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THE AUTHORITY OF ALLEN V. FLOOD¹

IN THE case of *Allen v. Flood*,² one of the Lords asked this interesting question, "If the cook says to her master, 'Discharge the butler or I leave you,' and the master discharges the butler, does the butler have an action against the cook?"³ This, Lord Shand said, was the simplest form in which the very question in *Allen v. Flood* could be raised.⁴ And, like the original question, it puzzled the judges and Lords very much to answer. Cave, J. answers, Yes:—

"*Ex concessis*, the butler has been interfered with in earning his livelihood and has lost his situation, and the circumstances shew no just cause or excuse why the cook should have induced her master to discharge the butler; . . . no good cause or excuse being shewn, though many may be suggested, it is *malicious*, and actionable."⁵

Lord Herschell answers, No:—

"In my opinion a man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling; any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shewn to be in its nature *wrongful*, and thus to require justification."⁶

These answers fairly represent the divergence of views in *Allen v. Flood*, of which it has been said: "The ruling of the majority in the House of Lords is of extraordinary interest as affecting the fundamental theory of the Law of Torts."⁷ Sir Frederick Pollock in the 6th English edition of his work on Torts, says: "The chief alterations . . . are due to what was decided, perhaps still more to what was suggested in the House of Lords in . . . *Allen v. Flood*, shortly after the publication of the last edition."⁸ Chapter VIII, formerly entitled "Wrongs of Fraud and Malice," has become "Wrongs of Fraud and Bad Faith," and it is said:—

Since the decision of . . . *Allen v. Flood*, it seems that in those cases where the state of mind of the defendant is material, it is not malice in the popular sense of personal ill will that is the decisive element, but willful or reckless disregard of truth in some form."⁹ Also, "it cannot be an actionable

(1) The object of this article is to make more available the views set forth in this celebrated case, and not to discuss the case to any great extent, for that has been done sufficiently. Mr. Pollock has remarked that when the Lords and judges have spoken, the subject is exhausted—and we may add in something over 200 pages, not always accessible. There has been little said about it, that is not contained in it; to classify this and make it readily accessible is my excuse, whether sufficient or not, for this paper. H. L. W.

(2) (1898) A. C. 1-181; 77 L.T. 717-73; 67 L.J.Q. B. 119; 46 W.R. 258; 14 T. L.R. 125. Citations following, where nothing but page is given will be from (1898) A. C.

(3) pp. 36, 138-9, 165. (4) p. 165. (5) p. 36. (6) p. 138-9. (7) 11 Harv. L. R. 405-6.

(8) Advertisement 6th edition, April, 1901. (9) Torts, 6th Ed. p. 276, citing Lord Herschell, (1898) A.C. 1. 125, 126; 67 L. J. Q. B 119, 185.

conspiracy for two or more persons, by lawful means, to induce another or others to do what they are by law free to do, or to abstain from doing what they are not bound by law to do." "Persuading or inducing a man, without unlawful means, to do something he has a right to do, though to the prejudice of a third person, gives that person no right of action, whatever the persuader's motive may have been."¹ "Until this decision, it was current opinion, supported by a fair show of authority² that a special cause of action exists in *Holt, C. J.*'s words, where a 'violent or malicious act is done to a man's occupation, profession or way of gaining a livelihood.' But it must now be taken that decisions of this kind are grounded on damage to the plaintiff by reason of trespass, nuisance or some act of the defendant which is otherwise unlawful in itself; and that in no such case is the cause of action determined by the presence of 'malice.'"³

Other material changes are made, based upon this decision.⁴

Dr. Bigelow says:—

"In former editions of this book⁵ it has been stated, in effect, that an action lies for maliciously procuring one man to refuse to contract with another, if the latter suffered damage thereby; but not without noting that the doctrine has been denied. The statement was founded upon express decisions both in this country and in England.⁶ But in the year 1898, the doctrine was repudiated in England, decisions and dicta to the contrary being reversed or overruled by the House of Lords, and the contrary plainly laid down."

Mr. Cooke, having suggested "for the first time, as the fundamental and universal test of civil liability for an act" as a tort "*whether it is the natural incident or outgrowth of some existing lawful relation*" was gratified "to discover that . . . in *Allen v. Flood*, the majority of the court had reached . . . an adumbration of, or approximation to" it.⁷ Mr. Krauthoff in an address before the American Bar Association says:—

"The logical effect of the recently decided, very great, exceedingly important, and highly interesting case of *Allen v. Flood*, and of the discussions there had, is to pave the way to consign the expression (malice) to the company of the host of the merely vituperative expletives with which it was the habit of the common law pleaders of the past to burden their effusions."⁸

The significance of the facts involved was as much in controversy as the principles applicable to them. For this reason they are stated fully:—

(1) Torts, 6th Ed. p. 316. (2) Citing *Keeble v. Hickeringill* (*Holt C. J.* 1705) 11 East, 573; *Tarleton v. McGawley* (1793) 1 Peake 270.

(3) Torts, 6 Ed. 317. (4) Compare p. 153, 6th Ed. with p. 180 Webb's Ed.; p. 155 with page 182; pp. 231-2 with p. 285; p. 244 with p. 306; p. 252 with p. 320; p. 272 with p. 348; pp. 316-7, with pp. 406-9.

(5) Citing *Walker v. Cronin* 107 Mass. 555, Cases, 102; *Graham v. St. Charles R. R. Co.* 27 L. R. A. (La.) 416; *Temperton v. Russell*. (1893) 1 Q. B. 715, C. A. Cases 109; *Flood v. Jackson*, 1895. 2 Q. B. 21, A. C. (since reversed).

(6) Torts, 7th Ed. p. 115, §235, referring to *Allen v. Flood*. (7) *Law of Trade and Labor Combinations*. 1898, by F. H. Cooke, preface p. IV.

(8) L. C. Krauthoff, *Malice in Civil Actions*, 21 Am. Bar Ass'n Report (1888) p. 338.

In April, 1894, about forty boiler-makers, or "iron men," were employed by the Glengall Iron Company in repairing a ship at the company's dock in Millwall. They were members of the boiler-makers' society, a trade union, which objected to the employment of shipwrights on iron work. On April 12, the respondents Flood and Taylor, shipwrights, were engaged by the company in repairing the woodwork of the same ship, but were not doing iron-work. The boiler-makers, on discovering that these men had shortly before been employed by Mills & Knight on the Thames in doing iron work on a ship, became much excited and began to talk of leaving their employment. One of them, Elliott, telegraphed for the appellant, Allen, the London delegate of the boiler-makers' society. Allen came the 13th, and being told by Elliott that the iron-men, or some of them, would leave at dinner-time, replied that if they took the law into their own hands he would use his influence with the council of the society that they should be deprived of all benefit from the society and be fined, and that they must wait and see how things settled. Allen then had an interview with Halkett, the company's manager, and Edmonds, the foreman, and the result was that the respondents were discharged at the end of the day by Halkett. Action was brought against Allen for maliciously and wrongfully, and with intent to injure plaintiffs, procuring and inducing the company to break their contract with the plaintiffs and not to enter into new contracts with them, and also maliciously, etc., intimidating and coercing the plaintiffs to break, etc., and also unlawfully and maliciously conspiring with others to do the above acts.

At the trial, before Kennedy, J., and a jury, Halkett and Edmonds, called for plaintiffs, gave their account of the interview with Allen:¹—

Mr. Halkett:—

Allen said, "He had received word from *some* of the boiler-makers that were working in our yard that they wanted to see him, and he came round and had an interview with these men, and they told him that we had two shipwrights engaged in our employment who were known to have done iron work before in Mills & Knight's yard, and that unless these two men were discharged from our employment that day, all the iron workers belonging to his society would leave off work that day; and they gave as the only reason that these men were guilty of doing iron work in Mills & Knight's yard.

. . . The substance of what he said was that they were *really trying to put an end to this practice* of doing iron work by the shipwrights—to stop shipwrights being engaged in iron work. That it was not from any ill feeling against ourselves nor against any men in particular,—Flood and Taylor; but they—that is, the boiler-makers—had made up their minds—that whenever it is known that any shipwrights have been engaged doing iron work, their workmen—that is, the boiler-makers—would cease work on the same ship on the same employment."

(Q.) "Did he say anything in regard to Flood and Taylor in respect of other yards besides yours?"—(A.) "Not in a particular sense; in a general sense, these men would be followed—that these men were known—it was so

(1) The testimony of these two witnesses is given here as nearly as possible in their own language as set forth in Lord Halsbury's opinion, 1898, A. C. 69.

difficult to get them known, that these men were known, and wherever these men were employed the same action would be taken there as had been taken in our place." He also said: "You have no option. If you continue to engage these men our men will leave. . . . It was in consequence of that that the men were discharged. It was the fear of the threat being carried out—of the men leaving—the boiler-makers. If the boiler-makers had left or had been called out, it would seriously have impeded our business. . . . The threat to withdraw these iron workers extended to every workman we had in our employment at whatever place." He goes on, "The threat was to withdraw the iron workers in the employment of the company from every ship or every job upon which the company were engaged on which the men of their union were employed."

Mr. Edmonds testified:—

"Mr. Halkett sent for me and when I got in the room he said, 'Mr. Allen has come here and says that if those two men,' that is, Flood and Taylor,— 'are not discharged all of the iron men will knock off work or be called out.' I will not be sure what term he used. I asked Mr. Allen the reason why. He said because those two men had been working at Mills & Knight on iron work. I told him I thought it was very arbitrary on his part to do anything like that. I told him I thought it was not right that Mills & Knight's sins should be visited upon us." (Q.) "Did anything else take place?"—(A.) "For the reason that we were not employing the shipwrights on iron work, and never had done so—not at the Glengall. . . . He says that was the case, and if these men were not discharged, their men would be called out or 'knock off'—I will not be sure what term he used." (Q.) "Was anything said about other yards?"—(A.) "Yes. When I spoke about it not being right to visit Mills & Knight's sins on us, he said the men would be called out from any yard they went to—they would not be allowed to work anywhere in London river."

On the part of the defendant, Elliott,¹ who sent for Allen, testified:—

"We were having a talk together at breakfast time, and some of them felt dissatisfied about it. Some of them said we had better leave our work. I said, 'Do not do anything of the kind.' . . . I sent a telegram to Allen. . . . When I met Mr. Allen at breakfast time next morning he said to me, 'Well, what is this here little bit of a trouble here?' 'Well, I said, the chaps are dissatisfied about these here two plaintiffs Flood and Taylor being in the habit of working over at Mills & Knight's.' 'Well,' he said, 'what do you want?' 'Some of them are saying they are going to leave their work.' He says, 'The best thing you can do is to go in and tell them not to leave their work until things are settled, wait and see how things settle.' I said, 'Very good. I will tell them what you say now.'"

On cross examination:—

(Q.) "Their (some of the men's) wishes were that these men whose conduct they objected to at Mills & Knight's should not be kept in the same employ with themselves?"—(A.) Oh, no. (Q.) That was the feeling, was it

(1) This is taken from Lord Halsbury's quotations from the testimony, 1898, A.I.C. 81.

not?—(A.) No. (Q.) Well, let me understand.—(A.) They did not say they should not be kept in the employ of the firm at all. (Q.) They did not say they should not be kept on the job on which they were being employed?—(A.) They did not wish them among our midst. (Q.) Working on the same ship?—(A.) Yes.”

Upon this point, it is stated in the opinion in the court below¹ that:—

“Soon after the repairs to the ship were commenced the iron workers held a meeting and resolved that they would not work in the same yard with the plaintiffs, and that they would leave the work unless the plaintiffs were removed.”

The boiler-makers’ society rules provided:²—

“Should a dispute arise in any shop or yard, the members of that shop of yard shall make the same known to the nearest branch. The officers of such branch shall try and settle such dispute; but should a dispute arise in any shop or yard which cannot be amicably settled by the branch or district committee, it shall be referred to the executive council, who will give instructions on the subject.”

In his testimony, Allen stated in reference to this rule:³—

“In minor cases the executive council leave things to my discretion; I considered this a minor case.” “I do not in cases of minor disputes refer to my committee.” And in answer to the question whether he wished the two men to be discharged, when he had his interview with Halkett, he said, “He had no such thought floating in his mind at the time.”⁴

Kennedy, J. ruled⁵ that there was no evidence of conspiracy, or of intimidation, or coercion, or of breach of contract, Flood and Taylor having been engaged on the terms that they might be discharged at any time. In the ordinary course, their employment would have continued till the repairs were finished or the work slackened.

In reply to questions put by Kennedy, J. the jury found that Allen *maliciously* induced the Glengall Company (1) to discharge Flood and Taylor from their employment; (2) not to re-engage them; (3) that each plaintiff had suffered £20 damages; and (4) that the settlement of the dispute was a matter within Allen’s discretion. Judgment was entered for the plaintiffs for £40. This decision was unanimously affirmed by the Court of Appeal.⁶ Allen brought this appeal. It was argued four days, before seven lords,⁷ and again six days, eight judges⁸ having been summoned to attend,

(1) L. R. 1895, 2 Q. B. 21, on 22. (2) *Ib.* 32. (3) *Ib.* 32. (4) 1898 A. C. 82. (5) 1898 A. C. 3, 4.

(6) L. R. 1895, 2 Q. B. 21 (Lord Escher, M. R., Lopes and Rigby, L. JJ., each delivering opinions).

(7) Lord Halsbury, A. C., and Lords Watson, Herschell, Macnaghten, Morris, Shand, and Davey.

(8) Hawkins Mathew, Cave, North, Wills, Grantham, Lawrance and Wright, JJ.

and before the same Lords, with two others.¹ At the close of the arguments this question was propounded to the judges: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?"

The judges desired time to consider, and on June 3, 1897, delivered opinions. Six² answered Yes; and two,³ No.

The House took time for consideration⁴—till December 14, 1897, when opinions were read by Lord Halsbury, L. C.,⁵ Lords Ashbourne,⁶ and Morris⁷ for affirmance; Lords Watson,⁸ Herschell,⁹ Macnaghten,¹⁰ Shand,¹¹ Davey,¹² and James of Hereford,¹³ for reversal.

It appears, therefore, that of the twenty-one judges and the jury whose opinions were given in the case, the jury and thirteen of the judges were in favor of the plaintiffs; the decision, however, of the six out of the nine members of the House of Lords determined the case in favor of the defendant, and apparently fixed the law of England; for, a few months later, the same court held that "An erroneous decision binds the House, and can be set right only by an Act of Parliament."¹⁴

Where there is so much diversity, the weight of the decision must rest upon the intrinsic merit of the opinions pronounced. A summary of these is, therefore, given—those of the majority of the House of Lords, first.

LORD WATSON:¹⁵ I. *Assumes*¹⁶ that the verdict found the company discharged plaintiffs and did not re-employ them; they were induced to do so by the acts of the defendant; the defendant maliciously induced the company's act; and the company's act was wholly legal.¹⁷

II. *Malice*: The whole *pith* is in '*malicious*,' that is, a wrongful act done knowingly, with a view to injurious consequences;¹⁸ a *wrongful* act is an invasion of the civil rights of another; *malice* depends not upon the motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed;¹⁹ the object of an act, that is, the result which will necessarily or naturally follow from the circumstances in which

(1) Lords Ashbourne, and James of Hereford.

(2) Hawkins, (A. C. 24); Cave, (A. C. 37); North, (A. C. 44); Wills, (A. C. 51); Grantham. (A. C. 58), and Lawrance, (A. C. 58, 62). (3) Mathew, (A. C. 24, 28); Wright, (A. C. 62, 67) (4) A. C. 67. (5) A. C. 67-96. (6) A. C. 109-114. (7) A. C. 154-60. (8) A. C. 90-109. (9) A. C. 114-142. (10) A. C. 143-154. (11) A. C. 160-69. (12.) A. C. 169-175. (13) A. C. 175-181.

(14) London Street Tramway Co. v. London County Council, [1893] A. C. 375.

(15) A. C. p. 90. (16) p. 91.

(17) p. 92. (18) p. 92. (19) p. 94.

it is committed, may give it a wrongful character, but it ought not to be confounded with the motive.¹

The jury in their finding that the company was maliciously induced by the defendant, meant to affirm that defendant was influenced by bad motive, an intention to injure plaintiffs in their trade and calling.²

As to crimes the rule may be different, but the law of England does not take into account motive as constituting an element of a civil wrong;³ if it did, one who committed an act not in itself illegal, but damaging to several, would incur liability to those he intended to injure, and not to others; a master who discharged a day to day servant because he disliked him and desired to punish him would be liable, and likewise the servant who left for the same reason.⁴

The authorities are all cases either of, 1, *privilege*, where the act per se constituted a legal wrong but was protected from usual consequences by an honest desire to perform a public or private duty; or, 2, cases in which the act was a plain *violation* of a *private* right; or, 3, cases in which an act detrimental to others but affording no remedy against the immediate actor, had been *procured by illegal means*.⁵ *Garret v. Taylor*,⁶ and *Tarleton v. McGawley*,⁷ are of the last class: *Lumley v. Gye*,⁸ and *Bowen v. Hall*⁹ are of class 2; and the first branch of *Temperton v. Russell*¹⁰ is the same as *Lumley v. Gye*, and the second branch was clearly of class 3, the injury being an unlawful conspiracy—a clear ground of liability.

III. *Procuring act of another, when a wrong*: According to the majority decision in *Lumley v. Gye*, a person who by *illegal means*, that is, means which in themselves are in the nature of civil wrongs, procures the *lawful* act of another, which act is calculated to injure and does injure a party, commits a wrong for which he may be made answerable.¹¹

One who procures the act of another is liable, when he knowingly, for his own ends, induces the other to *commit an actionable wrong*.¹² When the act induced is within the right of the immediate actor, and is not wrongful, the inducer is liable if he uses *illegal means* directed against the third party; the illegal means must be in the nature of *civil wrongs*.¹³

IV. *Wrong alleged*: There were no illegal means used; there was no coercion; coercion must, irrespective of motive, be a *wrongful*

¹ p. 102. ² p. 94. ³ p. 92.

⁴ p. 100. ⁵ p. 104. ⁶ Cro. Jac. 567. ⁷ 1 Peake, N. P. C. 270. ⁸ 2 El. & B. 216. ⁹ 6 Q. B. D. 333.

¹⁰ [1893] 1 Q. B. 715. ¹¹ p. 97. ¹² p. 96. ¹³ p. 97.

act;¹ it is the absolute right of every workman to exercise his option as to persons for whom he will work.² The boilermakers would have left if plaintiffs had continued.³ They would have been acting within their own right had they done so.⁴ They were entitled to inform the company of the step contemplated, and the reasons, by their own mouth, or by Allen.⁵ Giving such information did not coerce the employers.⁶ The employers simply followed their own interests,⁷ and the judge charged that there was no evidence of conspiracy, intimidation or coercion in a legal sense.⁸

LORD HERSCHELL:⁹ I. It was not contended that merely to induce the company to cease employing the plaintiff would constitute a legal wrong, but it was said to do so because the person inducing them acted *maliciously*.¹⁰

II. *Malice*: It is certainly a general rule that an act prima facie lawful is not unlawful on account of the motive with which it is done.¹¹ If the acts are or are not actionable according as malice is present or not, it is essential to define it: no greater danger can be imagined than to leave it to the jury; no one would know what his rights are.¹² *Malice* means a *wrongful act* done intentionally without just cause or excuse,—this eliminates motive altogether. It includes *wrongful act intentionally* done.¹³ Conspiracy is anomalous,¹⁴ and malicious prosecution an exception.¹⁵

III. *Differs from breach of contract*: There was no contract broken; and there is a chasm between inducing one to break a contract and inducing one not to enter into a contract.¹⁶ One is in 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;¹⁷ in the other case no legal right is violated by the person who did the act from which the plaintiff suffers.¹⁸ If the latter were actionable, it would follow that every person who induces another not to enter into any contract with a third person may be sued by that third person if the object were to benefit himself at the expense of such third person.¹⁹ The motive of injuring one's neighbor or of benefiting himself at his expense is as old as human nature. It must for centuries have moved men in endless instances to do or to refrain from doing particular acts.²⁰ The fact that under such circumstances no authority for an action founded on these elements has been discovered, goes far to show that such an action cannot be maintained.²³

¹ p. 98. ² p. 98. ³ p. 99. ⁴ p. 99. ⁵ p. 99. ⁶ p. 99. ⁷ p. 99. ⁸ p. 100. ⁹ p. 114. ¹⁰ p. 118.

¹¹ p. 123. ¹² p. 118. ¹³ p. 124. ¹⁴ p. 124. ¹⁵ p. 125. ¹⁶ p. 121. ¹⁷ p. 121. ¹⁸ p. 121.

¹⁹ p. 126. ²⁰ p. 128. ²¹ p. 128.

IV. *The wrongful act alleged:* There was no threat. I admit that fear of personal violence is not necessary to constitute threats, menaces, intimidation or coercion.¹ I am quite unable to conceive how the plaintiffs can have a cause of action because instead of the iron workers leaving, either of their own motion or because they were called out, there was an intimation beforehand that either the one or the other of these courses would be pursued.² It is admitted that the defendant had no personal spite against the plaintiffs.³ The object was at the utmost to prevent them in the future from doing work which he thought was not within their province, but within that of the ironworkers.⁴ If defendant had acted the same when the plaintiffs were engaged upon iron work his motive would have been precisely the same, and the result the same.⁵

V. *The right involved:* I do not doubt that every one has a right to pursue his trade or employment without molestation or obstruction, if these terms imply some act in itself *wrongful*.⁶ If it is intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, such a proposition has no solid foundation in reason to rest upon.⁷ A man's right not to work, or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law of precisely the same nature and entitled to just the same protection as a man's trade or work.⁸ They are examples of the wider right that every one has, to do any lawful act he pleases without molestation or obstruction, and embrace the right of free speech.⁹ A man has a right to say what he pleases to induce, to advise, to command, provided he does not slander or deceive or commit any of the other wrongs known to the law, of which speech may be the medium.¹⁰

LORD MACNAGHTEN:¹¹ I. *Findings of the jury:* That Allen *maliciously induced* the company to discharge the plaintiffs.¹² I do not know what the jury meant by '*induced*';¹³ nor by '*maliciously*'; and I doubt whether I quite understand those unhappy expressions myself.¹⁴ They must mean, however, that Allen induced the company to discharge the plaintiffs by representing to the manager, not otherwise than in accordance with the truth, the state of feelings in the yard, and the intentions of the workmen;¹⁵ and that he did so maliciously, because he must have known what the result of his

¹ p. 128. ² p. 130. ³ p. 131. ⁴ p. 131. ⁵ p. 131. ⁶ p. 138. ⁷ p. 138. ⁸ p. 138.
⁹ p. 138. ¹⁰ p. 138. ¹¹ p. 143. ¹² p. 143. ¹³ p. 143. ¹⁴ p. 144. ¹⁵ p. 150.

communication would be, and perhaps was not sorry to see an example made of persons obnoxious to his union.¹

II. *Such conduct is not actionable—not wrongful:* No action would lie against the company for discharging the plaintiffs;² nor against the men for striking against them;³ nor against the officers of the union for sanctioning a strike.⁴ Allen happened to be the medium of communication between the iron men and the company—the most innocent of them, for he neither set the agitation on foot nor did anything to increase it.⁵ There was nothing wrong in going where he was sent for; nothing wrong in telling the manager that the iron men would leave unless the shipwrights were dismissed, if he believed that that was what they intended to do. They were free to leave at any time, for any reason, or no reason, or a bad reason; any one might have gone alone, or all together, if peaceably, and said they would not work with plaintiffs.⁶

III. *Not the cause of the loss:* Allen's order did not put an end to the employment; the result would have been the same if Edmonds had told Halkett what was going on, or if Flood had told it himself.⁷ I do not think it can be said that "Allen did 'induce' the company to discharge the plaintiffs. Certainly it cannot be truly said that he *procured the company from continuing to employ* them. If the whole story had been a fiction, and an invention on his part, I could have understood the finding of the jury.⁸ I do not think there was any misrepresentation on Allen's part. I do not think there was any exaggeration, nor was such a point made at the trial.⁹ Evidence of plaintiffs proves that the iron men were in a very nasty state; they believed that the iron men meant mischief. Edmonds thought Allen 'had only to hold up his hand and the whole of the men would go off.' It is plain what it was that induced Mr. Halkett to discharge the plaintiffs. It was nothing that originated with Allen. It was no misrepresentation on his part. It was not fear of his personal influence. It was simply a very natural desire for peace and quiet."¹¹

IV. *Nothing short of unlawful acts would be actionable.* There is no foundation in good sense or authority that a person who suffers loss by reason of another's doing or not doing some act which that other is entitled to do or to abstain from doing at his own will or pleasure, whatever his real motive may be, has any remedy against any third person who by persuasion or *some other means not*

¹ p. 150. ² p. 151. ³ p. 151. ⁴ p. 151. ⁵ p. 151. ⁶ pp. 148-9.

⁷ p. 151. ⁸ p. 149. ⁹ p. 149. ¹⁰ pp. 149-50. ¹¹ p. 150.

in itself unlawful has brought about the act or omission, even though he was actuated by malice, and was without justification or excuse.¹

The case may be different where the act itself to which the loss is traceable involves some *breach of contract* or some *breach of duty*, and amounts to an *interference with legal rights*; there the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too.²

V. *Malice will not make the act wrongful*: If the immediate agent cannot be made liable, though he knows what he is about, and what the consequences of the action will be, it is difficult to see on what principle a person less directly connected with the offence can be made responsible unless malice has the effect of converting an act not in itself illegal or improper into an actionable wrong.³

If that is the effect of malice, why is the immediate agent to escape?⁴ Suppose a man makes a transfer of a debt with which he has no concern for the purpose of ruining the debtor; or declines to give his servant a character because he is offended with him for leaving; or a person of position takes away his custom from a tradesman merely to injure him, on a fancied grievance not connected with their dealings,—or not content with taking away his own custom, says something not slanderous or otherwise actionable to induce his friend not to deal any more with the tradesman. There is no liability for taking away his own custom. Is it possible that the one can be made liable for inducing the other not to employ the person against whom he has a grudge?⁵ *These all belong to morals, rather than to law*, and self interest and public opinion are the best safeguards. An inquisition into motives in such cases would be intolerable.⁶ What I say here “can have no bearing on any case which involves the element of *oppressive combination*,” since boycotting, and other forms of oppressive combinations, depend upon considerations conspicuously absent here.⁷

LORD SHAND:⁸ I. *Facts*: *There was no contract*, but the employment would have continued, if employers had not been induced to discontinue it by the representations made to them by Allen.⁹ There was no exaggeration or *misrepresentation* of the condition in the yard.¹⁰ Allen was not actuated by *malice* in the popular sense of ill will,—he did not even know the plaintiffs.¹¹ There were no *threats*. Threats to be actionable must be “threats of violence, intimidation,

¹ p. 151. ² p. 151. ³ p. 152. ⁴ p. 152.

⁵ p. 152. ⁶ p. 152. ⁷ p. 153. ⁸ p. 160. ⁹ p. 160. ¹⁰ p. 161. ¹¹ p. 162.

obstruction or the like,"—threats which may be described as menaces which improperly affect freedom of action in the person who is induced to act or to refrain from acting.¹ The boiler-makers were entitled to resolve they would not work then or in the future with the plaintiffs;² also to inform their employers that they had done so.³ Allen was only doing what was right and proper in intimating this resolution to the employers, rather than allowing them to quit without notice.⁴ There was no threat of the nature of menace so as to amount to the use of illegal means to induce the employers to act—no threat to do anything beyond the exercise of their legal rights.⁵

II. *Rights of plaintiffs:* The plaintiffs were entitled to pursue their trade as workmen without hindrance.⁶ This right was qualified by an equal right, or the same right on the part of the workmen.⁷ The hindrance must not be unlawful, nor by *unlawful acts*.⁸

III. *Rights of defendant:* Amongst the rights of all workmen is the right of *competition*.⁹ In the like manner and to the same extent as a workman has a right to pursue his work or labor without hindrance, a trader has the right to trade without hindrance.¹⁰ That right is subject to the rights of others to trade also, and to subject him to competition which is itself lawful, and cannot be complained of where no unlawful means have been employed.¹¹ The judgment in the Mogul case¹² determined this, it seems to me, and also held that the exercise of any legal right in the course of competition in labor or in trade does not become illegal because it is prompted by a motive which is improper or even malicious.¹³ The case was one of *competition* in labor;¹⁴ the defendant was bent, and bent exclusively on the object of furthering the interests of those he represented. This was the motive of his action, and not a desire to "do mischief to the plaintiffs in their lawful calling."¹⁵

IV. *Contract:* I reserve my opinion, as do Lord Herschell and Lord Macnaghten, in case defendant had induced one to break a contract,—as in cases of *Lumley v. Gye*,¹⁶ *Bowen v. Hall*,¹⁷ and *Temperton v. Russell*.¹⁸ There is ground for consideration that only the person who breaks the contract is liable.

LORD DAVEY.¹⁹ I. *Findings:* The jury have found that Allen maliciously induced the company to discharge the plaintiffs; maliciously induced the company not to engage them further, to their

¹ p. 165. ² p. 165. ³ p. 165. ⁴ p. 165. ⁵ p. 165. ⁶ p. 166. ⁷ p. 166. ⁸ p. 166. ⁹ p. 166. ¹⁰ p. 166. ¹¹ p. 166. ¹² *Mogul Steamship Co. v. McGregor* [1892] A. C. 25. ¹³ p. 168. ¹⁴ p. 164. ¹⁵ pp. 163-4. ¹⁶ 2 E. L. & B. 216. ¹⁷ 6 Q. B. D. 333. ¹⁸ [1893] 1 Q. B. 715. ¹⁹ p. 169.

damage of 20 pounds each;¹ *malice* was intended to be used in the sense of intending to do mischief to plaintiffs;² there was no evidence of conspiracy, or intimidation, or coercion in any legal sense of the term.³

The Court of Appeal seems to hold that *damnum absque injuria*, if accompanied by malicious intent, will give a right of action, or that malicious motive per se amounts to or may in certain circumstances amount to *injuria*. I am unable to assent to this.⁴

II. *Malice*, in its legal sense, means a *wrongful* act, done intentionally, without just cause or excuse. If so, it seems to be an argument in a circle to say that an act not otherwise wrongful becomes so if malicious.⁵

III. *Plaintiffs had no right*: A man has no right to be employed by any particular employer, and has no right to any particular employment if it depends upon the will of another.⁶ The right which a man has to pursue his trade or calling is qualified by the equal right of others to do the same, and compete with him, though to his damage.⁷ It is obvious that a general abstract right of this character stands on a different footing from such a private particular right as the right to the performance of a contract.⁸

IV. *Differs from right to contract*. There is a legal difference between persuasion to break a contract and persuasion not to enter into a contract.⁹ In the former, if the persuasion is successful, the other party is deprived of the benefit of having the contract completed.¹⁰ In the latter, he loses nothing to which he has a legal right, and he has no legal ground of complaint against one who refuses to contract with him.¹¹ In the one case there is the violation of a right; in the other, not.¹² For the present purpose I accept without comment,¹³ the doctrine of *Lumley v. Gye*,¹⁴ and *Bowen v. Hall*.¹⁵

V. *Employer's right,—proximate cause*: An employer may discharge a workman with whom he has no contract, or may refuse to employ one, from the most mistaken, capricious, malicious or morally reprehensible motive that can be conceived, but the workman has no right of action against him.¹⁶ It seems strange to say that the principal who does the act is under no liability, but the accessory who has advised him to do so, without any otherwise wrongful act, is under liability.¹⁷ This is not a case of conspiracy, whether that would make any difference or not.¹⁸

¹ p. 169. ² p. 170. ³ p. 170. ⁴ p. 171. ⁵ p. 171. ⁶ p. 173. ⁷ p. 173. ⁸ p. 173. ⁹ p. 171. ¹⁰ p. 171
¹¹ p. 171. ¹² p. 171. ¹³ p. 171. ¹⁴ E. & B. 216. ¹⁵ 6 Q. B. D. 333. ¹⁶ p. 172. ¹⁷ p. 172. ¹⁸ p. 172.

VI. *The authorities.* The cases cited do not hold otherwise. In every one of them there was either *violence* or the *threat of violence*, obstruction of the highway, or the access to the plaintiff's premises, nuisance, or other unlawful acts, done to the damage of the plaintiff.¹ Nor is the gist of the action in the cases, that plaintiff was a trader, or exercised a profitable calling; that circumstance afforded evidence of damage.² I suppose that if a person obstructed the access to my house or my vessel by molesting and firing guns at persons resorting thither on their lawful occasions, I may have my action against him, though I do not keep a school, or am not a trader, but am sailing my yacht for my own pleasure; or if a person obstructs my free use of the highway, and I suffer damage thereby, I have a right of action, though my carriage does not ply for hire.³ I think *Keeble v. Hickeringill*⁴ was decided on the ground that the act was a wilful disturbance of the enjoyment of the plaintiff of his own land for a lawful and profitable purpose, and was a nuisance.⁵

VII. *Fraudulent representations:* It was urged that Allen was guilty of wilful misrepresentation in what he told Halkett—that the men never really intended to strike, and Allen knowingly exceeded his instructions.⁶ Such a state of facts, amounting to fraud, would have constituted a legal wrong, and have been the essence of the action.⁷ It therefore should have been pleaded.⁸ It is a question of fact and should have been submitted to the jury.⁹ It is not in the pleadings, was not urged at the trial, was inconsistent with the charge against the other defendants below, and was not referred to by the trial judge in his summing up, and not raised by counsel until the argument in the House of Lords.¹⁰

LORD JAMES OF HEREFORD:¹¹ I. *Facts assumed:* In consequence of Allen's communication to the company, the company determined to discontinue the employment of plaintiffs; this determination was arrived at in order to avoid the inconvenience that would arise if the boiler-makers quit work.¹² The company committed no unlawful act; no contract was broken; there was simply a refusal to renew a hiring, that is, to enter into a new contract.³

II. *Defendant's acts not wrongful:* There was no coercion or intimidation (within the legal meaning) of the company, by the defendant.¹⁴ He *informed* the company of the existing, preformed intention of the boiler-makers;¹⁵ that intention was formed before

¹ p. 173. ² p. 173. ³ p. 173. ⁴ 11 East, 573. ⁵ p. 174. ⁶ p. 174-5. ⁷ p. 175. ⁸ p. 175.
⁹ p. 175. ¹⁰ p. 175. ¹¹ p. 175. ¹² p. 176. ¹³ p. 177. ¹⁴ p. 177. ¹⁵ pp. 177-178.

he came, and not in consequence of anything that he said or did;¹ he was only communicating this preformed intention, merely warning the company.² He doubtless desired that the boiler-makers should execute iron work, that steps should be taken to secure it, and so naturally would use solicitation and persuasion to procure plaintiffs' non-employment.³

III. *Not the proximate cause:* For him to communicate the boiler-makers' intention to the company did not injure plaintiffs.⁴ The boiler-makers would have acted upon it whether the company knew or were ignorant of their intention.⁵ They were about to desert their work when the defendant by his threat prevented them from doing so, and prevailed upon them to give him an opportunity to communicate with the company.⁶ He took a very minor part, and if he had never appeared the injury would have been the same, for the company would have discontinued plaintiffs' services to secure those of the boiler-makers.⁷

IV. *Wrongful acts only are actionable:* Only an interference which is *itself unlawful* constitutes a cause of action. I think the cases cited establish no more than this.⁸ If Lord Esher's principles laid down in *Bowen v. Hall*⁹ and *Templeton v. Russell*—¹⁰

"Merely to persuade a person to break his contract may not be wrongful, in law or in fact * * * But if persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in fact and in law a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it,"

were applied to the ordinary affairs of life, great inconvenience would ensue.¹¹ Every competitor who alleged that he was the best person to fulfill an offer would be liable to an action.¹² An architect says: "My plans are best, and following them will make the best house at the least cost; therefore employ me, and not A. or B." This would be actionable by the dicta in *Bowen v. Hall*,¹³ for his object is clearly to benefit himself at the expense of such third person.¹⁴

V. *Mere interferences not wrongful:* But 'interfered with' in its legal sense should be defined also.¹⁵ Every man's business is liable to be 'interfered with' by the action of another, and yet no action lies for such interference. Competition represents 'interference,' yet it is in the interest of the community that it should exist.¹⁶ A

¹ p. 177. ² p. 178. ³ p. 178.

⁴ p. 177. ⁵ p. 177. ⁶ p. 177. ⁷ p. 178. ⁸ p. 180. ⁹ 6 Q. B. D. 333. ¹⁰ [1893] 1 Q. B. 715.

¹¹ p. 179. ¹² p. 179. ¹³ 6 Q. B. D. 333. ¹⁴ p. 179. ¹⁵ pp. 179-80. ¹⁶ p. 179.

new invention 'interferes with' (even destroys) an old trade.¹ The boiler-makers' conduct here interfered with plaintiffs' business, but it is not said an action lies against them.² Every organizer of a strike for higher wages 'interferes with' the employer, and every employers' federation that persuades a co-employer to lock out his workmen 'interferes with' them—but neither is actionable.³

VI. *Interference with trade not actionable.* I see no ground for saying that any different rule should be applied to cases of interference with a man when carrying on his trade or business, than when he is engaged in any other pursuit.⁴ In the Mogul case,⁵ though an extreme case of interference directly injuring plaintiffs' trade, for the express purpose of benefiting the defendants', it was held that the acts were those of competition, were not unlawful, and there was no conspiracy.⁶

The views of the judges who held with the majority of the Lords may be summarized as follows:—

MATHEW, J.: Defendant is charged with malice in law, that is with *wrongful* conduct which violated a *right* of the plaintiffs.⁷ In the charge of malice in law, personal malevolence is not necessarily imputed.⁸ It is most important to bear in mind that it was admitted on the trial that there was no ground for charging the defendant with having acted with any ill will to the plaintiffs.⁹ Although this was admitted in the trial court, the Court of Appeal considered that the jury might find the act of the defendant had been malicious.¹⁰ But motive is immaterial unless a right of plaintiff is infringed.¹¹

Defendant is charged with having acted wrongfully and unlawfully with the object and result that the plaintiffs were deprived of a right to follow their *trade and earn wages*. Is there such a *right*?¹² This did not arise from a contract—no right of that kind was infringed. If there is a right to labor, it is admitted to be limited by fair competition; by any one refusing to employ; by the right to *give advice* not to employ.¹³ But it is said that after making these allowances, the balance of such a right is specially protected. No authority is cited for the rule; it is strange such a right should have been dormant so long; no reason is given why other persons' contracts should not be likewise protected; but if they were; extraordinary results would follow;—the question of whether advice was properly given would have to be left to the jury, for which they are altogether unfit.¹⁴ There is no authority that the right is like a property right—many cases were cited, but none are applicable.¹⁵ There can be no right to have that which no one is bound to provide, namely, employment in his trade or business. It seems equally clear that he cannot be said to have a right to the hope of such employment.¹⁶

¹ p. 179. ² p. 179. ³ p. 180.

⁴ p. 180. ⁵ *Mogul Steamship v. McGregor*, 23 Q. B. D. 598; [1892] A. C. 25. ⁶ p. 180. ⁷ p. 25.

⁸ p. 25. ⁹ p. 25. ¹⁰ p. 27. ¹¹ p. 27. ¹² pp. 25-26.

¹³ p. 26. ¹⁴ p. 26. ¹⁵ pp. 26-27. ¹⁶ p. 27.

WRIGHT, J.:¹ Apart from malice, was there any cause of action? *No.*² "The foundation of every action of tort, apart from the question of malice is an act *wrongful*, and which may be qualified legally as an injury. It is essential to an action in tort that the act complained of should under the circumstances be legally wrongful, as regards the party complaining, that is, it must prejudicially affect him in some legal *right*; merely that it will, however, directly do him harm in his interests is not enough."³

Was there evidence of *malice*, and if so in what sense? No, in the legal sense. Yes, in the popular sense.⁴ Since there was not otherwise any wrong, or *injuria*, it follows that there could not be malice in the ordinary legal sense of the term, as "the willful infringement of a legal right or a breach of a legal duty without matter of legal justification or excuse." In this sense, in a statement of a cause of action, or a crime, "it imports not an inference of motive to be found by the jury, but a conclusion of law which follows on a finding that the defendant has violated a right and has done so knowingly, unless he shows some overriding justification,"—as in law of murder, and libel, and malicious prosecution."⁵ The only kind of malice, therefore, which can be suggested in the present case is malice in its popular sense, importing a malicious motive, spite, and ill will. *It seems to me impossible to say that there was not evidence fit to be left to the jury, of malice in this sense.*"⁶

Can the addition of malicious motive create an *injuria*? No. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."⁷

The views of the minority were:—

LORD HALSBURY, L. C.⁸ I. *Assumption*: There was no contract by which the company were bound to keep the plaintiffs in their service till the repairs were completed.⁹

II. *Plaintiffs' right*: Plaintiffs have a right to employ their labor as they will, recognized by law, and guarded from any undue interference as an actionable wrong.¹⁰ Very early authorities recognize this right, and no authority can be found which questions or qualifies it.¹¹ 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.¹² It is "the liberty of a man's mind and will, to say how he shall bestow himself and his means, his talents and his industry," and is "as much a subject of the law's protection as is that of his body."¹³ An action for the infringement of such a right is not a novelty, and if it were, it would be no sufficient argument against its existence.¹⁴

¹ p. 62. ² p. 63.

³ p. 63, citing *Rogers v. Dutt*, 13 Moo. P. C. 209, 237, 241; also cited by Bowen, L. J., in *Mogul Case*, 23 Q. B. D. at 613. ⁴ p. 63. ⁵ p. 63. ⁶ pp. 63-64. ⁷ pp. 64-65, citing *Stevenson v. Newham*, 13 C. B. 285; *Kearney v. Lloyd* [1890], 26 L. R. Ir. 268; *Capital Counties Bank v. Henty* [1882], 7 App. Cas. at 793. ⁸ p. 67.

⁹ p. 68. ¹⁰ p. 71. ¹¹ p. 71. ¹² p. 72. ¹³ p. 73, quoting *Bramwell, B. in Reg. v. Druitt*, 10 Cox C. C. 600. ¹⁴ p. 73.

III. *Wrongs to such a right:* "Intimidation, obstruction, and molestation are forbidden; so is intentional procurement of a violation of individual rights, contractual or other, assuming always there is no just cause for it."¹ "Intentionally to do that which in the ordinary course of events is calculated to do, and does damage, is actionable if done without just cause or excuse,"² — per Lord Bowen, in the *Mogul* case.³

IV. *The defendant's acts were wrongful.* They amounted to *threats*. "To my mind, Allen was guilty of intimidation, and coercion, through that intimidation:"⁴ "I do not use 'intimidation' in the technical sense of the statutes (where it is construed along with associated words), because I observe the judge instructed the jury there was no intimidation in a legal sense."⁵ If what was meant by that was that there was no threat of violence to person or property, it is true.⁶ But the judge left the exact question to the jury, 'If you find he induced the company by *the threat, which is suggested by the plaintiffs, of calling out all the men on the strike,*' did he do it maliciously, etc.?'⁷ If that which was held out as the inducement to dismiss the plaintiffs was that such a stoppage of the works should be occasioned as that the business of the company would seriously suffer, I should think that would be a thing which would be likely to produce fear of the consequences of the company retaining them in their employment, and a company which abstained from doing so by reason of that fear would justly be described as 'intimidated.'⁸

V. *They were malicious: Intentional action* done without just cause or excuse is what the law calls a *malicious* wrong.⁹ Objection is made that 'maliciously' adds nothing; if the thing was lawful, it was lawful absolutely; if not lawful, it was unlawful, and *malicious* can make no difference. The fallacy is in the assumption that everything must be absolutely lawful, or absolutely unlawful. There are many things that become lawful or unlawful according to the circumstances. There is no analogy between the case of a man's digging into his own land and diverting the subterranean water to the flow of which his neighbor has no right, and the intentional inflicting of injury upon another person's property, reputation or lawful occupation.¹⁰ The word '*malicious*' appears to me to negative

¹ p. 74, citing *Mogul Case*, 23 Q. B. D. 614, per Lord Bowen.

² p. 75. ³ 23 Q. B. D. 643. ⁴ pp. 80, 83. ⁵ pp. 80, 83. ⁶ p. 83, ⁷ pp. 82, 83. ⁸ p. 83. ⁹ p. 75, citing American cases, *Walker v. Cronin*, 107 Mass. 555; *Benton v. Pratt*, 2 Wend. 381; *Rice v. Manley*, 66 N. Y. 82; *Bixby v. Dunlap*, 2 Am. R. 475; *Angle v. Chicago*, etc., Ry. Co. 151 U. S. 1. ¹⁰ p. 83.

just cause or excuse.¹ No better illustration can be given of the distinction between an act which can be legally done and an act which cannot be so done because tainted with malice, than such a colloquy as might have been held in a case of this kind. "If the representative of the men had, in good faith and without indirect motive, pointed out the inconvenience that might result from having two sets of men working together on the same ship, whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union because on some former occasion they had worked upon an iron ship, it seems to me that the difference of motive may make the whole difference between the lawfulness or unlawfulness of what they did."²

VI. *Allen misrepresented the facts:* It was not necessary to set this forth in the pleadings, for it is not an action for false representations, but for *maliciously and wrongfully causing the discharge* of the plaintiffs. It is not necessary to set forth the *unlawful means* when there is an unlawful procuring.³ "If concerted collective action to enforce, by ruining the men's employment, the will of a large number of men upon a minority, whether the minority consists of a small or a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that an individual who *falsely assumes* the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters, and so produces the injury, could shield himself by proving he had no authority."⁴ "It might as well be contended that the highwayman was not responsible for the coercion he exercised toward his victim if he puts a pistol to his head because it should afterwards turn out that the pistol was unloaded."⁵

VII. *The defendant's wrongful act was the proximate cause of the damage to the plaintiffs.* "In the face of the evidence, how any one can doubt that it was the communication made by Allen that caused the dismissal of these two men, I am not able to understand. I shall assume as proved, or at all events as established by evidence proper to be submitted to the jury, that it was Allen who caused the dismissal of the plaintiffs.⁶ That the company was acting within their legal rights makes no difference—the question is what was the cause of their thus exercising their legal right? I have never heard that a man who was dismissed from his service by reason of

¹ p. 84. ² pp. 84-5. ³ p. 88. ⁴ p. 87. ⁵ p. 89. ⁶ p. 71.

some slander could not maintain an action against the slanderer because the master had a legal right to discharge him."¹ The dissatisfaction of the boiler-makers has been greatly exaggerated—the evidence called it a "little bit of a trouble," "some of the men felt dissatisfied," "some said we had better leave," or "are going to leave;" but Allen said: "Tell them not to leave work until things are settled; wait and see how things settle."²

VIII. *Changes the law*: The adverse views overrule the views of the most distinguished judges going back now for certainly two hundred years, and up to this time there was an unanimous consensus of opinion; and in denying a remedy we are departing from the principles which have hitherto guided our courts in the preservation of individual liberty to all.³

LORD ASHBOURNE:⁴ I. *Plaintiffs' right*: Plaintiffs had a clear right to pursue their lawful calling, to have the full benefit of their employment, and the right to enjoy the legitimate, reasonable and probable expectation of a continuance of it.⁵ The law is so stated by Sir Wm. Erle,⁶ and Holt, C. J., in *Keeble v. Hickeringill*⁷ says: "He that hinders another in his trade or livelihood is liable to an action for doing so." No subsequent case has thrown doubt upon the effect of that authority. *Tarleton v. McGawley*⁸ supports it as a settled law; the Mogul case⁹ accepted it as undoubted law, and only held that fair competition did not violate the right.

II. *Defendant's acts were wrongful*: It was not an effort, by competition, to enable the boiler-makers to get the iron work instead, but to *punish* the plaintiffs; the motive was founded upon the determination to inflict punishment on them for their past action, by driving them out of their employment.¹⁰ There was evidence to go to the jury that the defendant intimidated and coerced or maliciously induced the company's action.¹¹ I would gather from the defendant's evidence that he would not say his acts were right.¹²

III. *The defendant's acts were the proximate cause* of the loss. There is no question that they damaged the plaintiffs. The natural result of the defendant's words and intervention would be that the plaintiffs would not then or in the future be free to carry on their trade, even confining themselves to¹³ wood-work. The fact that plaintiffs could make no claim against the company, cannot exon-

¹ p. 74. ² p. 81. ³ p. 90. ⁴ p. 109.

⁵ p. 112. ⁶ *Trade Unions*, p. 12, *infra*, p. 49. ⁷ 11 East 573. ⁸ Peake N. P. 270. ⁹ 23 Q. B. D. 598. ¹⁰ pp. 111, 114. ¹¹ p. 111. ¹² p. 111. ¹³ p. 111.

erate the defendant from his own wrongful act.¹ In *Temperton v. Russell*² Lord Esher gave it as his opinion that there was no real difference between a malicious inducement to break a contract and a malicious inducement not to enter into new contracts of service. The consequences to the workmen so treated are alike disastrous.³ The object of the wrongdoer is the same in each case.⁴

IV. *As to malice*, I can add nothing to what was said by Lord Halsbury, in whose opinion I fully concur.⁵

LORD MORRIS.⁶ I. *Plaintiffs' right*: At common law a workman had a *right* to work with any person who was willing to employ him. Both had a right to trade in labor as in any other commodity as they thought fit. This was a part of the personal liberty enjoyed by every man, and like personal liberty was the subject of peculiar safeguards,—it was inalienable, could not be bartered away, and contracts restraining it were (with certain exceptions) null and void. Its existence was established as far back as Queen Anne,⁷—in *Keeble v. Hickeringill*,⁸ which has never been dissented from and in the *Mogul Case*⁹ in the Appeal Court, Lord Bowen cites it with approval, and in the same case in this House¹⁰ three (Lord Bramwell, Lord Macnaghten, and Lord Field) of the seven Lords pronouncing opinions, refer to it with approval, and none expressed any disapproval or adverse criticism of it.

II. *Wrongs to such a right*: “In my opinion it is actionable to disturb a man in his business by procuring the determination of a contract at will; or by even preventing the *formation* of a contract, when the motive is malicious and damage ensues.”¹¹

III. *Defendant's acts were wrongful*: His *object was to injure* the plaintiffs and to *punish* them, and he had the intention of *further persecuting* them by not allowing them to work anywhere, and this *was not the wish of the men or their union*.¹² His conduct was *unauthorized*, and he *misrepresented* to the employers both the wishes of the men and their objects, and acted outside the scope of his authority as a district delegate of the union. *The jury found it so*. 1. Kennedy, J. in his charge put Allen's case thus: “Bearing in mind how Allen came, you have to consider *whether the plaintiffs have proved to you not merely that he represented to the employers what the men working in that yard would be likely to do unless they could come to some settlement, and left to the*

¹ p. 114. ² 1893 1 Q. B. 715.

³ p. 114. ⁴ p. 114 ⁵ p. 114. ⁶ p. 154 ⁷ p. 155. ⁸ 11 East 573 ⁹ 23 Q. B. D. 613. ¹⁰ (1892)

¹¹ p. 155. ¹² p. 159.

employers . . . the choice of action. I do not think in that case you would say that was an *inducement*.' Or that "he felt himself in this position: I am a district delegate; in the interest . . . of the employers . . . as well as of the men, it is better that I should go and tell the employers what the facts are after telling the men to take no hurried action—to let the matter either be settled peaceably by the employers, or if it cannot be settled by them be brought in due course before the executive of the union."¹

2. Some of your lordships have put yourselves in the place of the jury by coming to the conclusion that Allen had gone to the employers merely to *intimate* as has been said, or represent to them the feelings and views of the men, to be their messenger or mouthpiece,—*that being the very case that was negatived by the jury*.² Indeed Lord James has gone further and said, for Allen to communicate such intention to the company did not injure the respondents. If this was correct, there was no necessity to go any further.³

3. In my opinion it was for the jury to say whether Allen went to the employers as peacemaker, intimator, representative, messenger, or mouthpiece, as was stated by him, *or rather for him by some of your Lordships*, or whether he went with the object and for the purpose of having the plaintiffs punished for past alleged offenses by getting them discharged at once from their employment.⁴

4. The defendant did not take, in his evidence, the position taken up for him by some of your Lordships. He was conscious *he had done wrong*, and denied altogether what Mr. Halkett proved. The jury disbelieved him.⁵

The views of the six judges who held for plaintiff may be added:

I. *The plaintiffs' right*. All the judges except those of the Court of Appeal (all of whom assumed the plaintiff had a right that could be invaded), quoted with approval Lord Holt's words in *Keeble v. Hickeringill*,⁶ given above. Hawkins,⁷ Cave,⁸ and North,⁹ JJ., as well as Lords Halsbury,¹⁰ Ashbourne,¹¹ Morris,¹² all quoted with approval the following from Sir William Erle.¹³

"Every person has a right under the law as between him and his fellow subjects to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction

¹ p. 158. ² p. 159.

³ p. 159. ⁴ p. 159. ⁵ p. 159. ⁶ 11 East 573. ⁷ p. 14. ⁸ p. 36. ⁹ p. 39. ¹⁰ p. 39. ¹¹ p. 112.

¹² p. 156. ¹³ Trade Unions, p. 12.

would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong to be remedied either by action or by indictment, as the case may be."

Hawkins says¹ further that a component part of this right is "the right to the full benefit of that valuable interest, which Lord Ellenborough termed a 'probable expectation' (as distinguished from a vested legal interest)," upon which the daily laborer may rely for continual employment in the future. . . It is analogous to the good will of a business. Cave reviewed the cases² fully.

II. *Wrongs to such rights.* Lawrance stated these most succinctly as follows:³—"I think the principles on which the case is to be decided are to be found in the dicta of Holt, C. J. in the case of *Keeble v. Hickeringill*,⁴ as above given. The conditions necessary to support the action are⁵ "trespass, violence, fraud, or breach of contract," or any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy, or any act, the ultimate object of which is to injure the plaintiffs, having its origin in malice or ill will to them." Hawkins adds: "Any menacing action or language . . . which no man of ordinary firmness . . . can reasonably be expected to resist, used . . . with intent to destroy" his freedom of will, "and to compel him through fear of such menaces to do what it is not his will to do," and "calculated to cause injury to him or to some other person," is sufficient.⁶

III. *Wrongful nature of the defendant's acts:*—The judges generally considered them wrongful both to the employers and to the plaintiffs. *Threats, or coercion of the employers.* Kennedy, though ruling there was no evidence of intimidation or coercion in a legal sense, called defendant's acts threats.⁷ Lord Esher,⁸ and Hawkins,⁹ North,¹⁰ and Grantham,¹¹ did the same. Cave waived the question as unnecessary.¹² Hawkins says if the defendant's acts were "not coercion, . . . I do not know what coercion is."¹³ Grantham adds there could be "no better evidence of intimidation of the employer."¹⁴

Desire to punish. A determination to prevent further employment and to punish the plaintiffs,—“procure discharge,”¹⁵ “forcing company not to employ them,”¹⁶ “make an example of,”¹⁷ “followed,”¹⁸ “not be allowed to work anywhere on London river,”¹⁹ “deprive them of their means of living,”²⁰ “as a warning to others,”²¹ “inflict upon them great loss and suffering,”²² “for what they had done.”²³ Nearly all characterized the acts so.

¹ p. 16. ² 1410, Schoolmaster's Case, Y. B. 11 Hen. IV. fo. 47 pl. 21; 1593, Levet's Case, Cro. Eliz. 289; 1620, Garret v. Taylor, Cro. Jac. 567; 1661, Sheperd v. Wakeman, 1 Sid. 79; 1706, Keeble v. Hickeringill, 11 East 573 n.; 11 Mod. 74, 130; 3 Salk. 9; Holt 14, 17, 19; 1794, Tarleton v. McGawley, 1 Peake, N. P. C. 270; 1809, Carrington v. Taylor, 11 East 571; 1824, Hannam v. Mockett, 2 B. & C. 934; 1835, Green v. Button 2 C., M. & R. 707; 1844, Gregory v. Duke of Brunswick, 6 M. & G. 953; 1853, Lumley v. Gye, 2 El. & B. 216; 1862, Young v. Macrae, 3 B. & S. 264; 1876, Riding v. Smith, 1 Ex. D. 91; 1881, Bowen v. Hall, 6 Q. B. D. 333; 1883, Quartz Hill Min. Co. v. Eyre, 11 Q. B. D. 674; 1889, Mogul Case, 23 Q. B. D. 598; 1893, Temperton v. Russell, 1 Q. B. 715; Western Counties Manure Co. v. Lawes, L. R. 9 Ex. 218; Winsmore v. Greenbank, Willes, 577.

³ p. 58. ⁴ 11 East 573. ⁵ Quoting Lord Bramwell in Mogul Steamship Co. v. McGregor [1892] A. C. 25. ⁶ p. 17.

⁷ pp. 82, 83. ⁸ (1895) 2 Q. B. 37 (C. A.). ⁹ pp. 17 & 18. ¹⁰ p. 39. ¹¹ p. 53. ¹² p. 37. ¹³ p. 13. ¹⁴ p. 53. ¹⁵ p. 36. ¹⁶ p. 39, 42. ¹⁷ p. 45. ¹⁸ pp. 38, 39, 42. ¹⁹ pp. 37, 39, 42, 53. ²⁰ p. 45. ²¹ p. 45, 48. ²² pp. 21, 48. ²³ p. 39.

Were not fair competition. Cave says, "according to the Mogul case the action of Allen might have been justified" as trade competition, if it had been confined to the time when respondents were doing iron work, and were therefore acting in competition with the boiler-makers. . . . As soon as he overstepped those limits, and induced their employers to dismiss them by way of punishment, his action was without just cause or excuse, and consequently malicious. . . . If this is not malicious, I ask where the line is to be drawn? Might Allen lawfully have carried out his threat, and with impunity have procured the dismissal of the respondents from every yard in London by way of punishment, and not in the way of competition?"¹ And Grantham speaks similarly.²

They were malicious: The jury found them so, and thirteen judges approved their finding. Nearly all the twenty-one judges approved the definition of malice as being "a wrongful act done intentionally without just cause or excuse;" but of this, North said: "If the proposition intended is that an act itself legal cannot be rendered actionable by being done from a wrong motive, such as spite or ill will or vindictiveness, or merely to vex or annoy, I deny that the proposition is sound in law or universally true. It is much too large. Each case must be considered separately."³ All agreed that there were acts in which the motive was immaterial, like digging in one's land; and others in which, like malicious prosecution, it was essential. Of the six judges, all except Cave⁴ urged that there was a class of rights which would be invaded by a malicious act not otherwise wrongful, if there were no just cause or excuse for it, if damage resulted, and that the defendant's act was one of that kind. All agreed that the malice here consisted of the desire "to punish the plaintiffs;" all held it was present; and though "spite or ill will," is not necessary "there is evidence of its existence here,"⁵ "ample materials,"⁶ "about as strong a proof of malice as can be found in any case reported in our law books,"⁷ and "evidence of malice of the worst form towards the plaintiffs."⁸

Misrepresentations by the defendant: There was evidence for "the jury that the men had no intention to leave, that the defendant could not have believed that they had, but that the firm intention of both was to remain, and to drive out the plaintiffs, and that the assertions made to Mr. Halkett were falsely made for the purpose of intimidation."⁹ "There was malicious conduct and *falsehood* on the part of the defendant."¹⁰ It was "strong evidence of malice to tell the company that the men were about to strike, when he had himself informed them that not only would a strike not be permitted . . . but that the men would be fined for so doing." By that "fraudulent statement he induced the company to discharge the men."¹¹

IV. *Proximate Cause:* All the six judges agreed that Allen's acts were the proximate cause of the plaintiff's loss; and indeed all who held for the plaintiff must have found so. "There are numerous cases shewing clearly that a wrongful interference between employer and employed, from which *damage ensues*, gives a cause of action, even where the employment is at will only, and not for a fixed period. The real question is whether Allen

¹ p. 37. ² p. 54.

³ p. 40. ⁴ p. 29. ⁵ p. 18, Hawkins, J. ⁶ p. 42, North J. ⁷ p. 53, Grantham, J.

⁸ p. 53, Grantham, J. ⁹ pp. 22-23, Hawkins, J. ¹⁰ p. 56, Grantham, J. ¹¹ p. 61, Lawrance, J.

did or did not wrongfully interfere with the existing relation . . . and the duration of the employment is immaterial except on a question of the amount of damages;¹¹ "the loss and damage are the same as if they had had a contract with the company," except they would have then had some remedy against it, while now they have none; why should an invalid contract because not written or stamped "give immunity to one who induces its breach?"¹²

To sum up: When a person sues another and obtains judgment, some things have necessarily been found. These are, that the plaintiff had the right claimed, = R; that this right has been infringed and damage done, = D; that the defendant's act was wrongful, and *proximately* caused the damage, = W; and so we might say $R-(W+D)=$ a cause of action. If either of these elements is absent, there can be no recovery. Confining ourselves to the prevailing views expressed we have:

As to D, all admitted its presence,—the plaintiff had sustained temporal loss.

As to R,—Mathew, J.,³ Lord Herschell⁴ and Lord Davey⁵ held that plaintiffs had no legally protectible right under the circumstances; if this is so, what was further said as to *malice*, by these, was unnecessary to the decision. All the rest of the Lords and Judges, however, recognized that the plaintiff had a legally protectible right of some kind.

As to *proximate* cause,—waiving all questions as to the character of the defendant's acts,—Lord Macnaghten,⁶ Lord James⁷ and Lord Herschell⁸ clearly held that the defendant's acts were not the proximate cause of the plaintiffs' loss; if so, what they said as to malice becomes immaterial; Lord Watson⁹ is not clear upon this point, but intimates that defendant's acts did not do the injury to the plaintiffs in the legal sense.

As to W, if defendant's acts were rightful, that is, wholly innocent as having no *morally wrongful* quality at all, and neither the character of a trespass nor fraud, nor negligence, then it would not be actionable,—all the 21 Judges and Lords substantially agreed to this. Lord Watson¹⁰ said defendant had the *absolute* right to do what was done. Lord Herschell¹¹ seems to consider that defendant's acts were acts of fair competition and not wrongful for that reason; and Lord Shand¹² clearly holds this. Lord Macnaghten¹³ and

¹ North, J. p. 43. citing, 1859, *Thompson v. Ross*, 5 H. and N. 16; 1787, *Bennett v. Allcott*, 2 T. R. 166; 1867, *Evans v. Walton*, L. R. 2 C. P. 615 (citing fully the old cases). ² p. 35, *Cave, J.*

³ p. 27. ⁴ p. 121; ⁵ p. 173. ⁶ pp. 149-52. ⁷ pp. 176-178. ⁸ pp. 118, 131-2. ⁹ pp. 98-99. ¹⁰ pp. 98-99.

¹¹ pp. 117, 131. ¹² pp. 163-4. ¹³ pp. 149-151.

Lord James¹ looked upon them as wholly innocent and almost commended Allen for "warning the company's representative not to pursue a course which would be detrimental to the company's interest"—a view sufficiently answered by Lord Morris.²

If the foregoing is correct, what becomes of what the six Lords say upon the subject of *malice*? Upon the most simple and obvious principles, the majority would have decided the same way without discussing malice at all,—Lords Davey and Herschell because there was no right; Lord Macnaghten, Lord Herschell and Lord James, because the acts of defendant were not the proximate cause of the loss; Lord Watson, that the defendant had an absolute right; Lord Shand, that the acts were those of fair competition, and clearly within the principles of the *Mogul* case, and Lords Macnaghten and James, that the acts were innocent, accidental or commendable. These are all,—and the long discussions as to malice would seem to be little more than fulmination against the unfortunate and unnecessary dictum of Lord Esher (Brett, L. J.) in *Bowen v. Hall*³ given above. Wright, J.'s theory of the case was the only one that required a holding that malice made no difference.⁴

The above summary comes to much the same result so well expressed by Lord Lindley, in *Quinn v. Leatham*,⁵ that the majority of the Lords in *Allen v. Flood*, found the "defendant had infringed no right of the plaintiffs; had done nothing which he had no legal right to do; and that the fact that he acted maliciously and with intent to injure the plaintiff did not, without more, entitle the plaintiffs to maintain an action."

Expressions of approval and disapproval have been as divergent as were the original opinions of the judges. "Probably no precedent exists in which their Lordships overruled such a preponderance of judicial decision and opinion as existed" here.⁶ "Politics took sides, perhaps involuntarily," and as in Lord Brougham's time, "the decisions of English judges could be predicted from their political leanings."⁷

"The House of Lords never deserved better of the Common Law;" "it will make the law broader and simpler;" "it is one of the rare leading decisions whose effects are not fully worked out for many years."⁸ "That it is simple, convenient in practice, and in accord with a conservative view of the spirit of the Com-

¹ p. 178. ² pp. 158-9. ³ 6 Q. B. D. 333 [1881], Ames Cases Torts 613. ⁴ p. 64.

⁵ [1901] A. C. 495 on p. 533. ⁶ 14 L. T. R. 126. ⁷ Law Times, Dec. 18 and 25, 1897. ⁸ 14 L. Q. R. 107, 129.

mon Law, seems almost undeniable."¹¹ "Time will demonstrate the correctness of the decision."¹² It affirms "well settled principles of the Common Law."¹³ It overthrows "a rule which conferred a most dangerous power upon courts and juries."¹⁴

In England it has been cited and approved, on some point, in six cases.⁵ In Canada it has been followed in two cases,⁶ and has overruled there the civil law rule that one could not on his own land do something "*merely to hurt others*," "a pure act of malice."⁷

Lord Halsbury's criticism that it overruled the holdings of two hundred years is noted above. Lord Morris remarked it "overturns the overwhelming judicial opinion of England."⁸

In Scotland, "malice and motive have been more considered . . . than is consistent with . . . *Allen v. Flood*."⁹ And in the Irish Queen's Bench Division, in *Leatham v. Craig*,¹⁰ Andrews, J., says "the final decision has been regarded by many eminent judges as going very much too far;"¹¹ O'Brien, J., thought there were "several fallacies scattered through the argument of the majority,"¹² and Palles, C. B. said "I feel myself coerced by the judgment . . . to hold that the law is powerless to protect from that which the jury has found to be the tyranny of a trades union, the sacred right of a workman to save himself and his family from starvation by the work of his hands."¹³ It was held here and unanimously affirmed by the Irish Court of Appeal, that "notwithstanding *Allen v. Flood*, an action was sustainable by the plaintiff against the defendants for maliciously conspiring to procure breaches of contract, and also for *maliciously conspiring* together to injure him by *preventing persons from entering* into contracts with him."¹⁴ The case was then taken to the House of Lords, and unanimously affirmed by Earl Halsbury, L. C., Lord Macnaghten, Lord Shand, Lord Brampton, Lord Robertson, and Lord Lindley,—the syllabus¹⁵ saying "*Allen v. Flood* explained, and its real effect stated," affirming *Temperton v. Russell*,¹⁶ and holding—

¹ 11 Harv. L. R. 405-6. ² 17 Law Notes, Jan. 17, 1898, as quoted by Mr. Krauthoff, 21 Am. Bar Assn. R. 384. ³ 18 Can. L. T. 123. ⁴ London Times, as quoted by Mr. Krauthoff, 21 Am. Bar Assn. Rept. p. 384. ⁵ *Huttley v. Simmons*, L. R. [1898] 1 Q. B. 181; *Ajello v. Worsley*, L. R. [1898] 1 Ch. 274; *Lyons v. Wilkins*, [1898] 78 L. T. R. 618, 619; *Hubbuck, etc. v. Wilkinson* [1898], 79 L. T. R., 429; *Boots, etc., v. Grundy* (1900) 82 L. T. R. 769 on 772. ⁶ *Perrault v. Gauthier*, 28 Can. Sup. Ct. R. 241; *McBryan v. Canadian Pacific Ry. Co.* 29 Sup. Ct. R. 359. ⁷ 29 Sup. Ct. R. 359, on 372. ⁸ p. 154. ⁹ *Scottish Coöperation, etc., Soc. v. Glasgow Fleshers' Assn.* [1898] 35 Sc. L. R. 645, Lord Kincairney. ¹⁰ [1899] 2 Irish R. 667. ¹¹ *Ib.* 676, 12 *Ib.* 14, 686, 690, 691.

¹³ [1899] 2 Ir. R. 701. ¹⁴ [1899] 2 Ir. R. 667, Syllabus. ¹⁵ *Quinn v. Leatham*, [1901] A. C. 495 ¹⁶ [1893] 1 Q. B. 715.

“A combination of two or more, without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts to deal with him or continue in his employment, is, if it results in damages to him, actionable.”

Lord Macnaghten¹ distinguishes this from *Allen v. Flood* in that there was no trade dispute, and an “oppressive combination” differs widely from an “invasion of civil rights by a single individual.” Lord Shand,² that a combination not for legitimate competition “but in pursuit of a *malicious* purpose to injure another, would be clearly unlawful.” Lord Brampton says³ “It must not, however, be supposed that a malicious intention can in no case be material to the maintenance of an action.” Lord Lindley⁴ suggested that *Allen v. Flood* “only applies to ‘acts otherwise lawful,’ *i. e.*, to acts involving no breach of duty, or in other words, no wrong to any one,” and adds “it is a very valuable decision, but it may be easily misunderstood and carried too far.”⁵ If these statements are correct, then all the difficulties as to *malice* are likely to arise when the acts of two or more persons are considered instead of one.

In this country soon after the decision of *Allen v. Flood*, it was said:—

“There have been so many decisions holding defendants liable for what courts consider malicious interference with the plaintiff’s business that it seems probable that the judges will pay little or no respect to it, beyond distinguishing it as without the element of conspiracy which has been present in all of the American cases.”⁶

And now since *Quinn v. Leatham*⁷ the English rule is so. The case has been cited several times. In Illinois,⁸ as not applying where an existing contract was involved. In Massachusetts,⁹ Holmes, J., says:—

“I regard it as settled in this Commonwealth, and as rightly settled, whether it be consistent with some dicta in *Allen v. Flood* or not, that an action will lie for depriving a man of custom, that is, possible contracts, as well when the result is effected by persuasion as when it is accomplished by fraud or force, if the harm is effected simply from malevolence, and without some justifiable cause, such as competition in trade.”¹⁰ And again, “When the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant who has controlled the employer’s action to the plaintiff’s harm. The no-

¹ [1901] A. C. 511.

² [1901] A. C. 512. ³ [1901] A. C. 524. ⁴ [1901] A. C. 522-4. ⁵ [1901] A. C. 542. ⁶ 11 Harvard L.R. 405-6. ⁷ [1901] A. C. 495. ⁸ *Doremus v. Hennessy*, 176 Ill. 608, 618.

⁹ (1898) *May v. Wood*, 172 Mass. 11 on 14. ¹⁰ Citing *Walker v. Cronin*, 107 Mass. 555, 556; *Morasse v. Brochu*, 151 Mass. 567; *Hartnett v. Plumbers’ Supply Ass’n*, 169 Mass. 229, 235; *Delz v. Winfree*, 80 Tex. 400, 405; *Vegetahn v. Guntner*, 167 Mass. 91, 69, 105.

tion that the employer's immunity must be a non-conductor so far as any remoter liability was concerned troubled some of the judges in *Allen v. Flood*, but is disposed of for this Commonwealth."¹

Hammond, J., says, "We are not disposed, in view of the circumstances under which that decision was made, to follow it. We prefer the view expressed by the dissenting judges."²

In Michigan, Grant, C. J., says "To other courts than those of England, it is mainly instructive in the learned and exhaustive opinions rendered."³ In New York, it has been followed in six cases⁴ in the Supreme Court, and according to newspaper reports, very recently by the Court of Appeals;⁵ but Rumsey, J., says "it cannot be sustained either upon principle or authority."⁶ In Wisconsin,⁷ Marshall, J., says of the three English cases, the *Mogul case*,⁸ *Allen v. Flood*,⁹ and *Huttley v. Simmons*¹⁰—"If the doctrine of these cases as settled in the last of them is to prevail, we must all revise our notions of the law of conspiracy and the books must be rewritten,"—and "there is very little in *Allen v. Flood* to warrant adopting it." It has been cited in the Federal Courts a few times, but not with entire approval.

An editorial in the *American Law Review*¹¹ says of the case:—

"The element of motive can no more be eliminated from the civil law of torts than it can from the law of crimes. A thousand such decisions as that rendered in the case of *Allen v. Flood* could not accomplish such a result. The argument that it presents an element of uncertainty in jury trials is an argument that may be made with even greater force in criminal cases. In a civil trial, property or money . . . is at stake. . . . The whole gist of murder is malice. Let us take an infamous case, the monument of which can be seen any day upon the top of Knob Hill in San Francisco, where a rich man wanted to build a palatial residence. An undertaker had a small lot within the tract which this multi-millionaire desired to purchase. He refused to sell except for a good price, and the multi-millionaire refused to buy, and instead exercised the right which the barbarism of the Common Law has conceded to land owners—the right to erect a wall on his own land, let us say twenty feet high—so high as to shut out light and prospect from that lot and render it worthless. And there that erection stands, a monument to the doctrine of *Allen v. Flood* which in that respect was held to be the doctrine of the common law by the

¹ [1901] *Moran v. Dunphy*, 177 Mass. 493, on 487. ² [1900] *Plant v. Woods*, 176 Mass. 492 on 499.

³ [1898] *Beck v. Teamsters' Union*, 118 Mich. 497, on 523-9. ⁴ *Davis v. United Engineers*, 28 App. Div. 396 on 399, 401-2; *Coons v. Chrystie* [1898] 24 Misc. 296, *Bischoff, J.* at 298; *Reynolds v. Plumbers' Ass'n* [1900] 30 Misc. 709, *Davy, J.*; *National Protective Ass'n v. Cumming*, [1900] 23 App. Div. 227, *McLaughlin J.*, p. 232; *Ingraham, J.* p. 236; *Wunch v. Shankland* [1901] 59 App. Div. 482, *Williams, J.*; *Collins v. Am. News Co.* [1901], 34 Misc. 260, *Gilchrist, J.* ⁵ *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. Rep. 369. ⁶ 28 App. Div. 396 on 399. ⁷ *State v. Huevin* [1901], 110 Wis. 189, 263. ⁸ 23 Q. B. D. 598, [1892] A. C. 25. ⁹ [1898] A. C. 1. ¹⁰ [1898] 1 Q. B. 181. ¹¹ 32 Am. L. R. 905-7 [1898].

judiciary of California. Will any fair minded man say that that ought to be the law? . . . No rule of law can maintain a foothold which is so opposed to natural justice, and which so outrages the conscience of mankind."

As Dr. Freund suggests, "it is almost certain that the decision does not conclude the development of this phase of the law."¹

In all this merry war, the cook and butler have not been lost sight of; for besides Cave, J., and Lord Herschell, Grantham, J.,² and Lord Shand³ championed the one or the other. And in this country, Dr. Freund⁴ and Mr. Eddy⁵ have taken up the cause. So far as I know, however, the case is yet undecided and unreported.

H. L. WILGUS.

¹ 11 Harv. L. R. 449, 464. ² p. 57. ³ pp. 165-6. ⁴ 11 Harv. L. R. 449, 461. ⁵ Eddy on Combinations, Vol. I, p. 401, note.