

cumstances tend to connect the accused with the crime. If it is decided that the confession is to be admitted, the jury, of course, should also be warned of the doubtful validity of statements made while asleep.²⁸ By the use of this warning in conjunction with the requirement of added corroboration, a two-fold protection would be provided which would insure that any conviction based upon a confession made by a defendant while asleep would be grounded in fact.

TORTS—LIABILITY FOR INDUCING NON-PERFORMANCE
OF UNENFORCEABLE CONTRACT

Evans v. Mayberry, 278 S.W.2d 691 (Tenn. 1955)

Plaintiff entered into an oral contract to purchase real estate from his brother. Defendant, a third party with knowledge of the existence of the contract, induced the vendor to sell the property to another. In plaintiff's action for damages for inducing the vendor's non-performance of the contract, the trial court sustained defendant's demurrer. On appeal, the Tennessee Supreme Court, affirming the ruling of the trial court, held that since the contract was not enforceable between the parties because of the Statute of Frauds,¹ defendant could not be held liable for inducing its non-performance.²

Grounded in antiquity,³ the tort of "inducing breach of contract" was limited to liability for enticing a servant from his master's employment⁴ until 1853 when, in *Lumely v. Gye*,⁵ the doctrine was extended to include interference with any contract of personal service. Later, the doctrine was further expanded to include contracts other than those for personal services.⁶ The rule has been generally accepted

28. A problem arises where there is a question as to whether the accused was asleep. This being a question of fact, it would have to be decided by the jury. If the judge would admit the confession *only* if the accused was awake at the time of making the confession, he should instruct the jury to disregard the confession if they find he was asleep. See cases cited in notes 26 and 27 *supra*.

1. TENN. CODE ANN. § 7831 (Williams 1934).

2. *Evans v. Mayberry*, 278 S.W.2d 691 (Tenn. 1955). The action was based on a Tennessee statute providing for the recovery of treble damages against a person who procures the breach of a "lawful" contract. TENN. CODE ANN. § 7811 (Williams 1934). In *Watts v. Warner*, 151 Tenn. 421, 269 S.W. 913 (1925), the court held that under this statute an unenforceable contract was not a "lawful" contract, and thus was not within the purview of the statute. As a matter of statutory construction, this result is highly questionable since a contract may be unenforceable merely because of technical defects and yet may not be "unlawful" in the sense of being illegal or contrary to public policy. While the court in the principal case relied on the *Watts* case, the decision was not reached primarily on the basis of statutory construction. See text supported by notes 22-24 *infra*.

3. For the history of the action, see PROSSER, TORTS 722-25 (2d ed. 1955); Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663 (1923).

4. See PROSSER, *op. cit. supra* note 3, at 723; Sayre, *supra* note 3, at 665-66.

5. 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853).

6. *Temperton v. Russell*, [1893] 1 Q.B. 715 (C.A.).

in the United States⁷ and is set forth in section 766 of the Restatement of Torts.⁸ Inducing breach of contract is essentially an intentional tort⁹ which requires that the defendant know of the contract and intend to prevent its performance.¹⁰ If these elements are satisfied, it can be broadly stated that, unless the interference is "privileged,"¹¹ recovery will be permitted for inducing the breach of virtually any type of contract enforceable between the parties.¹²

In addition, the majority of courts have held that the enforceability of the contract between the parties is not a necessary prerequisite to liability. Even though the contract is unenforceable by reason of the Statute of Frauds,¹³ formal defects,¹⁴ lack of mutuality,¹⁵ or uncertainty of terms,¹⁶ recovery has been permitted against the interfering third person. Several reasons have been advanced for allowing recovery in these situations. One explanation is that a defense such as the Statute of Frauds is available only to the parties to the contract and cannot be utilized by a third person.¹⁷ Also, it has been urged that in most cases, the parties would have consummated their agreement even though not legally bound to do so.¹⁸ Furthermore, it has been pointed out that liability is based on interference with the *contractual relation-*

7. *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P.2d 631 (1941); *Sorenson v. Chevrolet Motor Co.*, 171 Minn. 260, 214 N.W. 754 (1927); *Downey v. United Weatherproofing, Inc.*, 363 Mo. 852, 253 S.W.2d 976 (1953); *Bryant v. Barber*, 237 N.C. 480, 75 S.E.2d 410 (1953). See *Annots.*, 26 A.L.R.2d 1227 (1952), 84 A.L.R. 43 (1933).

8. RESTATEMENT, TORTS § 766 (1939).

9. PROSSER, TORTS 732-35 (2d ed. 1955). *But see* *Cue v. Breeland*, 78 Miss. 864, 29 So. 850 (1901) (Recovery was permitted when defendant negligently drove logs into bridge which plaintiff was under contract with county to keep in repair.).

10. *Rinnander v. Denver Milk Producers, Inc.*, 114 Colo. 506, 166 P.2d 984 (1946); *Thomason v. Sparkman*, 55 S.W.2d 871 (Tex. Civ. App. 1932). See PROSSER, TORTS 734 (2d ed. 1955); *Annot.*, 26 A.L.R.2d 1244-46 (1952).

11. See text supported by notes 26-30 *infra*.

12. The courts, however, have consistently refused to predicate liability on interference with certain types of contractual relationships. Thus, recovery has been denied when the contract is "illegal" or contrary to public policy. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911) (contract in restraint of trade); *Bailey v. Banister*, 200 F.2d 683 (10th Cir. 1952) (purchase of restricted Indian land); *Gunnels v. Atlanta Bar Ass'n*, 191 Ga. 366, 12 S.E.2d 602 (1940) (usury). Also, there is no liability for interference with a marriage contract. *Brown v. Glickstein*, 347 Ill. App. 486, 107 N.E.2d 267 (1952); *Nelson v. Melvin*, 236 Iowa 604, 19 N.W.2d 685 (1945); *Conway v. O'Brien*, 269 Mass. 425, 169 N.E. 491 (1929).

13. *Powell v. Leon*, 172 Kan. 267, 239 P.2d 974 (1952); *Vaught v. Pettyjohn*, 104 Kan. 174, 178 Pac. 623 (1919); *Royal Realty Co. v. Levin*, 69 N.W.2d 667 (Minn. 1955); *Leibovitz v. Central Nat'l Bank*, 75 Ohio App. 25, 60 N.E.2d 727 (1944). See RESTATEMENT, TORTS § 766, comment c (1939).

14. *Salter v. Howard*, 43 Ga. 601 (1871).

15. *Philadelphia Record Co. v. Leopold*, 40 F. Supp. 346 (S.D.N.Y. 1941); *Aalfo Co. v. Kinney*, 105 N.J.L. 345, 144 Atl. 715 (Ct. Err. & App. 1929).

16. *Aalfo Co. v. Kinney*, 105 N.J.L. 345, 144 Atl. 715 (Ct. Err. & App. 1929).

17. *Powell v. Leon*, 172 Kan. 267, 239 P.2d 974 (1952); *Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 175 Atl. 62 (Ct. Err. & App. 1934).

18. *Powell v. Leon*, 172 Kan. 267, 239 P.2d 974 (1952); *Royal Realty Co. v. Levin*, 69 N.W.2d 667 (Minn. 1955). See PROSSER, TORTS 726 (2d ed. 1955).

ship,¹⁹ and thus a binding contract between the parties is not deemed essential.²⁰ Indeed, one writer has suggested that the interfering third person's conduct is more reprehensible when the contract is not legally enforceable because the plaintiff in such a case has no right to recover on the contract.²¹

The court in the principal case, however, elected to take the position adopted by a minority of courts, holding as a matter of law that no liability can be predicated on interference with an unenforceable contract. Apparently unimpressed by the argument that the Statute of Frauds could be pleaded as a defense only by the parties to the contract, the court relied on a prior Tennessee case,²² and on a Texas decision²³ which stated that it would be "legally incomprehensible" to impose liability on an interfering third person when the principal parties were not themselves bound by the contract.²⁴

The primary difficulty in determining whether to impose liability in these cases appears to result from the way in which the courts view the nature of the cause of action. If the cause of action is based on interference with the *contractual relationship*,²⁵ it would seem to follow that the fact that the contract was not enforceable between the parties should not affect the ultimate result. If, however, the position is taken that the tort of inducing breach of contract is primarily designed to prevent interference with *enforceable contracts*, a court may justifiably feel that permitting an action when the contract was unenforceable would unreasonably extend the basic principle underlying the action.

Even if it is accepted that the enforceability of the contract between the parties is not a prerequisite to recovery, it is apparent that an undue extension of liability will result in absurdities in some cases. To eliminate this problem in the area of enforceable contracts, courts have recognized that the interference may be privileged in numerous factual situations.²⁶ Thus, for example,²⁷ recovery has been denied

19. An agreement may be a contract even though it is voidable and unenforceable between the parties. See RESTATEMENT, TORTS § 766, comment c (1939).

20. PROSSER, TORTS 725 (2d ed. 1955).

21. HARPER, TORTS 476 (1933).

22. *Watts v. Warner*, 151 Tenn. 421, 269 S.W. 913 (1924). See note 2 *supra*.

23. *Davidson v. Oakes*, 60 Tex. Civ. App. 269, 128 S.W. 944 (1910). The *Davidson* case was disapproved in *Yarber v. Iglehart*, 264 S.W.2d 474 (Tex. Civ. App. 1953).

24. See also *Sweeley v. Gordon*, 47 Cal. App. 2d 385, 118 P.2d 842 (1941) (no liability for inducing one to stand on a "legal right," i.e., the Statute of Frauds).

25. See text supported by notes 19, 20 *supra*.

26. *Lancaster v. Hamburger*, 70 Ohio St. 156, 71 N.E. 289 (1904); *Gregory v. Dealers' Equipment Co.*, 156 Tenn. 273, 300 S.W. 563 (1927); *O'Brien v. Western Union Tel. Co.*, 62 Wash. 598, 114 Pac. 441 (1911).

RESTATEMENT, TORTS § 767 (1939), provides:

In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:

(a) the nature of the actor's conduct,

when the defendant has interfered to protect a presently existing economic interest,²⁸ or to give advice in response to a request by one of the contracting parties,²⁹ or to protect the interests of a person toward whom he stands in a position of responsibility.³⁰ It would seem that if recovery is to be permitted at all in an action involving interference with an unenforceable contract, these same privileges should be recognized.³¹

Apparently the court in the principal case has determined that actions for interference with contract should be restricted to situations in which there is a legally enforceable contract. To those who view with suspicion the tort of inducing breach of contract, such an attitude seems perfectly justifiable. Courts which accept the view adopted in the principal case thus will dismiss the action as a matter of law whenever the pleadings disclose that the contract was unenforceable between the parties. If the majority view is accepted, however, whether recovery is to be permitted should depend, not merely on a matter of pleading, but rather on a careful factual determination of whether the interest of the defendant is of sufficient merit to justify his interference with the relationship between the contracting parties.

TORTS—LIABILITY OF AUTOMOBILE OWNER FOR NEGLIGENCE
OF EX-CONVICT SERVANT

Boland v. Love, 222 F.2d 27 (D.C. Cir. 1955)

Plaintiff was injured due to the negligent driving of defendant's gardener, who had taken defendant's automobile from its garage in

- (b) the nature of the expectancy with which his conduct interferes,
- (c) the relations between the parties,
- (d) the interest sought to be advanced by the actor and
- (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

For specific privilege situations, see RESTATEMENT, TORTS §§ 768-74 (1939); § 768 (privilege of competitor), § 769 (privilege of one having financial interest in business of person induced), § 770 (privilege of person responsible for welfare of another), § 771 (inducement to influence another's business policy), § 772 (privilege to advise), § 773 (privilege to assert bona fide claim), § 774 (privilege to break restriction violative of public policy).

27. The following list is intended to be illustrative, not exhaustive.

28. *Meason v. Ralston Purina Co.*, 56 Ariz. 291, 107 P.2d 224 (1940) (mortgagee); *O'Brien v. Western Union Tel. Co.*, 62 Wash. 598, 114 Pac. 441 (1911) (lessor of property).

29. It is often the duty of lawyers, doctors, and bankers to give such advice. However, the privilege is not limited to professional persons. See *Arnold v. Moffitt*, 30 R.I. 310, 75 Atl. 502 (1910) (in answer to request, electrical inspector for insurance company advised employer that plaintiff's bill for electrical work was exorbitant).

30. *Legris v. Marcotte*, 129 Ill. App. 67 (1906) (mother attempting to protect child); *Terry v. Zachry*, 272 S.W.2d 157 (Tex. Civ. App. 1954) (employee inducing corporation to litigate claim).

31. One writer has suggested that liability should depend on motive; there should be no liability unless the interfering defendant sought the same object as did the plaintiff in making the contract. Sayre, *supra* note 3, at 663.