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Torts—Interference with Contractual Relations—Treble Damages Denied

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TORTS—INTERFERENCE WITH CONTRACTUAL RELATIONS—TREBLE DAMAGES DENIED

Plaintiff, a member of Local 805, Confectionery & Tobacco Drivers and Warehousemen's Union, had been employed by the defendant, Metropolitan Tobacco Co. for about twenty-five years. Pursuant to a contract made between the Union and the Company, plaintiff was to be re-instated at his old position after a month's illness. Plaintiff alleges that the Metropolitan Tobacco Company, with "full knowledge of plaintiff's rights, and for their own personal benefit, unlawfully and wilfully, with intent and purpose to interfere with and destroy the rights of plaintiff," induced the Union to break the contract made with plaintiff and refused to provide him with the employment he was entitled to. Plaintiff sues, and claims treble damages as allegedly authorized by Sec. 1433, (3), of the Penal Code. Defendant moved to dismiss the complaint for failure to state a cause of action. The Court (1) sustained the cause of action for inducing the breach of contract, but (2) denied the claim for treble damages, *Frishman v. Metropolitan Tobacco Co. Inc.*—Misc.—104 N. Y. S. 2nd 446 (Sup. Ct. 1951).

(1) A cause of action exists against one who unlawfully induces a party to breach a contract, *Hornstein v. Podwitz,* 254 N. Y. 443, 173 N. E. 674 (1931). An express contract must be proved, *Franham Distributors v. New York World Fair,* 124 F. 2nd 82 2nd Cir. 1939). But, the contract need not be legally enforceable, for the law assumes that even unenforceable promises will be carried out if no third person interferes. Thus. the fact that the agreement is invalid because of the Statute of Frauds, *Rice v. Manley,* 66 N. Y. 82 (1876), or because of lack of consideration, *Rich v. N. Y. C. & H. R. R.,* 87 N. Y. 322 (1882), or that it lacks mutuality, *Philadelphia Record v. Leopold,* 40 F. Supp. 346 (S. D. N. Y. 1941), does not prevent the unlawful inducement from being actionable. However, if the contract is "directly" unenforceable because it outrages public policy, the court will not "indirectly" honor it by allowing an action for inducing its breach. *Ford Motor Co. v. Union Motor Sales Co.* 244 F. 156 (6th Cir. 1917), *Cameron v. Barancik,* 173 Ill. App. 23 (1912).

The defendant, by words or acts, must intentionally "induce" the breach; negligence is not sufficient, *Lamb v. Cheney & Son,* 227 N. Y. 418, 125 N. E. 817 (1920). Knowledge of the contract is the precursor of intention, *Posner v. Jackson,* 233 N. Y. 325, 119 N. E. 573 (1918). By the majority view, the essence of the action is that the inducement be contrived "without legal justification," *Lamb v. Cheney & Son, supra.*

A rapidly dwindling minority requires fraud, intimidation, violence, or other wrongful means as necessary ingredients to sustain the cause of action, *Phillips v. Belding Hemingway Co.,* 50 F. Supp. 1015 (S. D. N. Y. 1943); *Kline v. Eubank,* 109 La. 241, 33 So. 211 (1902); and see *Imperial Ice Co. v. Rossier,* 18 Cal. 2nd, 631, 112 P. 2nd 631 (1941).

In certain situations, an inducement to breach a contract has been held privileged. This has occurred where the breach has involved protection of the public health from contagious disease, *Legris* v. *Marcotte,* 128 Ill. App. 67 (1924) protection of the public morals, *Brimelow v. Casson,* 1 Ch. 302 (1924) giving disinterested advice when requested, *Hopper v. Lennen & Mitchell, Inc.,* 52 F. Supp. 319 (S. D. Cal. 1943), defending a prior existing contract right, *Knapp v. Penfield,* 143 Misc. 132, 256 N. Y. S. 41 (Sup. Ct. 1923); and see *N. Y. Bank Note Co. v. Hamilton Bank Note Engraving Co.,* 83 Hun. 593, 31 N. Y. S. 1060, (Sup. Ct. 1895); persuasion by a parent to an engaged daughter to renounce fiance, *Guido v. Pontrelli,* 114 Misc. 181, 186 N. Y. S. 147 (Sup. Ct. 1921); or similar persuasion by a rival suitor, *Steffler v. Boehm,* 124 Misc. 55, 206 N. Y. S. 187 (Sup. Ct. 1924).

But the courts have refused to acknowledge as privileged a defense of hearty competition, *Posner v. Jackson, supra,* or personal gain, *Gonzales v. Kentucky Derby Co.,* 197 App. Div. 277, 189 N. Y. S. 783 (2nd Dept. 1916), or a desire to drive a rival out of business; *Peekskill Theatre Co. v. Advance Theatrical Co.,* 206 App. Div. 13 F. 200, N. Y. S. 726 (1st Dept. 1923). However, where there was a contract of employment terminable at will, competition has been held privileged on the argument that that property right has lesser stature, comprising only the interest in prospective advantage against which the social and economic interest in fair competition stands equal, *Biber Bros. News Co. v. N. Y. Evening Post,* 144 Misc. 405, 258 N. Y. S. 31 (Sup. Ct. 1932). But, where the motivation was not competition, but spite, ill will, or revenge, the courts will surround contracts terminable at will with an aegis of protection, *Warschauser v. Brooklyn Furn. Co.,* 159 App. Div. 81, 144 N. Y. S. 257 (2nd Dept. 1903); *Third Ave. R. R. v. Shea,* 43 Misc. 18, 179 N. Y. S. 43 (Sup. Ct. 1919).

Damages must result from the inducement, *Posner v. Jackson, supra.* It is no defense that the injured party can recover on the contract, *Hornstein v. Podwitz, supra.* If the breach was produced under circumstances of an aggravating character exemplary damages are recoverable. *Pickle v. Page,* 252 N. Y. 474, 169 N. E. 650, (1941).

(2) Penal Law, Sec. 1433, in defining Malicious Mischief, states, . . . "a person who unlawfully and wilfully destroys or injures any real or personal property . . . in a case where the punishment is not specifically prescribed by statute, is punishable as follows: . . . (3) and in addition to the punishment (criminal) prescribed therefore, he is liable in treble damages for the injury done, to be recovered in a civil action . . ."

In disallowing the claim for treble damages as allegedly authorized by law, the court declared the complaint deficient as failing to set forth facts sufficient to

constitute a crime, because there was no precedent in New York for the contention that Sec. 1433 was intended to cover the incorporeal right here involved. See *Schneider v. 44-84 Realty Co.,* 169 Misc. 249, 7 N. Y. S. 2nd 305 (Sup. Ct. 1938), *aff'd.* 247 App. Div. 932, 12 N. Y. S. 2nd 1022 (1st Dept. 1939).

Malicious mischief comprises any injury or destruction of the property, real or personal, of another, from wantonness, or ill will toward the owner or possessor, *People v. Smith,* 5 Denio 258 (N. Y. 1825); *People v. Rader,* 140 Misc. 707, 251 N. Y. S. 539 (Mag. Ct. 1931); *Commonwealth v. Williams,* 110 Mass. 401 (1872); *State v. Colman,* 29 Utah 417, 82 P. 465 (1905); 54 Corpus Juris Secundum 933.

The American courts have been silent on whether an incorporeal property right can be an object for attack by malicious mischief. Historically, the American accounts of the crime are entirely devoid of any but tangible entrys. See Am. Digest, "Malicious Mischief;" [there is one case to the contrary, *Commonwealth v. Wing,* 9 Pick Mass. 1, 19 Am. Dec. 347 (1829).]

An English Court has held that in malicious injury to real or personal property, "the words real or personal property mean corporeal, tangible, and visible property, and do not apply to incorporeal rights," *Laws v. Elthringham,* 8 Q. B. 283 (1881).

There has been no "explicit" pronouncement of the limitation of malicious mischief to physical property in New York courts prior to the present case. But see *Vassadarkis v. Parisch,* 36 F. Supp. 1002 (S. D. N. Y. 1941). That the distinction was "implicitly" intended in the New York law might well be argued by (1) reference made within Sec. 1433 itself to tangible property, and (2) by the surrounding sections of the same article which articulate other injuries to only tangible interests, see *Dieterick v. Fargo,* 194 N. Y. 359, 87 N. E. 518 (1909); and General Construction Law, Sec. 110.

But strong and opposing arguments appear that intangibles were meant to be encompassed within the domain of Sec. 1433. In the General Construction Law, Sec. 39, the legislature has quite plainly defined personal property as embracing . . . "everything except real property which may be the subject of ownership." This includes intangible as well as tangible interests, *Matter of Bronson,* 150 N. Y. 1, 44 N. E. 707, *mod,* 1, App. Div. 546, 37 N. Y. S. 476 (1st Dept. 1896); *People v. Roberts,* 159 N. Y. 70 (1889); *People v. Ashworth,* 220 App. Div. 498, 501, 222 N. Y. S. 24, 28 (4th Dept. 1927); and see *People v. Barondness,* 133 N. Y. 649, 31 N. E. 240 *rev'd,* 61 Hun 517, 16 N. Y. S. 436 (1891). Also, General Construction Law, Sec. 25 a, defines "injury to property" as any "actionable act whereby the estate of another is lessened" . . . and it has been construed to

include invasion of incorporeal interests. *Jay Bee Apparel Stores, Inc. v.* 563-564 *Main Street Realty Co.* 130 Misc. 23, 223 N. Y. S. 537 (Sup. Ct.), *aff'd.* 226 App. Div. 721, 233 N. Y. S. 792 (4th Dept. 1927), and more specifically to include tortious invasions of contract rights, *Buyers v. Buffalo Paint & Specialties Co.* —— Misc. ——, 99 N. Y. S. 2nd 713 (Sup. Ct. 1950).

In the instant case, the court interpreted the term "personal property" so as not to include intangible or incorporeal interests. The reason advanced was the absence of a precedent. However, it might well be that the true determinant was public policy: the fear of making malicious invasions of such intangible personal property as business reputation, good-will, contract rights, etc., a criminal offense; but this fear is unfounded because the intent element of the tort action (malice in law) differs from the intent element of the crime (malice in fact). Another factor might be the fear of making the award of damages, already a matter of speculation when injury to intangibles is involved, a mechanism of oppression and abuse when trebled.

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SALES—SPECIFIC PERFORMANCE OF PERSONALTY—EFFECT OF UNIFORM SALES ACT

Louis O'Disho, a peach grower, contracted to sell all peaches to be grown by him for a period of five years to Hunt Foods, Inc. The purchase price was to be the average price paid by the canner to other growers in that county in the current season of delivery. When O'Disho refused to deliver after the first year the canner brought suit for specific performance under section 1788 of the Civil Code of California, (Uniform Sales Act, sec. 68.) *Held*: the contract was specifically enforceable; that, "By its enactment of this section the legislature unquestionably had in mind the liberalization of the law regarding specific performance of contracts for the sale of chattels." *Hunt Foods, Inc. v. O'Disho et al.,* 98 F. Supp. 267 (N. D. Cal. 1951).

Specific performance was established as a remedy for breach of contract in the early history of Anglo-American jurisprudence. It was meant to supplement the legal remedy of damages and was decreed only where the money damages would not be adequate compensation. It was not decreed as a matter of right but only in the exercise of sound judicial discretion, subject to fixed rules and legal principles. *Rogers v. Challis,* 27 Beav. 175, 57 Eng. Rep. 68 (1859); Restatement, Contracts, sections 358, 359 (1932); 4 Pomeroy, *Equity Jurisprudence,* sec. 1401 (5th Ed. 1941); 31 Halsbury's Laws of England, 329, *et. seq.* (2nd Ed. 1938). Where specific performance has been made a statutory remedy these principal features have been preserved. Section 68 of the Uniform Sales Act, es-