

(1914) 11 BOM CK 0014
In the Bombay High Court
Case No : O.C.J. Suit No. 494 of 1913

Khimji Vasanji

APPELLANT

Vs

Narsi Dhanji

RESPONDENT

Date of Decision : 06-11-1914

Acts Referred:

Citation : AIR 1915 Bom 300 : (1915) 17 BOMLR 225

Hon'ble Judges : Beaman, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Beaman, J.—The plaintiffs, father and son, sue the defendants for damages alleging that the three defendants conspired with each other and others not made parties to this suit, to procure the breach of a contract of marriage entered into by one Mulji, not a party, with the plaintiff 1 on behalf, respectively, of Jamnabai, the daughter of the said Mulji, and Kanji, the plaintiff 2. The material undisputed facts are that the girl Jamnabai was formally betrothed by her father Mulji in 1910 to the second plaintiff, the contract being made according to the usages of the caste between Mulji and the plaintiff 1. The terms of the contract were that the plaintiffs were to provide Rs. 5500 worth of ornaments for the bride.

2. Early in March 1913 Mulji appears to have contemplated making another marriage for his daughter, as he alleges, because he had already broken off the engagement with the second plaintiff on account of the plaintiff's failure to comply with the conditions of the original betrothal. Towards the close of March, Mulji went to Calcutta and appears to have sounded the defendant 1 who was then recently a widower. The defendant 1 is a much wealthier man than the plaintiff 1 or plaintiff 2.

3. The defendant 1 agreed to marry the girl, Jamnabai, who was now rather over-mature in the opinions of these people to be left unmarried any longer.

4. Accordingly, on the 17th April, Mulji took the girl and a bridal party to Calcutta, where they all put up in the house of the defendant 1. Overtures appear to have been made to the local Jamat that evening, but the customary dues were refused. The following morning, the betrothal ceremony was first performed and thereafter the marriage. The result is that Mulji, the father of the bride, as well as the defendant 1, have been excommunicated for breaking off the girl's engagement to the plaintiff 2 and marrying her to the defendant 1.

5. An enormous amount of irrelevant evidence, about the past history of the first defendant and many other matters, has been accumulated. It is unnecessary to refer to any part of it. There is also much evidence about the manner in which the marriage of Jamnabai to Nursey, defendant 1, was hurried through, as well as the customs of this caste, and the attitude adopted by the Jamat, the complaint made to the Jamat by the plaintiffs and the like, the only bearing of which upon the points to be decided is, that it might heighten the probability of the defendant 1 having been fully aware of the previous engagement of the girl to plaintiff 2. There is also a good deal of evidence as to the subsequent conduct of the defendant intended to prove that he knew very well that he had deliberately wronged the plaintiffs and desired to hush the matter up. Except, again, as bearing upon defendants' knowledge of the pre-existing contract, this is immaterial.

6. Mulji's story is that he had a perfect right to break off the first engagement when the plaintiffs would not make the last three thousand rupees worth of ornaments, and that he had, in fact, done so after giving them a stipulated time in which to fulfil their part of the contract. It was only after this, according to Mulji, that he offered his daughter to the defendant 1. The plaintiffs deny that they ever refused to perform any part of their contract and alleged that the father of the girl threatened to withhold his daughter for three years after the last ornament had been made. The defendant 1 says that he knew nothing at all of the previous engagement till after his marriage With Jamnabai on the 18th April 1913.

7. Clearly, if the defendant 1 did not know of the contract between Mulji and the plaintiffs the plaintiffs would have no cause of action against him, either as an individual for procuring the breach of a subsisting contract, or as a conspirator with others for the same object. And it has caused me much doubt since the case was opened whether in the facts and circumstances alleged in the plaint it discloses any cause of action against any of the defendants. It is to be noted that the case is laid in conspiracy. And surveying the history of the law of conspiracy since its origin in the first writ which ever issued on such a count in the Civil Courts, at the end of the thirteenth century, up to such cases as those of *Allen v. Flood* [1898] A.C. 1 and *Quinn v. Leathem* [1901] 85 L.T. 289, it might be doubted whether any such action could have been maintained consistently with its historical development and theoretical origin without an ingredient of malice. No malice is alleged on the part of the defendants in this case. But ever since

Lumley v. Gye (1853) 22 L.J.Q.B. 463, which was not a case of conspiracy, mere knowledge of the existence of a contract, which it was the object of the individual or of a body of conspirators to get broken, has been held in law to be tantamount to malice. So it was summarily stated by Crompton J. in delivering the judgment of the Court in Lumley v. Gye (1853) 22 L.J.Q.B. 463. Nevertheless it is worth noting that even in that case, the pleadings alleged malice on the part of the defendant. Erle J.'s dictum appears to have been made the foundation of the later law, which may now be taken to govern, in England, all cases of the kind, whether put on the ground of conspiracy in the old sense or merely upon the ground of procuring the breach of a contract, as in Lumley v. Gye (1853) 22 L.J.Q.B. 463. In the latter class of cases, analogies from the old conspiracy action are introduced, probably on the supposition that there has still been a conspiracy between the defendant and the person induced to break the contract. The English law on this subject is extremely interesting and the judgments of the numerous great Judges who took part in the decisions of such cases as Lumley v. Gye (1853) 22 L.J.Q.B. 463, Mogul Steamship Company v. McGregor, Gow & Co. [1892] A.C. 25, Allen v. Jackson (1879) 45 L.J. Ch. 10, Allen v. Flood [1898] A.C. 1, and Quinn v. Leathem [1901] 85 L.T. 289 seem to invite the closest analytical scrutiny. For it can hardly be denied that they are full of dicta, which are in conflict, and in no case can any of the broader generalizations to which some of our greatest Judges have committed themselves be considered as having really settled any one definite and consistent principle. Erle J. said that procuring the violation of any subsisting right was a cause of action, and the violation of the right an actionable wrong. This appears to have been adopted either expressly or by implication by Lords Watson and Macnaghten in Allen v. Flood [1898] A.C. 1 and Quinn v. Leathem (1901) 85 L.T. 289. But when the judgments of all the learned law Lords in these cases come under critical examination it will be found, I think, that they contain many pieces of questionable or at least imperfect reasoning and attempts at definition, which have not really succeeded in defining permanently or universally the notions in controversy. On the strength of these and many other earlier and some later judgments, text-book writers have settled down comfortably on one or two general propositions, as for example, "it is now settled law that procuring the breach of a contract is a good cause of action," and that "in civil actions for conspiracy malice is not but damage is the gist of the action." Lord Esher said in Allen v. Jackson (1875) 45 L.J. Ch. 310, that merely persuading a man to break his contract with another gave no right of action in the civil law, unless it were done maliciously. That would make malice the gist of that kind of action, and a fortiori, in all conspiracy actions, the gist of the action, in one sense. The word "gist" is a bad word having but a very loose and ill-defined meaning. If the word "essential" be substituted for it, then we shall see at once that notwithstanding the emphatic dicta of Lord Watson and Lord Macnaghten that the intentions of the conspirators mattered nothing at all, malice, either express or constructive, still remains an essential of all these actions. It is not the "gist" of the action in another sense of course. That is to say, unless damage is caused, a mere malicious attitude of mind or a malicious

intention will not give a cause of action. It is only in that sense that it is true, I submit, that malice is not and damage is the gist of the action. Nor is it even now strictly true to say in the widest sense, that a man's mental state has nothing to do with an action of this kind. This is too plain to allow of argument when we find it universally conceded (and indeed this is implied in every pleading) that unless the defendant knew of the contract which he is alleged to have conspired to break or the breaking of which he has procured, no action would lie against him. It might be said that knowledge can be proved as a fact, whereas intention cannot. But in the eye of the law intention has to be found as a fact in ninety-nine out of every hundred criminal convictions and if mere knowledge is held in law to involve malicious intention for all purposes of an action for damage for procuring the breach of a subsisting contract, nothing much is gained, in the direction of theoretical perfection at any rate, by peremptorily ruling out all considerations of intention. There is, in fact, whatever the law may choose to presume in its rough and ready fashion, a great difference between mere knowledge and a malicious use of that knowledge. But the term "malice" in law has long been the despair of all clear thinkers, and it is probably too late now to attempt to clarify the fog which has gathered about this legal concept.

8. It may be doubted whether any practical difficulty was experienced in administering the law governing, either (1) conspiracy actions, (2) actions for unlawfully and maliciously procuring the breach of a contract, until *Lumley v. Gye* (1853) 22 L.J.Q.B. 463 gave an enormous extension to a doctrine, which up to that time had been kept within narrow and intelligible limits. It is matter of judicial history that the decision in that case gave rise to much conflict of opinion and grave doubts. But Lord Macnaghten took occasion to say in *Quinn v. Leatham* (1901) 85 L.T. 289 that, in his opinion, it was rightly decided. So again almost all the Irish Judges first concerned with *Quinn v. Leatham* (1901) 85 L.T. 289 openly lamented the decision of the House of Lords in *Allen v. Flood* [1898] A.C. 1 as constituting a wide and questionable departure from the law as it formerly stood. To get anything like a clear perception of the entanglements of reasoning and the subtle difficulties underlying the judgments in the long series of cases usually cited in the later judgments a broad line of cleavage ought, it is submitted, to be drawn and strictly observed between actions on the ground of conspiracy, and heterogenous actions which have really nothing to do with conspiracy at all, but have been gradually drawn into the current of legal thought and decision on this subject by way of analogical illustration. For example, the old case of the decoy ducks had nothing whatever to do with, either conspiracy, or procuring the breach of a contract. The ground of that decision involving a distinction too subtle, I think, to be maintained consistently, was, as far as I can make anything out of it, that the defendant was liable because his act was not only malicious but wrongful in itself, being in the nature of a nuisance. If he had alarmed the plaintiff's decoy duck area, by firing on his own land in pursuit of his own game, it would seem that he would not have been liable, but he was held

liable because he fired for no other purpose than to injure and annoy the plaintiff. Similarly, the Schoolmaster's case Gloucester Grammar School case (1410) 11 Hen IV was not a case of conspiracy at all, but a case of procuring the breach of a contract. At least I suppose that would now be thought to be its true ground, though it might also have been presented as an instance of maliciously injuring a man in the peaceful pursuit of his own trade or profession. It is an interesting case, because it appears to me to conflict in principle with *Lumley v. Gye*, and to be referable, so far as the reasons governing the decision go, to the principle of actions for conspiracy. Briefly, the formula of all conspiracy actions is the same, that ABC maliciously conspired together to do a rightful act by wrongful means or to do a wrongful act by rightful means, or to do a wrongful act by wrongful means. Such ingredients exhaust, I think, the content of the legal notion of conspiracy in the civil law. But unless damage was caused there could be no action. For then it would be merely *injuria sine damno*. Yet it is important, nay, essential to remember, that the mere conspiracy *per se*, the agreement of the defendants, was in itself a wrongful act in view of the end aimed at or the means by which the end was to be attained. And this marks a distinction and a very necessary distinction to be observed between cases of conspiracy and cases of procuring the breach of a subsisting contract. Here is a very simple case.¹ If A B C all sell their cargoes of wheat, then on the high seas, to X a speculator, on condition that they shall be delivered to him at the price agreed, on the ships reaching port, unless they ABC had before that event chosen to re-sell to others. Now, suppose A with the deliberate intention of injuring X re-sells his cargo to M at a lower price, and so deprives X of the bargain. It is pretty clear, I think, that no action would lie by X against A. So if B and C, each for himself and without pre-concert, did the same, X would have no remedy. But if ABC maliciously conspired together to injure X by selling their respective cargoes to others, then there would have been a case of conspiracy, and the facts being so found X would have had his remedy against them. It is obvious that the damage caused to X would have been exactly the same in the two cases last supposed, yet in the one case, for want of the conspiracy and the malicious intent, there would have been no remedy, while in the other, because of those factors, there would. In such a case how could it be said that malice was not an essential of the action? It might be objected that here is no conspiracy to do either an unlawful act, or a lawful act by unlawful means. But I apprehend that, according to the understanding of the older law, it would be an unlawful act to injure a man maliciously in the pursuit of his trade, and that merely conspiring to do so would be an unlawful means. Whether that understanding could be made to conform with the law laid down in *Allen v. Flood* [1898] A.C. 1 and in *Quinn v. Leathem* (1901) 85 L.T. 289 is doubtful. It is not of course an actionable wrong merely to injure a trader by legitimate competition as in the *Mogul* case [1892] A.C. 25. There was a conspiracy up to that point but as it was held that neither the end nor the means of the conspiracy were unlawful, the action failed. It would have been otherwise had the end been to injure the defendant maliciously. Had the conspiracy been formed not with the sole object of

benefiting the conspirators by excluding hostile competition, but out of spite to a particular person to ruin him, although the means employed had been exactly the same, I gather from the reasoning of all the learned Judges, that the plaintiff would have succeeded. In a word, the conspiracy which plus damage gives an action at civil law must be a conspiracy which without damage would have been indictable. A conspiracy to coerce indentured servants to break their labour contracts would certainly have been indictable, and the whole current of conspiracy actions in the Civil Courts shows how directly they are derivable from the peculiar sentiments with which the Legislature long regarded the relations created by contract between master and servant. It may, however, be doubted whether an action could have been brought in the Civil Courts for conspiracy to procure the breach of a great number of other contracts, or whether, in fact, any such case ever has arisen. Yet it is extremely hard to find any distinction in principle. There would, at least, be this refuge which is denied to those who would seek a complete and satisfactory delimitation of the principle to which effect was given in *Lumley v. Gye* that in the former cases the act of conspiring might be declared to be a wrong in itself, while in the latter, there is no such discoverable element. It is obvious too that the use of the term "procuring" suggests a distinction between cases in which the defendant's motive must, on the facts, have been malicious in the widest sense, and others in which, using language in its ordinary sense, it could not have been. Here is another case. A sells a piece of land to P. B desires the land. Knowing that A is a strong temperance man, and that P means to put up a gin palace on the land, B informs A of P's intention, with the result that A refuses to sell the land to P, and afterwards sells it to B. It is clear that, according to Lord Macnaghten's understanding and application of Erle J.'s dictum, B would be answerable to P in an action for procuring a breach of contract. And so he would, presumably if he had merely offered A a higher price. Then the case would seemingly have been on all fours with *Lumley v. Gye* in all material particulars. But would an action lie? Perhaps it would now, but it may be doubted whether it would before *Lumley v. Gye*. In the case supposed, if instead of the representation having been made to A by B alone in his own interest and without any particular malice against P, B C D had conspired to deprive P of his bargain in this way, and had, in furtherance of the conspiracy, made the same representation to A, then if an action would have lain against B C D at the suit of P, it would have been based on the conspiracy and implied malice. Again, if no representation had been made to A but BCD had, as a syndicate, desired to get the land and had offered a higher price than that agreed upon between A and P, would this have been an actionable conspiracy? I doubt it, and I do not believe that any case of the kind can be found. Yet if B C D knew of the contract between A and P and deliberately induced A by offering a higher price to break it, the case falls within the terms and principle of the law laid down by Lord Macnaghten. There is a large and quite perceptible difference between all such cases of one or more individuals trying to get something already contracted for by some one else for themselves, and all true cases of actionable conspiracy. But as the terminology of the most

authoritative judgments stands at present, it is difficult, if not impossible, to express that difference in the terms of any constant principle. Because the one real and substantial criterion, namely, the motive, the malicious motive, has been peremptorily ruled out. But even were that still left for use, it would not suffice. Take such a case as this. A has a valet B who has agreed to serve him for a year. X particularly desires the services of B. He does not know A and has no malice, except in the most extended legal sense of that term, towards A. He offers B higher wages, and B deserts A after three months of the term agreed upon have expired. The ground of A's action against X would now be in the words of the old writ *per quod servitium amisit*. And presumably this was the ground of the decision in *Lumley v. Gye*. The same writ would serve in an action for seduction of daughter or female servant, but it takes us far from the ground of the action in conspiracy. Still it may help to bridge the chasm between true conspiracy cases and cases for procuring the breach of a subsisting contract. As a limitation as well as an explanation it may here be of some service. It might be contended that in the two first hypothetical cases put, the plaintiff analogically had lost the use of the corn or the land and so the actions were referable to the same principle. In all cases of the *Lumley v. Gye* class, there must be taken to be an existing contractual relation already entered upon and in part performed, before it is broken at the solicitation or by the conspiracy of the defendant or defendants. It is true that we are here met at once by a fresh difficulty. For it has often been said in conspiracy cases that it makes no difference whether the object of the conspiracy be to break off existing contracts, or to prevent the making of fresh contracts. And this is intelligible when we bear in mind the nature of the conspiracy itself, and its malicious direction against the plaintiff. But it certainly would not be true if extended for the purposes of theoretical construction to such a case as *Lumley v. Gye*. Had there been no contract between Wagner and Lumley, it is clear that Lumley would have had no cause of action against Gye merely for outbidding him and so securing the services of Miss Wagner for himself. And I think that is universally true of every case properly restricted to the procuring by a single person of the breach of an existing contract for his own benefit. If I am so far right, we come in sight of something like a real distinction which might be embodied in a general rule. Leaving aside for a moment cases of conspiracy, and confining ourselves to cases of procuring a breach of contract, it would then appear that such procuring is only actionable at civil law, when the contract is of a peculiar kind already partly executed and partly to be executed. Even if it is so, it is extremely doubtful whether any logical ground could be discovered apart from conspiracy, and analogies drawn from that action, upon which to justify actions of the limited kind mentioned. It, would, for example, be a nice and over-refined distinction to say that if A desiring to obtain the services of B's valet should tempt him away from B a day after he had actually entered upon his service to B there would be a good action at B's suit against A, but not if A had so tempted B's servant after making the contract of service, to break it one day before entering upon it. But the latter case is in no way distinguishable from any other case of procuring the

breach of a contract. Eliminating malice, conspiracy, wrongful means and all such special factors, it would come to this, either all procuring the breach of a contract known to the procurer to be subsisting is actionable or none is. Subject to the eliminations just suggested, it is submitted that the proper answer is that none is. An article is to be sold. A, the proprietor, agrees to sell it to B on the next day. X who greatly desires the article comes to A and offers him ? 500 more than B had offered. A accepts and breaks off his agreement with B. Now if X knew of the agreement with B he would, according to Erle J.'s rule applied by Lord Macnaghten, be liable to B in an action for procuring the breach of A's contract with B, but if he did not, he would not be liable. Yet the damage to B would be exactly the same. The basis of such an action is clearly revealed to be malice (which is a consideration I wish to have excluded in any attempt at a reasoned theory of these actions). For if X knows that B has a prima facie right to obtain an article which he wishes to obtain for himself, he is presumed to act maliciously towards B in inducing A, the owner of the article, to break off his bargain with B. But this is a mere abuse of ordinary language to cover inexact thought and get over a difficulty which has always been felt, but rarely expressed. In thus grouping a complex of notions loosely under the dictum that knowledge in all such cases is equivalent to malice, the Courts have thrown a very wide net indeed, so wide as to embrace every case in which a man knowing of the existence of a contract between two others, persuades or induces the promisor to resile from his contract. Feeling this inconvenience, to use no stronger term Judges have enwrapped the bare doctrine in a cloud of qualificatory phrases explanatory, or intended to be explanatory, of justification. The action will, it appears, always lie, but it is a good defence in the absence of malice etc., to show that the defendant was justified in procuring the breach of the contract. What does or does not amount to justification is now shrouded in such a mist of words and phrases that it may be neglected for all purposes of scientific examination. But there is more in the bare doctrine which needs to be scrutinized. In the first place, it seems to ignore altogether the freedom of the will of the first promisor. When the Courts speak of the invasion of an existing right, it is pertinent surely to enquire what are the limits of the right. The right of A to the performance of an agreement entered into between himself and B at the hands of B is a tolerably clear and definite notion. As between these two, A who seeks to enforce the right is the person of inherence and B the person of incidence. Outside persons have nothing to do with it, for them the right does not exist. If A chooses to deny B his right or B chooses to deny A his right, each is at perfect liberty to do so, subject to a claim for compensation in damages, or, if need be, specific performance. In the case supposed, A being the person of inherence, B may refuse to perform his part, and A has his ordinary remedy. It is only on the supposition that B's will is coerced by another so that he is no longer a free agent, that there could be any legal logical ground for the doctrine that the refusal of B to perform his part of the contract thus "invading" or "violating" A's right, gives A any cause of action against anyone else than B. That is where the old conspiracy action takes its stand. It supposes that a combination of

persons may so oppress the will of one or more other persons that they cease to be free agents, and their acts are, therefore, really the acts of the conspirators who are therefore rightly made answerable to the aggrieved person. In contract the law assumes that men are perfectly free. It is only he who makes that can break the contract. And again it is only on the assumption that a third person or persons has deprived him of free contractual will, and so substituted his or their will for that of the original contractor that these outsiders could be regarded as answerable in his stead to the person aggrieved by the breach. But where there has been no combination or conspiracy, it is plain that ordinarily no such reason could apply. There might be a case, in which the person procuring the breach of the contract stood in such authoritative relation to the first person of incidence, that the breach might fairly be attributed to the substitution of his for the will of the contracting party. No case of that kind has yet, as far as I know, come before the Courts. And the reasoning I have ventured to suggest is entirely ignored in the broad loose generalizations which cover the decision in the *Lumley v. Gye* class of cases. It is submitted that where a man merely knowing of the existence of an unperformed agreement, without malice or the use of unlawful means, obtains the benefit of the agreement for himself, no action can lie against him for the breach of the agreement or procuring such breach, at the instance of the first promisee. It is clear that there is no principle of law, nor any logical reason why such an action should be maintainable. The wrong done to the aggrieved person has been done voluntarily by the first promisor, not by the person with whom he has entered into a new agreement. It is only by transferring the doctrine of abetment from the criminal to the civil law that any colourable reason could be adduced in support of such actions. A man who induces another to commit a crime is himself a criminal in the eye of the law. But by no parity of reason could it be argued seriously that a person who induces another to give him the benefit of a contract which he had formerly promised to someone else should be answerable civilly to that third person. For, the same harm would be done to the first promisee whether the second promisee knew or did not know of his right. In the former case, on this line of reasoning, he is to have, in the latter, he is not to have, a good action. Transpose this again into the criminal law of abetment and absurdity is patent. The cases of interference with existing contractual rights in operation, such as tempting a servant away from his master during the currency of the term of service, do not fall within the definition, since the agreement is already in part executed. And for all I can see there is no reason to make an exception of cases in which after a contract for service has been made, but before it is entered upon, some one else tempts the servant to break his agreement.

9. Turning again to Erle J.'s dictum, so much approved later by some of the very greatest English Judges, let us see, how in that later application it stands analysis. Procuring the violation of an existing right is a cause of action, the violation of the right is an actionable wrong. Now when the party aggrieved is seeking his remedy for the violation of his right (in the class of cases I am

considering the breach of a contract) his whole action must presumably be referred to its cause. In other words, he must sue the procurer of the violation but allow the actual violator, his promisor, to go scot-free. It can hardly be contended that he has a two-fold remedy against both, the procurer of the breach and the breaker of the contract. Nor I believe would it be argued that he can sue them together jointly and severally. If he first sue his promisor for damages on the breach, what becomes of his cause of action against the procurer? And if he elect to sue the procurer of the breach, the actual breaker of the contract to be exonerated? It may be answered that this is exactly what happens when actions for conspiracy to injure by causing others not to make contracts with the plaintiff are successful. It is not the servants and would-be customers who are sued but the conspirators who have induced them to break their contracts or withdraw their custom, etc. True, but the reason for this is simple and does not apply to such cases as I have in view. By the act of their conspiracy to injure the plaintiff, and attain that end by bringing about unlawful acts or the use of unlawful means, they have done the plaintiff a civil wrong entirely distinct and separable from the particular wrongs done him by the several persons upon whom the conspiracy has taken effect. Nothing in the least like this happens where a person knowing of the existence of a former agreement, merely takes a fresh agreement from the promisor of the former, although he knows also that doing so must involve the breach of the first agreement. Two elements at least are essential in the former action, the combination and the direction of its collective activity by means unlawful or lawful, to an unlawful end, the malicious injury of the plaintiff. In the class of cases I am dealing with, one of these elements is entirely wanting and the other can only be imported by a very large and loose expansion of the legal notion of malice. If the underlying idea is that an abettor of a civil wrong should be liable to the person suffering it, just as in the criminal law an abettor is as punishable as the principal criminal, we need only turn to Erle J.'s dictum and the practice founded upon it to see how completely the analogy breaks down. For here the abettor and the principal are not equally liable, but one or the other is to be selected as the wrong doer, while the other, usually the principal, is absolved. The criminal abettor could not possibly procure the crime unknowingly, but the civil abettor might bring about exactly the same injury and damage to the aggrieved party to the first contract without ever having heard of him or his contract. Apart from conspiracy, which is an indictable offence and therefore a wrong in itself, it may be doubted whether the act of a single individual not prompted by malice nor supported by unlawful means, resulting in the breaking of a contract which he knew of and the making of a subsequent contract with himself for his own advantage would, in strictness, give the first promisee any cause of action against him. In this connection it has often been argued in the Courts that there can be no conspiracy to do that which, if done by one member of the conspiracy alone, would not be an actionable wrong. This entirely overlooks the fact that the conspiracy itself is a wrong. No man is to be made the object of a conspiracy, although every man is free to play for his own hand by

lawful means. It must be acknowledged that some of the greatest English Judges who have refuted this argument appear to have missed the point and strayed into reasoning, which, with deference, I submit, is unsound.

10. Briefly, the position arrived at by this reasoning is that acts done by A B C D and X in concert and furtherance of an end, not necessarily unlawful in itself, may give the person against whom they are directed a cause of action, though, if the same acts were done by X alone, they would not; in other words, that merely collective action can give an act a new quality of wrongfulness, which it would not have had but for the fact that it was done by many instead of one. And the ground of reason upon which this is supported is that a man may well resist or ignore the attacks of a single man while he might be forced to succumb to the oppression of numbers. Both the reason and the conclusion, so stated, are false. Take a simple illustrative case, that of an actor complaining of a conspiracy maliciously to hiss him off the stage and so injure him in his profession. Let us suppose that there are two hundred persons in the conspiracy who have all agreed to hiss the actor as soon as he appears. Let us suppose that the entire audience consists of a thousand persons. The conspiracy being proved, and its object also being proved, namely, to injure maliciously the plaintiff, the means by which that end is attained may be wrongful in themselves or they may be not wrongful in contemplation of law. Every person attending a place of public entertainment, and honestly disapproving of any of the actors, has a right to express his disapproval by hissing. The hissing per se is not a wrongful act. If one of the two hundred conspirators alone hissed, this might pass unnoticed; it might do the actor no harm. According to the reasoning under consideration it would be a harmless act giving rise to no cause of action. But done in concert with hundred and ninety-nine others it is now held to be a wrongful act. This is a plain fallacy. The act does not change its character because repeated by many. If the whole two hundred, without any pre-concert, honestly hissed together, the total hissing would be as indifferent in the eye of the law as the hissing of each of them. Add the eight hundred non-conspirators making up the audience, and suppose that the whole thousand were so displeased with the actor's performance that they all hissed him, would he have any cause of action against them? Certainly not. The wrong which is the ground of his action does not lie in the means used but in the end attained. He would be far more injured by the spontaneous and honest hissing of a thousand, than by the concerted and malicious hissing of two hundred, yet he would have no cause of action. The truth is that if the hissing of the two hundred, in furtherance of a conspiracy, was a wrongful act, then the hissing of each one of them for the same purpose would be just as wrongful an act. If the proposition is meant to apply to the wrong actually done, then it comes to no more than this, that one man might not have been able to do a wrong which many in combination might. But if the wrong were actually done by a single person with the same intent and by the use of the same means, as it might have been done by two hundred, it is impossible to find any distinction between the cases; the result in either must be the same in the

eye of the law, if we eliminate the important fact that conspiracy is per se an offence, and so of course a material ingredient of a civil wrong. If it is lawful for X alone to induce a man not to sell his land to another, not to make a contract with another, or to exclude him from a new field of competitive enterprise, it is equally lawful for twenty or a hundred men without pre-concert or malice, to do the same. It is true that the combination of two hundred might achieve what one of their number alone could not. But this pre-supposes conspiracy. It is also true that the collective but not concerted or malicious action of two hundred might similarly achieve a result which any one of them singly would have failed to achieve. But here no one can doubt but that no action would lie against any one of them singly or all together. In the hissing case, just given, every one of the two hundred would be as liable as any other or all together if it could be proved, (a) that he was actuated by malice, (b) that his act caused damage to the plaintiff. For this, like so many other cognate cases, is really a case of privilege in the first instance, later displaced by proof of malice. It will be found on analysis that the reasoning of all the eminent Judges who have dealt with this argument, resolves itself into this, that given a wrong aimed at, many may succeed in inflicting it where any single person would not. But this is quite a different conclusion from that I have stated, namely, that what done by a single person would not be a wrong at all would be a wrong if done by a number of persons in concert. The only possible ground for any such distinction is that the fact of combination or conspiracy is a wrong per se. And this is not very logical either when we turn to the ordinarily accepted definitions of "conspiracy." There could be no indictable conspiracy except to do a wrong act or use wrong means to do an act not otherwise wrong. Nor could there be any civil action for conspiracy unless, (a) a wrong act had been done or (b) wrong means had been used. Now we see *ex vi terminorum*, that in the first case there could be no valid distinction between the case of one person acting alone and the case of twenty people acting together, for to give a cause of action a wrong must have been done. And a wrong must always be a wrong whether done by one or by twenty. No case, therefore, can possibly be put under this head in which a wrong done to an individual by conspiracy would not also have been a wrong if done to him by any given member of the conspiracy. If it is wrong for fifty men to prevent servants going into A's service, it must equally be a wrong for one man to do so. But it is argued that apart from the conspiracy it is a fair fight one man against another, and no wrong would be done to A by X merely seeking to engage servants whom A desired. Neither for that matter would it be a wrong if done by the fifty, did not the conspiracy and the implied malice introduce new elements. If without malice and solely in his own interests X tried to corner the labour market, he would have given A no cause of action; but then neither would X plus forty-nine others. This was in effect the ground of the decision, as I understand it, in the *Mogul* case. But if the object of the fifty was malicious, merely to rum A, and this could be shewn from the facts of the combination and its subsequent action, A might have his action. But in like circumstances I do not see why he should not have his action against X alone. The difficulty would then be to prove the malice, since

there would be no starting point of a conspiracy to injure A in his trade. It would be hard indeed in such a case, as Lord Macnaghten and Lord Watson have said, to expect the Courts to pry into a defendant's soul and get at the hidden motives of conduct not unlawful in itself. And this brings us to the B category. Given an end not unlawful in itself, the means used to attain it by a single man could only be less wrongful than those employed by fifty men, because they would be less effective, in other words, would fail of attaining the desired end. It thus becomes clear that the proposition goes no further than this, that the pressure exerted by numbers might amount to coercion, which is wrongful, while the pressure exerted by one of them alone might not, and, therefore, would not be unlawful. That is not a distinction between the quality of the same act repeated by fifty persons, and the act done by one alone, but views the collective action of fifty from the standpoint of results alone as in law a different act from the act of one. In the former case it is called coercion, in the latter, it is not. Yet of course there might be genuine coercion by a single person if he were influential enough, and then the attempted distinction disappears altogether.

11. I return now to my central point, where, if anywhere, can a limit be set to the application of the principle established in *Lumley v. Gye*? Logically I should say nowhere, practically I should say that it was desirable to confine that case within the narrowest possible bounds. In a later case Rigby L.J. puts such a set of facts as I am dealing with though, of course, with reference to English customs and sentiments, as a *reductio ad absurdum* of any extension of *Lumley v. Gye* beyond its own facts. If a lady were engaged to be married to A and before the wedding X fell in love with her and induced her to break off her engagement with A and become engaged to him, would A, he asks, have any cause of action against X? Carry it a step further, and suppose that before the lady married X, A brought his action and applied for an injunction against X restraining him from pursuing his courtship, would any Court listen to him? Similarly, in *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.* (1907) 76 L.J. Ch. 194 Joyce J., without going very deeply into the question, expresses a very strong opinion against the too liberal extension of the principle upon which *Lumley v. Gye* appears to have been decided. He would draw a distinction between cases in which contractual relations already existing may be distinguished from un-fulfilled contracts, confining the former cases to the relations existing under contracts of service between master and servant, or employer and employed. I am unable to see how any such distinction can validly be based upon the dicta of the many eminent Judges who have had to deal with this question in the English Courts. The real distinction, if one is to be drawn and maintained at all, ought to rest upon plainer and solider ground. I have already tried to indicate that ground.

12. In all matters of private contracts the parties are supposed to be free agents accountable to each other and no one else. The promisor may break his promise with or without external inducement and the damage to the promisee is precisely the same in either case. What conceivable right then can he have against a third

person on the ground that he has induced the promisor to break his promise, unless it can be shown that he has done so maliciously or by the use of unlawful means ? None at all that I have been able to discover. The aggrieved party to the first contract always has his remedy against his promisor, and it is no concern of his how his promisor was brought to break his promise. It is enough that he has done so.

13. Perhaps some assistance might be got out of an analysis of the terms of Erle J.'s dictum. Procuring the violation of an existing right etc. Now in the case of a contract what is the existing right of the promisee ? Ordinarily, it goes no further, merely as a legal right than damages, should the contract be broken. In some cases it goes the length of specific performance. But marriage is evidently not one of those cases. Where the contract is not of a kind of which specific performance could be granted, then the legal existing right, up to actual performance, is no more than the right to have damages for the breach. And that right cannot, of course, be violated by any one who merely induces the breach. In the very nature and essence of the thing the legal right of one party to a contract against the other is restricted to that other, and is limited to compelling him, in some cases, to carry out the contract, in others, to getting damages out of him should he fail to perform it. Where then all other elements are absent and the wrong complained of is confined to the loss occasioned to the promisee by the non-performance of his promise by the promisor, the inducement by another not to perform, whether that other was or was not aware of the existence of the contract does not, in strictness, appear to make up any part of the real cause of action. No violation of any right actually existing in the plaintiff in such an action against the inducer, has been procured by the defendant. But this is possibly too nice, since it might fairly be replied that if there were no existing right in the promisee against the promisor, to have the promise carried out, there would be no ground for the action for damages against him, and the reasoning just suggested might be thought to confound right with remedy.

14. On the other hand, the peremptory ruling out of all regard to the intention of the defendant insisted upon by Lords Watson and Macnaghten is open to as plain an objection. For, in fact, it never is neglected as being of the essence of the plaintiff's cause of action against such a procurer, though it is partly concealed under a looser idea. This idea too is implied in the use of such a word as "procure." In one sense a man, who tempts the owner of an article with a higher price than that for which he has already agreed to sell it, may be said to procure the breaking off of the former agreement even though he did not know of its existence. And this also exhibits the rather coarse substitution of the bare idea of knowledge for that of malicious intent. For if two persons do precisely the same act, having the same damaging and injurious consequences to a third, and one of those persons is liable to the third in law for damages on account of knowledge, while the other is not, plainly the essence of the action against the former lies in the knowledge, or in other words, in the malice which is pre-supposed in the bare knowledge. Mere knowledge by itself could never, in an

exact analysis, be such an ingredient as added to an act would convert it from a non-actionable into an actionable wrong. It is only when, to avoid difficulties of proof, such mere knowledge is presumed in law to impute malicious intent that we arrive at a true understanding of why an act not actionable alone, may be with that ingredient added, actionable. We are thus brought back to what is undoubtedly the truth, that in every case conforming to the required conditions, malice is essential to the giving of a good cause of action.

15. In the case put by Rigby L.J., there was the existing right, there was a procuring of its violation, and there was the requisite knowledge, which, according to Crompton L.J., is tantamount to malice, and yet no one can doubt that the party injured by the breaking of the first contract would have no cause of action against him who induced its breach. The rule then deducible from *Lumley v. Gye* and the comments made on it in *Allen v. Flood* [1897] A.C. 1 is not a rule of universal applicability. Any exception invalidates an universal. Probably it is untrue to impute malice to mere knowledge; the fact of knowledge may suggest the existence of malice, but it seems rather a rude generalization to say that the two are equivalent. But if they are not, and the line requires to be drawn where I have submitted that it ought to be drawn, one thing is clear, and that is that *Lumley v. Gye* was wrongly decided. This cannot be argued now, since it was explicitly approved by the House of Lords in the later cases of *Allen v. Flood* and *Quinn v. Leathem*. This much at least may be hazarded without disrespect that the universality of the rule which appears to have been established by *Lumley v. Gye* is questionable, and that it ought not to be applied to any new set of facts without a Court being satisfied that it exactly fits them. I should like to say, that limiting the case before me to the plaintiffs and the defendant 1 (I will deal shortly with the element of conspiracy presently) it does not apply, and that, on the facts pleaded, the plaint discloses no cause of action. But in view of the state of the law at present I do not think it would be safe to do so, since it would appear from a perusal of the leading text-books that it is accepted as axiomatic that procuring the breach of a contract gives a good cause of action. I shall never be able to bring myself to believe, that without the addition of other elements, it does, I assume that the word "procuring" in this compendious phrase connotes knowledge of the existence of the contract which the defendant procures to be broken. Even so, in the absence of express malice, I do not think that looking at the development of the doctrine historically and theoretically that as an universal proposition is good law and true.

16. The plaintiffs have entirely failed to prove any conspiracy between the defendants inter se or with others not made parties to the suit. Some attempt was made to prove that the defendant 1 wrote to his sister Radhabai, defendant 2, on the subject of procuring a bride for him. Some attempt was made to prove that the betrothal of Jamnabai to the defendant 1, took place in Bombay under the auspices of the 2nd defendant, who was well aware of the existence of the betrothal of Jamnabai to the second plaintiff. But that attempt appears to me to have failed. Nor even had it been successful would it have been sufficient to

prove a conspiracy between the defendants 1 and 2 to procure the breaking off of the marriage arranged between Jamnabai and plaintiff 2. There is absolutely nothing to show that at that time the defendant 1 had any particular girl in view, or was aware of the betrothal of Jamnabai to Kanji. Defendant 1 has, for many years, resided permanently in Calcutta and must not be presumed to have known all that was going on in the caste in Bombay. As to the third defendant, I cannot remember that any serious attempt was ever made to connect her with this alleged conspiracy. Both, defendants 2 and 3, are sisters of the defendant 1. Such evidence as there is of conspiracy points to a woman called Adhibai having taken the leading part. It was she who appears to have recommended Mulji, the father of the girl Jamnabai, to go to Calcutta and choose a husband for her, naming one Bhabar and the defendant 1 as suitable bridegrooms. But what conceivable reason had this woman Adhibai to conspire with defendant 1 to procure the breaking off of Jamnabai's betrothal to the plaintiff 2 ? I do not believe that there was any conspiracy or anything in the least like a conspiracy. It is possible that when the marriage between Jamnabai and Kanji hung fire so long, members of the caste may have found out or guessed that the girl's father was dissatisfied with the proposed marriage, and so suggested to him that he had better look out for a more suitable husband for his daughter. It is quite possible that up to a point what Mulji has deposed to, may be true. He may have insisted upon the punctual fulfilment of the terms of the betrothal, and the plaintiffs may have procrastinated, and so an impression got abroad that the match was broken off, as indeed Mulji swears that it was, before he opened negotiations with defendant 1. That may account for Adhibai's intervention and suggestions. But nothing in the evidence either direct or inferential, would warrant me in holding that a conspiracy between the defendants had been proved. As the plaint founds the claim of conspiracy this might be a sufficient ground for dismissing the suit.

17. But the separate case of the defendant 1 might still have to be considered, after eliminating the element of conspiracy. Did he know when he proposed to marry Jamnabai, that she was still engaged to Kanji ? Was she in fact so engaged? I think that the latter question would have to be answered in the affirmative. I do not doubt that Mulji was very much dissatisfied with his prospective son-in-law, and was anxious to break off the engagement upon any pretext. But I do not believe that he had in fact broken it off when he went to Calcutta in March. Had that been the case I think he would have returned the deposit of Rs. 3000 and the Rs. 2500 worth of ornaments already made. This he did not do, and later the plaintiffs had to sue him for the deposit and the ornaments. But I think that he was eagerly desirous of finding a substitute for Kanji, and went to Calcutta with the express object of suggesting a marriage with defendant 1. Defendant 1 is a much wealthier man than either of the plaintiffs and doubtless in the opinion of Mulji a much better match for his daughter. Up to this point (apart from the evidence that Jamnabai was actually betrothed to defendant 1 in Bombay with the full knowledge of Radhabai, and presumably,

therefore, with the knowledge of the defendant 1 himself that she was at the time betrothed to Kanji) there is nothing to suggest that Nursey knew anything of the engagement of 1910 to Kanji. The Court is asked to infer that he did from what followed. It is true that the marriage and betrothal, both on the same day, in Calcutta (if as regards the betrothal this part of the evidence for the defendant be true) with other circumstances suggest that all concerned were in the utmost haste to get the girl married to the defendant 1. The many unseemly informalities attending upon the indecent haste with which the marriage was put through on the 18th April, are strongly insisted upon on behalf of the plaintiffs as proof enough of the defendant 1's knowledge. But they are at least as consistent with Mulji's desire to keep defendant 1 in the dark about the previous engagement until the marriage was an accomplished fact as with the defendant 1 knowing of that previous engagement. It is not as though this haste enabled the marriage to be performed under the auspices and with the sanction of the Calcutta Jamat. The Jamat did not countenance the marriage. This did not deter the bridegroom, who claims to be a reformer and to care little for caste ordinances and authority. He went through with it, and as a result was out-casted. If the object of all this hurry had been to get the approval of the Calcutta Jamat before they were made aware of the fact that the bride had already been promised to another, it entirely failed of its object. The elders refused the customary fees and would have nothing to do with the affair. The suggestion is that Nursey, knowing that his bride was already promised to another, wanted to get married before the Jamat had time to put its veto on the ceremony. But since the facts show that Nursey was quite indifferent, did not care whether the Jamat sanctioned the marriage or not the suggestion loses much of its force. On the other hand, it is, in my opinion, much more probable that Mulji was extremely anxious to obtain so good a match for his daughter and feared that should Nursey hear before the marriage that she had already been betrothed he might refuse to go on with the marriage. This would account for the haste with which everything was precipitated, and many customary decencies ignored. At the same time it would be consistent with Nursey's sworn statement that he did not know before he married Jamnabai that she was at the time engaged to Kanji. As to what occurred afterwards, that has little bearing on this point. The plaintiffs appealed to the Bombay Jamat, and Nursey might very well have wished to placate them, not only in order to avert the unpleasantness of being out-casted, but the much more serious prospects of heavy litigation. I do not think there is anything in the evidence as to what occurred after the marriage which would suffice along with the inferences I have already indicated, to prove affirmatively that the defendant 1 knew of the existence of the engagement of 1910 to Kanji, when he married Jamnabai on the 18th April 1913.

18. But there is another answer to the plaintiffs' claim, which appears to me to be conclusive. It has the advantage, too, of lying outside the English law, and being unaffected by any of the English decisions. The Hindu law, by which these parties are governed, enacts that a father may break off his daughter's

engagement, should a more suitable bridegroom be available. Under that law, then, the plaintiffs never had more than a conditional right to the fulfilment of the contract upon which this suit is founded. So that since it was optional with the father of the promised bride to give her to any other more eligible suitor, and such a suitor having been found before the betrothal to Kanji had been followed by his marriage to the betrothed girl, it is clear that no legal right inhering in him or his father has been violated. There can then be no cause of action for the violation of any such right either by individual procurement, or by conspiracy.

19. All that the plaintiffs at best had a right to, was the marriage of Jamnabai to Kanji at some future time, should a certain event not happen. It has happened, and there is an end of it.

20. I think that on every ground the plaintiffs' suit fails, and must be dismissed with all costs.

1. Note.-I have taken this and the next instance from an interesting article by Mr. Nolan in the Law Journal.-F.C.O.B.