consider were: (1) That the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley* v. *Gye.* According to the second finding, the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiffs, by means of unlawful conspiracy—a clear ground of liability according to *Lumley* v. *Gye,* if, as the court held, there was evidence to prove it."

[15] L. R. (1893), 1 Q. B. D. 715.

Lord Davey also in his opinion in support of the judgment called attention to the fact that the case was not one of conspiracy, thereby indicating that, if it were, the views of the court as to the liability of the defendant might have been different. That case can therefore not be cited as authority for the proposition, as held in some quarters, that nothing which is not actionable when done by one person can be actionable or unlawful when done by a combination of persons.

In the very early case of *Gregory* v. *Brunswick*,[16] the Duke of Brunswick and others as defendants were held liable in an action of damages on the ground of conspiracy for combining to hiss the plaintiff, who was an actor, and actually carrying out this purpose, though it was expressly admitted by the court that it was perfectly lawful for anyone, without preconcert, to express his disapproval of an actor in this manner.

In Pennsylvania, conspiracy has always been regarded as furnishing a special ground for an action of tort. Thus in the case of *Wildee* v. *McKee*[17], Justice Sterrett said:

"It cannot be doubted that trespass on the case for conspiracy to defame and thereby injure another in his particular avocation or business may be maintained whenever, in pursuance of such unlawful combination, means have been employed which tended to effectuate and, to a greater or less extent, accomplish the object of the conspirators: *Mott* v. *Danforth*, 6 Watts, 304-6; *Haldeman* v. *Martin*, 10 Barr. 369; *Hood* v. *Palm*, 8 Id. 237-9. In the last case it is said: 'A conspiracy to defame by spoken words, not actionable, would be a subject of prosecution by indictment; and if so, then equally so a subject of prosecution by action, by reason of the presumption that injury and damage would be produced by the combination of numbers. Defamation by the outcry of numbers is as resistless as defamation by the written act of an individual. The mode of publication is different; and it is for this reason that an action lies, at the suit of one who has been the subject of a conspiracy, whenever an indictment

[16] 6 Man. and G. 205.
[17] 111 Pa. 335.

would lie for it.' As an illustration of the principle, it is said an indictment lies for a conspiracy to vex or annoy another, for instance, to hiss a play or an actor, right or wrong; and hence, if the subject of such a conspiracy has been damnified thereby, a civil action may be maintained."

In *Cote* v. *Murphy*,[18] in discussing the right of action of the plaintiff for the refusal on the part of certain dealers to furnish him materials, the court, through Justice Dean, said:

"We assume, so far as concerns defendants, if their agreement was unlawful, or if lawful it is carried out by unlawful acts to the damage of plaintiff, the judgment should stand. The authorities of this state go to show that while the act of an individual may not be unlawful, yet the same act when committed by a combination of two or more may be unlawful and thereby be actionable."

The exact opposite of this doctrine was stated by Justice Mitchell in the case of *Bohn Mfg. Co.* v. *Hollis* (*supra*), who said:

"What one man may lawfully do singly two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be lawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act."

Of course, there are certain conspiracies, such as combinations in restraint of trade, which are not enforceable as between the parties themselves, and which may be the subject of indictment because of the injury to the public, but which do not form the ground of an action at the instance of an individual. The authorities, however, would seem to make a distinction between conspiracies, which affect an individual simply as one member of a community generally affected by it, and a conspiracy which is directed in a given case toward a particular individual with the design of inflicting injury upon him in his person, reputation or business. In the case

[18] 159 Pa. 420.

of a number of merchants, for example, who by combination advance the price of an article of food, they may be subjected to an indictment, but would not be amenable to a civil action at the hands of some person who was obliged by reason of the combination to pay more for the particular article of food affected by it; but it is submitted the case would be different if these merchants entered into an agreement not to sell, except at an extortionate price or not to sell at all, their products to a certain individual to his detriment. In such a case if the combination is in the sense of the law unlawful, it is quite clear that the particular individual injured should be able to obtain redress by an action of conspiracy against any one or all of the members of the combination.

What constitutes an unlawful combination, which will give a right to civil action to persons injured by it, was discussed by Justice Dean in the case cited. He says:

"A dictum of Lord Denman in *R.* v. *Seward,* 1 A. & E. 711, gives this definition of a conspiracy: 'It is either a combination to procure an unlawful object or to procure a lawful object by unlawful means.' This leaves still undetermined the meaning to be given the words lawful and unlawful in their connection in the antithesis. An agreement may be unlawful in the sense that the law will not aid in its enforcement, or recognize it as binding upon those who have made it, yet not unlawful in the sense that it will punish those who are parties to it, either criminally or by a verdict in damages. Lord Denman is reported to have said afterwards in *R.* v. *Heck,* 9 A. & E. 690, that his definition was not very correct. See note to sec. 2291, Wharton's Criminal Law.

"It is conceded, however, in the case in hand, any one of defendants, acting for himself, had a right to refuse to sell to those favoring the eight hour a day, and so, acting for himself, had the right to dissuade others from selling. If the act were unlawful at all, it was because of the combination of a number. Gibson, J., in *Com.* v. *Carlisle,* Brightly's R. 39, says: 'Where the act is lawful for the individual, it can be the subject of conspiracy when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the

prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence.' "

Upon the principles here set out is not an agreement among a number to refuse to sell supplies to a debtor of one of them the object of coercing him into paying the debt a conspiracy, which gives the debtor a right of action if he suffers damages from it? Such an agreement unquestionably establishes an artificial restraint upon the freedom of trade, and is a direct infringement upon the rights of a trader to obtain his supplies from such persons as would ordinarily, if not restrained, be willing to sell to him. No merchant would, under ordinary conditions, refuse to sell to another if paid in cash the full price demanded for the article sought to be purchased; and when he refuses to do this in a given case by reason of being party to an agreement, it is perfectly apparent that an artificial barrier to trade has been set up between him and the person offering to purchase, to the detriment of the latter.

Debt-collecting agreements of the kind under discussion, whether evidenced by the by-laws of an association or otherwise, usually make it obligatory upon the creditor in the first instance to notify the other members that the debt has not been paid and then make it incumbent upon all the members to refuse to sell to the delinquent debtor. Thus the latter, though he be an honest debtor, unable to pay, but willing to do so, if given time, is deprived of any opportunity to seek indulgence at the hands of his creditor, and also of the means of continuing in business and securing thereby the means to discharge the debt. Thus not only does such an agreement deprive the debtor affected by it of his right to freely enter into contracts, as he would be able to do, under normal conditions, but totally interferes with the relations which would ordinarily exist between debtor and creditor.

Again, the agreement has a necessary tendency, when set in operation against a debtor who disputes the claim, to deprive him of his legal right to have the claim adjudicated in the courts by due process of law. If the members of the combination have been able to establish a monopoly in the

supplies which the debtor may need, it is perfectly apparent that he may find it rather to his advantage to pay even an unjust claim than to be deprived of the means of continuing his business. The Massachusetts case of *Weston* v. *Barnicoat* (*supra*) called attention to this phase of illegality, when it suggested that the organization in that case might have been found to be a "mere scheme to oust the courts of their jurisdiction and to enforce colorable claims of the members by a boycott, intended to take the place of legal process."

A combination fraught with such consequences to persons injuriously affected by it is necessarily vexatious, harmful and bad on grounds of public policy, and should therefore be regarded as a conspiracy, which would constitute the basis of an action of damages brought against any or all of the members by a debtor whom it has injuriously affected in his trade and business.

This conclusion is strongly sustained by the case of *Hartnett* v. *Plumbers' Supply Ass'n*,[19] wherein proceedings in the nature of *quo warranto* were instituted to forfeit the charter of an Association organized for the purpose of "promoting pleasant relations amongst its members, discussing, arbitrating and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business, and establishing and maintaining a place for social meetings," on the ground that the Association was exceeding its charter privileges by collecting the debts due members upon the boycott plan. The court decreed a franchise of the charter. In the course of his opinion Justice Barker said:

"In short, these proceedings against the alleged debtors of its members, instituted by the corporation under the pretended sanction of its corporate franchises, are a method of supplanting the courts by the private machinery of the corporation, of compelling such persons to pay what its members demand by means of threatening to expose to certain dealers their alleged delinquencies by actually informing such dealers that the persons owe overdue accounts, and by preventing such persons from obtaining credit from a num-

[19] 169 Mass. 229 (1891).

ber of dealers in goods needed in the business which such persons are carrying on.

"This private corporation assumes, in the exercise of what it claims to be the corporate privileges conferred by its charter, to require other persons to submit their controversies to arbitration, dictates the terms upon which trade shall be carried on by other persons, and requires other persons, under penalties, practically severe, to submit to it their reasons for their conduct in matters with which it has no concern."

In deciding that petitioner, who was a debtor affected by the boycott, had suffered legal injury, which under the *quo warranto* statutes of Massachusetts entitled him to institute the proceedings, the court said:

"The credit of a tradesman is an important and often his most considerable resource, and he has a right to rely upon and to use it in endeavoring to do business. No one has the right to attempt to destroy or to injure his credit unless the person so attempting can show that his own legitimate interests require such action. Assuming that the legitimate interests of sellers of plumbers' supplies may justify such persons in informing each other that a customer of one of them has not paid for purchases, and in agreeing with each other to sell him no goods except for cash paid before delivery, the respondent has no justification for its interference with the petitioner's business. The respondent is a legal person other than and distinct from its members. It is not a seller of plumbers' supplies, and has no interest in that market and no legitimate concern with the question of who shall purchase in that market upon credit. When without being engaged in the trade or in any relation by which its legitimate interests are affected by the question whether the petitioner shall have credit in that market, the respondent assumes to notify sellers of such goods that the petitioner has not paid his accounts, and to debar a considerable number of dealers from selling to him upon credit, his right to an open market and to proffer his credit without officious interference from persons who have no legitimate interest in the question whether he shall buy upon credit, is injured and put in hazard."

This opinion has been quoted at length because it bears upon the second branch of the question proposed, namely: whether a debtor injured by a boycott has any right of redress as against the Association through which it was instituted. In this case it was held that refusal to extend credit at the instance of the Association was a legal wrong, for which the wronged person was entitled to redress, because the Association had no legitimate interest to serve in the matter.

If this case should be followed it is quite clear that charters of the various trade associations organized for the purpose of collecting debts of members upon the plan indicated should be forfeited, for in all instances it will probably be found that their charters do not expressly authorize the carrying out of such a purpose any more than did the charter considered in the Massachusetts case.

In view of the many objections to the boycott plan of collecting debts, it will in all likelihood never be approved as legitimate by the courts. The origin of the term boycott itself is surrounded by circumstances of illegality and oppression, as will appear from the language of Mr. Justin McCarthy's work, "England Under Gladstone," which may appropriately conclude this article:

"The strike was supported by a form of action, or rather inaction, which soon became historical. Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mask, in the wild and beautiful district of Connemara. In his capacity as agent he had served notices upon Lord Earne's tenants, and the tenants suddenly retaliated in the most unexpected way by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles around resolved not to have anything to do with him, and, as far as they could prevent it, not to allow any one else to have anything to do with him. His life appeared to be in danger; he had to claim police protection. His servants fled from his as servants flee from their masters in some plague-stricken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time; no one would work for him; no one would supply

him with food. He and his wife had to work in their own fields themselves, in most unpleasant imitation of the Theocritian shepherds and shepherdesses, and play out their grim eclogue in their deserted fields, with the shadows of armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in which he was holding his ground, and they organized assistance and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mask, and Captain Boycott's harvests were brought in, and his potatoes dug, by the armed Ulster laborers, guarded always by the little army."

Francis B. Bracken.