Where the issue is not regarding a lost will, testimony as to what the testator said after making the will, in relation to the causes which influenced him in making it, is incompetent, as hearsay evidence.[32] But as to quantum and quality of proof, a clear distinction has been drawn between a mere will contest and the proof of a lost will. In the case of a lost will of whose contents secondary evidence alone is obtainable, what the testator himself said about it may be admitted to corroborate other substantial evidence of the due execution and the loss of the will, and that it was not subsequently revoked.[33]

C. SIDNEY NEUHOFF.

THE ELEMENT OF "MALICE" IN THE TORT ACTION FOR INDUCING BREACH OF CONTRACT

To a novice in the law many commonplace words are confusing as having a peculiar legal meaning quite different from their inflexible lay usage; and of this class one of the most elusive is "malice." Nor do the courts enlighten one much, though their definitions are impressive tributes to the casuistry of modern judges who carry on in a venerable scholastic spirit by repeating the ancient platitudes concerning malice, the gist of all of which seems to be that malice is wrong and therefore wrongful—for to the juridical mind there is evidently some nice distinction between the adjective and the noun—a wrongful act is an act without legal justification and therefore an unlawful act, and therefore an actionable one. In an early authority we read, "A malicious act is in law and fact a wrong act and therefore a wrongful act and therefore actionable if injury ensues,"[1] and subsequently this definition is accepted as authoritative. Or to put it in the unimpeachable and universal formula: "Malice is the intentional doing of a wrongful act without just cause or excuse."[2] The weight of authority behind these formulas is impressive, but as Sir Frederick Pollock remarks, "We do not need the House of Lords to tell us that a wrongful procurement of a breach of contract is wrongful or that an unlawful act or an act without lawful justification is unlawful." As to what constitutes lawful justification, the courts are vague and ambiguous, or absolutely silent.

The difficulty seems to be that in the early days of the action, the courts were trying to circumvent a maxim generally relied on at that time, and upheld by such an able jurist as Cooley: that "Malicious motives make a bad case worse, but they cannot make that wrong which

[32] Schierbaum v. Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; Walton v. Kendrick, 122 Mo. 54, 27 S. W. 872, 25 L. R. A. 701.

[33] Charles v. Charles *supra*, footnote 4; Mann v. Balfour, *supra* footnote 20.

[1] Bowen v. Hall, 6 Q. B. D. 333.

[2] Brennan v. United Hatters of No. America Local No. 17, 73 N. J. L. 729, 65 Atl. 165; So. Wales Miners' Fed. v. Glomorgan Coal Co. A. C. (1905) 239, 244; Walker v. Cronin, 107 Mass. 555 (1871); Beekman v. Marsters, 195 Mass. 205 (1907); Campbell v. Gates, 236 N. Y., 457; Wheeler Stenzel Co. v. Am. Window Glass Co., 202 Mass. 471; Lamb v. Cheney, 227 N. Y. 418; Luke v. Du Pree, 124 S. E. 13.

is in its essence lawful."[3] That is, if it was lawful to induce another to break his contract bona fide, it was lawful to induce him to break it mala fide, for the act must be not only the direct cause of the damage, but also a legal wrong, else it is *damnum absque injuria.* This theory was upheld by Lord Chief Justice Coleridge, dissenting in *Bowen v. Hall*[4] in support of Sir John Coleridge's dissenting opinion in *Lumley v. Gye.*[5] He believes the action should not lie, for, "If a man maliciously, (i. e., with intent to injure the plaintiff), tries to persuade another to break his contract but fails, the malicious motive is not in itself actionable; also if a man persuades another to break his contract but does it without malice, the resulting damage is not actionable. But if the damage which is not actionable be joined to a motive which is not actionable, the two together form a cause of action. This is fallacy. . . Except in the case of *Lumley v. Gye,* it has never been held that the same person for doing the same thing under the same circumstances with the same result is actionable or not according to whether his inward motive was selfish or unselfish. Judges are not very fit for such inquiries, and juries are very unfit."

But the trend of opinion seemed to be to allow the action; and to combat the plausible argument of Justice Coleridge, the courts formulated the syllogisms that malice was wrongful and therefore wrong; wrong is unlawful and therefore a tort, and therefore actionable. Malice was at first said to be one of the essential elements of the tort,[6] and most courts still repeat the conventional formula, but much ambiguity prevails as to what really constitutes "malice." The varying opinions can be grouped into four classes.

I. (a) The distinction that malice was no more than knowledge of an existing contract was made early in the history of the action[7] and is still followed by many jurisdictions, but it seems hardly tenable, as knowledge is a prerequisite of the false tort, without which no action lies. That is, if the defendant induced the breach without knowledge of the contract, the action, of course, does not lie and therefore to make knowledge of an existing contract the basis of malice is to presume malice in every action. (b) A second group of cases in this class, like *Beckman v. Marsters,*[8] make the formula unimpeachable but meaningless by the addition of the phrase, "without just cause."

II. The second theory is that the test of malice is whether the defendant induced the breach to benefit himself or to injure the plaintiff, and that if he acted from either of these motives, his act was malicious. Thus the action would lie if the defendant acted to spite the plaintiff or to benefit himself in any way, either by procuring the plaintiff's promised contract rights or by securing some indirect benefit for which he procured the breach. This would seem to be the most tenable

[3] Cooley, TORTS, (1888), 497; Chambers et al. v. Baldwin, 15 S. W. 57; Bourlier et al. v. Macauley, 15 S. W. 60; Jenkins v. Fowler, 24 Pa. St. 308.
[4] Bowen v. Hall, *supra,* note 1. [5] Lumley v. Gye, 2 El. & Bl. 216.
[6] Lumley v. Gye, *supra,* note 5; Bowen v. Hall, *supra,* note 1; Temperton v. Russell (1893) 12 B. 715.
[7] Crompton, J., Lumley v. Gye, 2 El. & Bl. 216, 224. [8] *Supra,* note 2.

distinction. It was suggested first by Lord Brett in *Bowen v. Hall,*[9] and later enlarged upon by Lord Justice Smith in *Temperton v. Russell.*[10] If malice is to have a peculiar legal meaning in these actions, this is perhaps the most workable distinction.

III. A less sweeping distinction than this, covering only half the field, is that cited in *McCann v. Wolff,*[11] that malice is "the intent to harm the plaintiff." This definition is good as far as it goes and covers cases in which the defendant was actuated by sheer spite or ill-will toward the plaintiff, such as *Lumley v. Gye,*[12] where the defendant's only object was to injure Lumley. But under this doctrine the action would not lie against a defendant who induced breach of a trade contract in order to secure the contract benefits or some other benefits for himself. Courts generally now allow the action in such cases, some holding that even trade competition is not lawful justification.

IV. The still narrower distinction is pointed to by Pollock[13] and carefully worked out by Mr. Sayre in the Harvard Law Review.[14] He distinguishes, first between the mere incidental causing of an undesired breach of contract, which should not be actionable, and the actual procuring of a desired breach of contract, which should be actionable. So far the distinction holds. But he goes on to say that the test of "malice" must be the conscious intention to appropriate for oneself the promised advantages of another, i. e., if the defendant's object in inducing the breach was the same as the plaintiff's object in making the contract, the defendant is liable. To be sure, the defendant is liable in this case, but he may also be liable if he induced the breach with an object foreign to the plaintiff's. Under a strict interpretation of Mr. Sayre's definition, if the defendant was moved by sheer animosity toward the plaintiff, he would not be liable, for his object is not the same as the plaintiff's object in making the contract. Undoubtedly Mr. Sayre did not really mean that such action ought not to lie, in such a case. Or if A had a contract with B, and C had a wager on the outcome of the contract and therefore induced B to break his contract so that C could collect his bet, is not C liable? Most jurisdictions would allow the action; yet his object was foreign to the plaintiff's object in making the contract. The last part of Mr. Sayre's definition, therefore, seems too sweeping, but it is the epitome of his views. As Mr. Sayre points out, the courts have not yet formulated his suggested distinction of the grounds for malice, but it seems to be supported by cases like *Nulty v. Hart-Bradshaw Lumber & Grain Co.,*[15] where the court held that one who conspires to assist another in violating his contract with a third person, and thereby obtains the benefit of that contract for himself, is liable in damages. However, Mr. Sayre's first distinction between causing and procuring a breach of contract is a plausible test of malice, and it is to be questioned whether this distinction or the defini-

[9] *Supra,* note 1.
[10] *Supra,* note 6.
[11] McCann v. Wolff, 28 Mo. App. 447.
[12] *Supra,* note 6.
[13] Pollock, TORTS, 12th ed. pp. 330-32.
[14] 361 HARV. LAW REVIEW, 663.
[15] 227 Pac. 254.

tion in Class II is to be preferred; the practical result of either would be much the same.

A review of the important cases for this action will best show the varying ideas of what constitutes malice. As pointed out by Mr. Sayre,[16] there are exceptional contract rights, such as contracts to marry[17] and peculiar labor contracts in which, for reasons of public policy, no action ought to lie, in spite of the required element of "malice." The opinions concerning malice in such cases are therefore less important and most case of this sort will not be considered in the following retrospect.

To begin with *Lumley v. Gye*,[18] the supposed archetype of the action, decided in 1853: the defendant in that case out of sheer animosity toward the plaintiff, induced an artist, Miss Wagner, to break a contract to sing for the plaintiff for a certain period. The defendant did not need her services himself and his only motive was hostility toward the plaintiff. The court allowed the action in this case, but such an action was limited to cases where (1) the contract was one to render exclusive personal services and (2) where the defendant's act was "malicious." What constitutes a malicious act was not stated, but it is clear from the circumstances of the case that the court used the term in its popular sense, i. e. malevolent or spiteful.

Justice Coleridge in a dissenting opinion believes the action ought not to lie whether the breach was maliciously procured or not. A "malicious" act he defines as an act done mala fide. For inducing another in bad faith to break his contract with a third person, the action should not lie, he says, for it is *malitio sine damno,* and the act is entirely that of the contracting party,[19] for which he alone should be liable.

But according to the majority opinion the action will lie, and the case thus falls under Class III in which "malice" is the intent to injure the plaintiff. *Bowen v. Hall*[20] like *Lumley v. Gye, supra,* was the case of procuring a breach of a contract to render exclusive personal service. The court allowed the action, but based its decision on the "malice" of the defendant, holding that apart from the question of malice, the dissenting opinion of Justice Coleridge in *Lumley v. Gye* was the better opinion and that the action should not lie except for master and servant contracts under the Statute of Labourers.[21] Lord Justice Brett in commenting on *Lumley v. Gye* said that merely to persuade a person to break his contract may not be wrongful in law and in fact. "The test is whether the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff. It is then a malicious act which is in law and fact a wrong act, and therefore a wrongful act, and therefore actionable if injury ensues." *Bowen v. Hall* therefore comes under Class II.

In 1893, in *Temperton v. Russell*,[22] a similar question was involved.

[16] Sayre, "Inducing Breach of Contract." 36 HARVARD LAW REVIEW, 663.
[17] Leonard v. Whetstone, 34 Ind. App. 383; Homan v. Hall, 165 N. W. 881; Guida v. Pontrelli, 186 N. Y. S. 147; Hiffler v. Boehm, 124 Misc. Rep. (N. Y.) 55.
[18] *Supra,* note.
[19] See Lumley v. Gye, *supra,* note 5.
[20] *Supra,* note 1.
[21] 23 Edward III.

In this case the defendants had no personal malice or spite toward the plaintiff, but they attempted by an illegal boycott to coerce the plaintiff and force him to boycott his brother who would not agree to their rules. The defendants refused to work for any builders whose materials were supplied by the plaintiff, thus inducing others not to enter into *prospective* contracts with him, and inducing the builders to break existing contracts with him.

The defense pleaded that the action would not lie unless the plaintiff could show they had induced the breach "maliciously," i. e. "in order to injure the plaintiff or to obtain for himself the benefit to which the plaintiff was entitled under the contract." Thus the defense relied on Mr. Sayre's definition of malice. The court does not sustain this defense however but affirms the definition of the judge of the lower court who, in charging the jury, explained the term "maliciously": "The defendant acted maliciously if he induced the breach of the contract in order to hurt the plaintiff, to hamper him in his trade, . . . or to procure some indirect advantage for the person himself (i. e. the defendant). To induce a breach of contract from any of these motives is to do it maliciously." *Temperton v. Russell,* therefore falls under Class II. The basis of this decision seems to be the malevolence of the plaintiffs in practising an illegal boycott; and the court held that the action would lie even in cases where the defendants merely induced the breach of prospective contracts by preventing others from contracting with him. (Subsequent cases, however, do not support this last). It is interesting to note that in the same year in which *Temperton v. Russell* extended the action in England, a Kentucky court in a very able opinion held that the action should not be extended even to employment contracts.[23]

In 1898 *Allen v. Flood*[24] held by the House of Lords is not really a case for inducing breach of contract at all, inasmuch as the plaintiffs had no contracts with their employers, but it is of much interest for Lord Herschell's discussion of "malice" and the comments on *Lumley v. Gye* and *Bowen v. Hall.* The plaintiffs were shipwrights—employed to repair a ship but were not under contract. Some ironworkers employed on the ship objected to the presence of the plaintiffs on the ground that they (the plaintiffs) had previously done iron work and infringed on the defendants' trade rights. A delegate of the defendants' union induced the employers to discharge the shipwrights, who are now suing the defendant for inducing their discharge. The court held that no contract rights were infringed and the act was lawful; and that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action. We quote from Lord Herschell's opinion on malice: Malice is not a question to be left to the jury, for no one would know what his rights were, and the result would be to put every action at the mercy of a particular tribunal. "The essence of the tort (in Lumley v. Gye)

[23] Temperton v. Russell (1893), 12 B. 715.
[24] See Bourlier et al. v. Macauley, 91 Ry. 135.

was . . . the procuring one person to do an unlawful act to the injury of another." "Maliciously," he thinks, means only "wilfully and with notice of the contract." (Class Ia.) "If it was a lawful act, however ill the motive might be, he had a right to do it." This case was important, too, as overruling *Keeble v. Heckeringill,*[25] which was supposed to have stated the principle that where the defendant is actuated by pure malevolence, where his sole motive is to injure the plaintiff, his act otherwise legal, may become illegal.

Quinn v. Leathem[26] decided in the House of Lords in 1901 affirms *Lumley v. Gye* and *Leathem v. Craig.*[27] It is a case much like *Temperton v. Russell;*[28] the defendants induced a butcher not to receive meat from the plaintiff because he employed non-union men. Lord Macnaghten in discussing *Lumley v. Gye* says the decision was right on the ground that a violation of a legal right committed knowingly is a cause of action, and it is a violation of a legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference. (See Class I). But Lord Shand is of the opinion "wrongfully and maliciously to induce the breach" was to induce it with the sole intent to injure the plaintiff (Class III). Lord Brampton too, seems to be of the opinion that malice is the intent to injure the plaintiff, as is the majority of the court.

Another famous case came before the House of Lords in 1905, the *South Wales Miners' Federation v. Glamorgan Coal Company.*[29] The coal company was under contract with its miners to give thirty days' notice to terminate contracts but the Miners' Federation ordered several "stop-days" to boost the price of coal, when the men left without giving the notice required by contract. The coal company sues the Miners' Federation, its trustees, and officers for maliciously inducing the miners to break their contracts. So far as the defendants' motive was concerned, the court in allowing the action, admitted that there was no malevolence on the defendants' part, but held that malevolence was not an essential part of the tort. The court was vague as to the meaning of malice: Justice Bigham, the trial judge, ruled that malice, i. e. malevolence, was essential to the tort, but his judgment is overruled, the House of Lords holding that it is now settled that malice in the sense of spite or ill will is not the gist of the action. As to what is the gist of the action, they are not clear, though all agree that the fact that the defendants advised them bona fide for the best interests of the miners, is no defense, which seems to put the case in Class I (b).

Turning from England to America we find a few scattered and obscure cases which antedate *Lumley v. Gye.* There were English cases analogous to *Lumley v. Gye* and antedating it,[30] but probably because of the fame and authority of the judges, *Lumley v. Gye* is considered the archetype of the action. *Aldridge v. Stuyvesant (1828)*[31] decided

[24] (1898) A. C. 1. [25] 11 East. 574n. (1706). [26] (1901) A. C.
[27] Leathem v. Craig (1899), 2 I. R. 667, decided in the Irish Ct. of Appeals.
[28] *Supra,* note 2. [29] *Supra,* note 28.
[30] See Green v. Button, 2 C. M. & R. 707. The defendant in that case had advanced money to the plaintiff to pay for some battins, and later the defendant

in the Superior Court of New York, was a case in which the landlord sues the defendant for wrongfully and maliciously disturbing his tenants (who were tenants for years) and forcing them to vacate, depriving the landlord of his rent. The court in this case allowed the action, Judge Oakley stating that he believed "that this was an action of the first impression," but one which was clearly maintainable on principle, and citing as authority *Comyn's Digest* and *Yates v. Joyce,*[32] in which the court held that "where the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages." Judge Oakley said he believed this case *(Aldridge v. Stuyvesant)* came within that principle, for the defendant maliciously intending to injure the plaintiff so disturbed his tenants that they abandoned the possession, whereby he lost his rent which he would otherwise have received.

It may be objected that a lease is not, properly speaking, a contract, and that this is not therefore an action for inducing breach of contract, but the principle is, if anything, broader than that laid down in *Lumley v. Gye* where the action was limited to contracts of personal service. It is of significance, too, that both cases cite Chief Baron Comyn's Digest as authority for the principle that "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages"[33] and also for the proposition that "if a man threaten the tenants of another, whereby they depart from their tenures, an action lies"[33a] Cowling cited Comyn in arguing for the plaintiff in *Lumley v. Gye,* saying that as tenants are not in any sense servants, it cannot be said that the action for procurement is an anomaly confined to master and servant cases. From these citations it would seem that prior to *Lumley v. Gye,* courts both in England and America allowed the action for inducing breach of contract.

Looking to *Aldridge v. Stuyvesant, supra,* for a definition of malice, we find Judge Oakley holding that the defendants wrongfully and ma-

falsely claimed a lien on them and prevented their delivery. Held: The action lies because of the wrongful act of defendant. Also Sheperd v. Wakeman, 1 Sid. 79 (1673) where the action was for asserting the plaintiff was married *per quod* she lost her marriage. Defendant procured breach of a marriage contract by asserting that the plaintiff was already married. Blake v. Lanyon, 6 T. R. 221, where the court held that an action will lie for continuing to employ the servant of another, after notice, without having enticed him away, and although the defendant had received the servants innocently. See especially Taylor v. Neri, 1 Esp. N. P. C. 386 which bears directly on Lumley v. Gye. The plaintiff, manager of the opera house, had engaged a certain artist to sing, and the defendant beat the artist whereby the plaintiff was deprived of his services. The case was decided at Nisi Prius, and was very little discussed but Lord Chief Justice Eyre "doubted whether the action was maintainable, observing that if such action lay, every person, whose servant, whether domestic or not, was kept away a day from business, could maintain an action." He believed the singer was not a servant at all. Wightman, J., in Lumley v. Gye.

[31] N. Y. Super Ct. 1, p. 210. [32] 11 Johns. Rep. p. 136.

[33] Lumley v. Gye. Cowling for the plaintiff, citing COMYN'S DIGEST, Action on the Case (a).

[33a] Cowling, citing COMYN'S DIGEST, Action on the Case for Misfeasance, (a6), and citing also 1 ROLLE'S ABRIDGMENT, 108, and the Year Book 9 Hy vii, p. 8.

liciously intended to injure the plaintiff. "Here is certain damage to the plaintiff . . . alleged to have been caused by the wrongful and malicious act of the defendant, committed with a full knowledge that he was violating the plaintiff's rights and with the intent to injure him." This early case holding malice an essential element of the tort thus falls under Class III, of cases which define malice as the intent to injure the plaintiff.

Among other analogous early American cases are *Andrews v. Blackeslee*[34] and *Marsh v. Billings*,[35] decided in 1851, two years before *Lumley v. Gye*, in both of which the court allowed the action. In *Randall v. Hazelton*,[36] however, decided in Mass. in 1866, the court did not allow the action. These cases are not important in considering the question of malice but they are of interest as showing the tendency of the courts to allow the action in similar cases prior to *Lumley v. Gye*.

The early history of the action in the United States can best be traced by looking to one of the state jurisdictions, which first allow the action. Turning then to one of the most important jurisdictions in the country, we find a Massachusetts court allowing the action in one of the oft-cited American cases on this action, *Walker v. Cronin*,[37] decided in 1871. The plaintiff in that case was a shoe manufacturer, and the defendant induced many shoemakers in the plaintiff's employ to leave his service, and induced others to refuse to perform their contracts to make shoes for the plaintiff. The court allowed the action both for enticing away employees and for inducing breach of a contract, holding that they were intentional acts done with the unlawful purpose of causing damage to the plaintiff "without justifiable cause on the part of the defendant, (which constitutes malice)." Judge Wells cited the Comyn's Digest passage already quoted, and such cases as *Keeble v. Hickeringill, supra*, as authority for stating that even where no contract rights exist, an action will lie for malicious wrong. The plaintiff, (he says), in the

[34] (1867) 12 Ia. 577. This case is not strictly one of inducing breach of contract, but is similar. The defendant agreed to convey land to a third person who was indebted to the plaintiff on a promissory note, and who had promised the plaintiff to convey the lands to him as security; the deeds had been executed and placed in escrow in the hands of one B who was to deliver them; and the defendant knowing that the plaintiff relied on the conveyance for his security had sold the land to an innocent purchaser, intending to deprive the plaintiff of his security. The court allowed the action.

[35] 61 Mass. 322. This was a case in which a hotel proprietor agreed with a livery stable keeper to carry passengers to and from his hotel, and a third person held himself out as having the patronage of the hotel keeper and induced passengers to ride with him. The court allowed the action in behalf of the livery stable keeper against the third person.

[36] 94 Mass. (12 Allen) 412. The holder of a power of sale mortgage voluntarily promised the mortgagor's vendee in possession not to act under the power without giving him personal notice. A third person falsely represented to the promissor that the vendee in possession desired the assignment and persuaded the promissor to assign it to him, after which he sold the premises while the vendee in possession was absent from home. The court held the action by the vendee in possession versus the assignee and the purchaser did not lie, although the plaintiff was thereby compelled to pay the purchaser an unconscionable sum to obtain title.

[37] 107 Mass., 555.

absence of contract rights has no right to be protected from competition but he has a right to be free from malicious and wanton interference. As the defendant's demurrer admits the absence of any justifiable cause, the court does not consider the question of what constitutes just cause. *Walker v. Cronin,* thus is one of the early authorities for the maxim that interference with a contract without just cause is malicious, and sets an early precedent for evading the issue of justifiable cause. As the court did not define "malice," it is difficult to classify the case; the facts would support the definition that malice was the intent to injure the plaintiff (Class III) for the defendant was not a competitor and had no motive apparently but spite toward the plaintiff; but the case is later cited as authority for the definition that malice is the intentional inducing of the breach without just cause (Class I).[38]

A few years later a Massachusetts court in the case of *Moran v. Dunphy*[39] held that maliciously to induce an employer to discharge his employee was actionable, using "malice" apparently in the sense of "malevolence" (Class III).

One of the most important Massachusetts cases on this subject is *Beekman v. Marsters,*[40] the famous tourist agency case in which the defendant's motive in inducing breach of the contract was trade competition. The plaintiff was proprietor of a tourist agency and had a

[38] It is not to be supposed that all the state jurisdictions allowed the action at this time; Massachusetts was in advance of many of them. Looking for instance to the West, we find the Missouri courts in the eighties unfavorable to the action. McCann v. Wolff, 28 Mo. App. 447, (1888), a case for preventing "by means unknown to plaintiff" a sale of land which he had negotiated with a third person. The defendant's demurrer was sustained, the court holding that no action lies in the absence of both fraud and malice. "There must be a wrongful attempt to harm the plaintiff before the right of action for procuring a breach of contract can be established. Mere knowledge that there is a subsisting contract will not do." This is then a case belonging to Class II, holding that malice is the intent to injure the plaintiff. Lally v. Cantwell, 30 Mo. App. 524 (1888), also decided by the St. Louis Court of Appeals, is not properly speaking a case for this cause of action for the plaintiff had no employment contract, but it is of interest in view of Glencoe Land Com. case, cited below, to see that the court allowed the action even though no contract existed, on the principle of Keeble v. Hickeringill, that the plaintiff may have an action for the intentional wrong done him by the defendant. In 1896, however, in the Glencoe Land & Gravel Co. v. Hudson Commission Co. case, 138 Mo. 439, the Supreme Court of Missouri held that no action lies for inducing breach of contract except where the relation of master and servant exists.

Likewise, the Court of Appeals of Kentucky in the admirable opinion of Judge Lewis in Chambers et al. v. Baldwin, 91 Ky. 121 (1891), on the authority of Cooley refused to allow the action in a contract for the sale of goods where the defendant induced the breach with intent to injure the plaintiff and to benefit himself in the plaintiff's stead. Two years later in Bourlier et al. v. Macauley, 91 Ky. 135 (1893), the same court refused to allow the action for breach of an employment contract.

California, also, in Boyson v. Thorne, 98 Cal. 578 (1893), refused to allow the action.

N. Y. too, was at first hostile to the action: Daly v. Cornwall, 54 N. Y. S. 107 (1898); De Jong v. Behrman, 131 N. Y. S. 1083 (1911).

See also Brown Hardware Co. v. Ind. Shoe Works, 69 S. W. 805, (Tex., 1902).

[39] 177 Mass. 485 (1901), Holmes, C. J. [40] 195 Mass. 205 (1907).

contract with a hotel, appointing him its exclusive agent within a certain territory to secure patronage, and defendant induced the hotel to employ him also as agent. The court, citing *Walker v. Cronin, supra,* and *Read v. Friendly Society of Operative Stonemasons,*[41] held that it was not sufficient justification for inducing the breach that the defendants acted bona fide for their own interest, i. e. that trade competition was no justification. "Their justification for interference must be an equal or superior right in themselves and no one can excuse himself . . . on the ground that he acted under a wrong understanding of his own rights or without malice, or bona fide or in the best interests of himself or even as an altruist seeking only the good of another . . . " To induce the breach intentionally and without just cause is to act maliciously. The case, then, comes under the second group of cases in Class I.

McGurk v. Cronenwett,[42] a case of inducing breach of an employment contract, decided in a Massachusetts court in 1908, upholds this decision, and determines an interesting question of procedure involving the definition of "malice." The first count of the allegation contained no averment that the defendant had committed any act in itself actionable, because there was no averment that the defendant knew of the existence of the agreement, unless that is implied in the word "maliciously." The court held the count insufficient to support a cause of action, because "where this is the sole cause of action relied on, it is necessary both to aver and prove the defendant's knowledge of the contract." The charge that the defendant "maliciously" prevented the plaintiff from performing his obligations under his agreement does not necessarily import an allegation that the defendant knew of the agreement. The natural meaning of the word "maliciously" is "wilfully and intentionally." Quoting from Justice Bayley in *Bromage v. Prosser,*[43] the court said "malice in its legal sense means a wrongful act, done intentionally without just cause or excuse." In spite of this last definition, the opinion in effect places the case under the second group of Class I.[44]

The United State Supreme Court in 1893 for the first time (Federal decisions) allowed the action in the case of *Angle v. St. Paul, Minneapolis & Omaha Ry. Co.*[45] The third and fourth counts were for inducing breach of contract, the defendant having persuaded the Legislature by false representations to revoke the grant of the Portage Company and to bestow the lands on itself, resorting to bribery and false allegations. The court held that "such wrongful use of the powers and processes of the court cannot be recognized as among the legitimate means of contest and competition. It makes the interference with the affairs of the Portage Company a wrongful interference." The case was clearly one of fraud and the court did not go into the question of what constitutes malice, thought it cited *Lumley v. Gye, Bowen v. Hall,*

[41] Read v. Friendly Soc. (1902), 2 K. B. 88.
[42] McGurk v. Cronenwett, 199 Mass. 457. [43] 4 B. & C. 247, 255.
[44] For later Massachusetts cases, see Wheeler-Stenzel Co. v. American Window Glass Co. (1909), 202 Mass. 471, and Tracy v. Osborne, 226 Mass. 29 & 237 Mass. 537. [45] 151 U. S. 1.

Walker v. Cronin,[46] *Rice v. Manley,*[47] *Jones v. Stanly,*[48] *Haskins v. Royster,*[49] with approval.

In *Heath et al v. American Book Co.,*[50] the Circuit Court of West Virginia held the defendant liable for inducing breach of a contract for the sale of textbooks. Plaintiff had a contract to supply certain textbooks adopted by act of the legislature, for use in the public schools, and defendant with knowledge of the contract induced the school board to discard the plaintiff's books and purchase his. There was no allegation of malice or ill-will toward the plaintiff; the defendant simply submitted his own publication, a revised English grammar, to the school boards, knowing of the existing contract with the plaintiff. The malice then, if any, is that defined in Class I (a) but the court does not discuss the question. The case is of interest as showing the tendency of the courts to allow the action even in sale contracts where the defendant's only motive was competition.

So also in *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.,*[51] the Circuit Court of Appeals held that where the defendant corporation induced another to break a contract to furnish certain machines, the plaintiff could recover without proof that the defendant was actuated by malice, (i. e. malevolence) or ill-will. The court held malice to be nothing more than inducing the breach with knowledge that a contract existed, (Class Ia) and quoted Lord Herschell in *Allen v. Flood*: that "Maliciously" means inducing the breach "wilfully and with notice of the contract."

In the famous *Dr. Miles Medical Co. v. Park & Sons Co.,*[52] the Supreme Court held that although one who maliciously interferes with a contract is liable, yet in this case the contract sued on was invalid and the plaintiffs cannot recover on it. Dr. Miles Medical Company sold on a system of contracts by which the Medical Company controlled prices of goods sold by its agents and prices for all sales by all dealers at wholesale or retail. The court held these contracts, fixing re-sale prices and eliminating competition, were in restraint of trade and invalid under the common law and the Sherman Anti-Trust Act. No dicta on malice are determined, as the majority held the contract invalid, but Justice Holmes dissented, holding the contract valid: "We greatly exaggerate the value and importance to the public of competition, . . . as fixing a fair price . . . with regard to things like Dr. Miles' Medicine the point of most profitable returns marks the equilibrium of social desires and determines the fair price."

The Circuit Court of Appeals in 1913 decided the case of *American Malting Co. v. Keital.*[53] Here the defendant had sent out libelous circulars concerning the plaintiff, a malting corporation. Plaintiff sues for maliciously inducing interference with its contracts. The court in allowing the action said: "We fail to discover any satisfactory dis-

[46] *Supra,* note 37.
[47] 66 N. Y. 82, in which fraud was proved.
[48] 76 N. C. 355 (1874), Malice as defined in Class I.
[49] 70 N. C. 601 (1870), Malice as defined in Class I.
[50] 97 Fed. 533 (1899).
[51] 159 Fed. Rep. 824 (1908).
[52] 220 U. S. 373.
[53] 209 Fed. 351 (C. C. A.).

tinction between an attempt to induce employes to break a contract of sale and an attempt to induce customers to break their business contracts for the purchase and sale of goods." The action lies for both. The opinion is of interest as showing the tendency of the courts to broaden the action,—the intimation here is that it would lie even for breach of contracts induced by underselling,—and the tendency likewise to ignore the question of malice. The defendant was actuated by malevolence in inducing the breach, but the court takes no notice of his motive. (Class Ia.)

In *Hodge v. Meyer*,[54] the same court refused to allow the action because the plaintiffs who sue in their individual capacity and not as shareholders of the Railway Company were not shown to have been damaged by the alleged wrongful interference with contract. The court here ignores the issue of malice. The Circuit Court of Appeals (Second Circuit) likewise ignores the issue of malice in a recent decision.[55]

From these last-cited cases, it will be seen that the tendency of modern American courts is to allow the action without regard to malice, legal or otherwise, or else to allow the action for maliciously inducing a breach of contract, i. e. inducing it intentionally without lawful justification (Class Ia). They throw no light on the question of what justification will exonerate one from such malice.

For the most recent decisions and dicta on malice, we turn again to the state jurisdictions. New York Courts have veered from their early stand on "malice" and come to the idea that malice in this action is intentionally inducing breach of the contract without just cause (Class Ia). *Campbell v. Gates*[56] decided in 1923 was a case for interference with an employment contract, and inducing an assistant to the plaintiff, a magazine publisher, to leave his service. The court allowed the action on the authority of *Lamb v. Cheney*,[57] holding that "malice" is not actual ill-will but the intentional interference with the contract without lawful justification (Class Ib). Again in *Goodman Bros. v. Ashton*[58] in 1925, the court allowed the action on the authority of *Lamb v. Cheney* and *Posner v. Jackson*,[59] both of which support this last definition (Class Ib).

Recent decisions in Massachusetts,[60] Maryland [61] and Georgia[62] also support this dictum (Class Ib), but it is to Wisconsin that we turn for the most interesting of the late cases, the North Wisconsin *Tobacco Pool v. Bekkedal*.[63] The plaintiff corporation was a farmers' coöperative tobacco pool, the members of which were farmers who agreed

[54] (1918) 252 Fed. 479.
[55] Second National Bank v. M. Samuel & Sons, 12 F (2 d.) 963, (May, 1926). For other federal decisions see Sweeney v. Smith, 171 Fed. 645; Dail Overland Co. v. Willys Overland (D. C.) 263 F. 171; Westinghouse Elec. & Mfg. Co. v. Diamond State Fibre Co. (D. C.) 268 F. 121; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229; Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275.
[56] 236 N. Y. 457 (1923).
[57] Lamb v. Cheney, 227 N. Y. 418, breach of an employment contract.
[58] 208 N. Y. 83 (1925). [59] 223 N. Y. 325.
[60] 137 N. E. 919, Moore Drop Forging Co. v. McCarthy et al. (1923).
[61] 133 A. 843, Goldman v. Harford Road Bldg. Ass'n. et al. (1926).
[62] Luke v. Du Pree, 124 S. E. 13 (1924). [63] 197 N. W. 936 (1924).

to sell all their tobacco crops to the association. The defendants, tobacco merchants, were unable to secure sufficient tobacco; their business was threatened, and to break up the pool, they induced its members to sell tobacco crops to them, promising to indemnify them for any damages that should result from breach of contracts with the plaintiff association. The defense relied on the theory that in the interest of free trade and competition, they had a right to purchase products offered in the open market, even though thereby causing a breach of contract.[64] But the court held that the action would lie because the defendants' interference with the contracts was a malicious interference. "There is some confusion in the authorities as to what constitutes malicious interference," the opinion reads, but as coöperative associations among farmers are favored by law and statute, the defendants' act in attempting to break the organization and eliminate undesirable competition was malicious. The case is interesting as showing a tendency to allow the action in contracts of sale, but the decision is perhaps based on the peculiar status of the plaintiff corporation. In 1925 this case was cited with approval in *Singer Sewing Machine Co. v. Lang.*[65]

These latter-day cases all point to a liberal definition of malice (Class Ib), relying on the statement that malice is inducing breach of the contract without just cause, but they offer no explanation of what constitutes just cause, and the facts of the cases support no general inferences. Whether the action should lie in certain labor union cases, against officers of a labor union for inducing a bona fide breach of contract, (as in the *Glamorgan Coal Company Case*) or against a Union official for inducing a manufacturer to break his contract (as in the *R. & W. Hat Shop Inc. v. Sculley*[66]), whether it should lie for inducing breach of contracts of sale as certain decisions seem to indicate,[67] are still unsettled questions.

As to what constitutes "malice," one cannot but agree with the opinion of Lord Lindley, that the distinction between legal and lay malice should be done away with:

"My Lords, I have purposely abstained from using the word 'malice.' Bearing in mind that malice may or may not be used to denote ill-will, and that in legal language, presumptive or implied malice is distinguishable from express malice, it conduces to clearness in discussing such cases as these to drop the word 'malice' altogether, and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments; but when all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill-feeling, it is better to drop the word malice and so avoid all misunderstanding." KATHLEEN GREEN, '29.

[64] Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Company, 171 Fed. 553; Sweeney v. Smith, 171 Fed. 645.

[65] 203 N. W. 399 (Wis. 1925).

[66] 118 Atl. 55. See also YALE LAW JOURNAL 32, 171, "Privilege of Labor Union to Induce a Breach of Contract."

[67] Morgan v. Andrews, 107 Mich. 33; Jackson v. Stanfield, 37 Ind. 592. Courts never actually allow the action for underselling, however.

[68] South Wales Miners' Federation v. Glamorgan Coal Co., *supra*, note 2.