[HIGH COURT OF AUSTRALIA.]

McKERNAN . . . . . APPELLANT;
DEFENDANT,

AND

FRASER AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Oct.* 1, 2.

SYDNEY, *Dec.* 23.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Tort—Conspiracy—Seamen "picked up" or selected for employment—Other seamen induced not to work with them—Whether "picking-up" amounted to a contract of employment—Whether refusal to work with selected men constituted a strike and was unlawful—Meaning of "strike"—Whether refusal to work was to further men's own interests or to injure others—Industrial Code 1920 (*S.A.*) (*No.* 1453), *secs.* 5, 100.

The plaintiffs were members, but unfinancial members, of the Federated Seamen's Union, which was formerly registered under the *Commonwealth Conciliation and Arbitration Act*, and the defendant was the secretary of that Union at Port Adelaide. The plaintiffs were desirous that the Union should again become registered under that Act and refused to pay the contributions required by its rules until it again became a registered body. Further, the plaintiffs promoted or at least joined another body known as the Australian Seamen's Union, which attempted to register itself under that Act. About January of 1929 the Adelaide Branch of the Seamen's Union resolved that members of that Union should refuse to sail with members who refused to pay their contributions. In May 1929 the Adelaide Steamship Co. "picked up" or selected the plaintiffs for engagement as greasers on the m.s. *Manunda*. The defendant then said in substance to the officer who had "picked up" or selected them:—"You can't sign them on. They are unfinancial. If you take these two men, the other crowd won't sign on." The representatives of the shipping company were prepared to allow the plaintiffs to sign the ship's articles, but after communication with the shipping company's head office the picking-up officer asked the six men who had been picked up with the plaintiffs whether they would sail if the plaintiffs signed on. The defendant

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repeated these words to the men who ultimately refused to sail with the plaintiffs. The shipping company then refused to sign on the plaintiffs. In an action for damages brought by the plaintiffs against the defendant for inducing the master and owners of the ship to break their contracts with the plaintiffs, alternatively for maliciously coercing the master and owners of the ship not to enter into contracts with the plaintiffs, and alternatively for conspiracy to injure the plaintiffs, the Special Magistrate found that the real reason of the animus against the plaintiffs was that they were active in trying to get a rival union registered, and he gave judgment for the plaintiffs. The Full Court of South Australia upheld this decision. On appeal to the High Court,

Held, by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Starke* J. dissenting), that judgment should have been given for the defendant.

By *Rich*, *Dixon* and *McTiernan* JJ. :—(1) The "picking-up" or selection of the plaintiffs was merely preliminary to a contract and did not itself amount to a contract; therefore, no contractual relations were established between the plaintiffs and the shipowners, and, consequently, no breach of such relations was procured by the defendant. (2) The defendant and the other members of the Union committed no actual or threatened violation of sec. 100 of the *Industrial Code* 1920 (No. 1453) of South Australia, which makes penal the doing of any act or thing in the nature of a strike, as what was done or threatened did not fall within the definition of a "strike" in sec. 5 of such Act, because in refusing to sign the articles or offer for or accept engagement, the men would be doing no more than refusing to begin a new employment: the word "strike" usually indicates a cessation or relinquishment of work, or at least the failure to resume work after a normal interruption or suspension; and in a penal provision the word "strike" ought not to receive an interpretation wide enough to include the concerted refusal of men to enter into a new employment of long duration, even although that employment was offered according to a regular customary practice by which labour is habitually obtained; and, consequently, illegal means were not actually adopted or threatened at the place of engagement. (3) For a combination or acts done in furtherance of the combination to be actionable where the end is not in itself unlawful and the means are not unlawful and no threat of illegality is made in furtherance of the combination, the parties to the alleged conspiracy must have been impelled to combine, and to act in pursuance of the combination, by a desire to harm the plaintiff, and this must have been the sole, the true, or the dominating or main purpose of their conspiracy: it is not enough to adopt a course which necessarily interferes with the plaintiff in the exercise of his calling and thus injures him; nor is it enough that this result should be intended if the motive which actuated the defendants was not the desire to inflict injury but that of compelling the plaintiff to act in a way required for the advancement or for the defence of the defendants' trade or vocational interests; and what actuated the conduct of the Union branch and of the defendant was to benefit themselves in obtaining employment, and, therefore, the cause of action in conspiracy was not established.

Sorrell v. Smith, (1925) A.C. 700, applied.

By *Evatt* J.:—(1) The circumstances of the case showed that all at the pick-up recognized that the "selection" was provisional, and that there was no binding agreement until the articles were signed; there was therefore no inducement by the defendant of any breach of contract. (2) The action taken at the pick-up did not constitute a breach of sec. 100 of the South Australian *Industrial Code* 1920. (3) The combined action of the defendant and the unionists was taken in deliberate pursuance of a previous plan against the rival unionists, and for the express purpose of depriving the plaintiffs as members of the rival Union of their chance of employment. In spite of this, the cause of action based on "conspiracy to injure" failed on two distinct grounds, namely, (*a*) the injury thus sustained by the plaintiffs was not inflicted wantonly or out of any purely personal hatred or malevolence, although the unionists strongly disliked the policy of their rivals; (*b*) even if McKernan's own conduct was inspired by purely personal malevolence towards the plaintiffs, he was not liable for conspiracy unless the other parties to the agreement were also liable, and McKernan's personal malevolence was not imputable to such other parties. Dictum of *McCardie* J. in *Pratt* v. *British Medical Association*, (1919) 1 K.B. 244, at p. 279, dissented from.

Decision of Supreme Court of South Australia (Full Court): *McKernan* v. *Fraser*, (1930) S.A.S.R. 364, reversed.

APPEAL from the Supreme Court of South Australia.

Leon Fraser and John Stapleton brought this action in the Local Court at Port Adelaide against Peter McKernan, who was the secretary of the Seamen's Union there, alleging:—(1) The plaintiffs are and were at the times hereinafter mentioned greasers and each had on 23rd May 1929 prior to the wrongful acts of the defendant hereinafter complained of entered into a contract with the master and/or owners of the motor-ship *Manunda*, then lying at Port Adelaide to serve on the said motor-ship as greasers for a period of six months at the monthly wage of £18 7s. 6d. (2) The defendant knowing that the said contract had been entered into as aforesaid maliciously and wrongfully and with intent to injure the plaintiffs procured and induced the said master and/or owners to break their said contracts and to refuse to perform the same and the said master and/or owners did by reason of such procurement and inducement break and refuse to perform such contracts whereby the plaintiffs respectively lost the benefit of the said contracts and suffered great damage and inconvenience. Alternatively, the defendant with the knowledge and in manner aforesaid procured and induced George

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Eric Middleton a responsible officer of the said master and/or owners to dismiss the plaintiffs and break the said contracts. (3) Further and in the alternative the defendant has maliciously and wrongfully and with intent to injure the plaintiffs intimidated and coerced the master and/or owners and/or the said George Eric Middleton not to enter into contracts with the plaintiffs for the services of the plaintiffs whereby the plaintiffs have suffered damage. (4) Further and in the alternative the defendant unlawfully and maliciously and with intent to injure the plaintiffs conspired with Henry Martin and Daniel Hannah and others whose names are unknown to the plaintiffs to induce the said master and/or owners and/or the said George Eric Middleton to break the said contracts or alternatively to intimidate and coerce the said master and/or owners and/or the said George Eric Middleton to break the said contracts and/or not to enter into contracts with the plaintiffs for their services whereby the plaintiffs have suffered damage. The plaintiffs each claimed £100 damages from the defendants.

The Special Magistrate who heard the action entered judgment for each plaintiff for the sum of £100. He found for the plaintiffs in respect of the first and third causes of action alleged in their claim.

On appeal to the Supreme Court of South Australia all the Justices held that the judgment might be supported on the ground that the means by which the defendant procured the shipowners to break their contracts or to refuse to enter into any contract with the plaintiffs, as the case might be, involved an illegal act under the *Industrial Code* 1920 of South Australia. And *Piper* J. also held that a contract was entered into between the plaintiffs and the master and owners of the ship *Manunda* which the defendant induced them to break :—*McKernan* v. *Fraser* (1).

The facts are fully stated in the judgments hereunder.

Nelligan, for the appellant. This was an action for damages against McKernan for preventing these men from getting work. The claim is based on the ground that there had been a contract, and, if there were no contract, that McKernan prevented a contract being made. The Special Magistrate found that there had been a

(1) (1930) S.A.S.R. 364.

contract and that there had been a breach of it. There was, however, no contract made between the shipowner and the respondents. The Full Court affirmed the decision of the Magistrate on the ground that the means by which the appellant procured the shipowners to break their contracts or to refuse to enter into any contract with the respondents, as the case might be, involved an illegal act under the *Industrial Code* of South Australia. There was no intention on the part of the respondents or the shipowner to make a complete contract until the articles were signed. No articles having been signed by the master or the men, there was no final and completed agreement, though it may have been that the appellant prevented a contract being made. Where it is shown clearly by the conduct of the parties that there should be no final agreement until the articles are signed, the mere picking-up of men will not constitute a contract. The Court took the view that the selection at the picking-up place amounted to an engagement which would subsequently be embodied in articles. It is necessary to have the articles signed in accordance with sec. 46 of the *Navigation Act*. Where a statute requires an agreement to be made in writing and it is not made in writing, it is strong evidence that the parties did not intend the agreement to amount to a final and complete agreement. The intention of the parties at the picking-up place was no more than to select certain men and not to make a final agreement. If there were no contract and the men acted bona fide in the interests of their trade, and their object was found to be such, no action would lie. The real reason why the appellant acted was because the respondents were active in setting up a rival organization which was working in conjunction with the shipowners. *Vickerson* v. *Crowe* (1) and *Re Great Eastern Steamship Co.* (*Claim of Williams*) (2) are distinguishable, as in each of those cases the selection went beyond mere negotiation and there was an actual engagement and performance under it (*Ridgway* v. *Wharton* (3)). As the articles were not signed, there was no contract ; alternatively, if it were not necessary to have the articles signed to make a final contract, there was no sufficient evidence to prove a contract. The matter was

(1) (1914) 1 K.B. 462, at p. 463.
(2) (1885) 53 L.T. 594.
(3) (1854) 3 DeG. M. & G. 677 ; 10 Ex. 1287, at p. 1297 ; (1857) 6 H.L.C. 238 ; 11 E.R. 1287.

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still in the stage of negotiation. Counsel referred to the *Industrial Code* 1920 (S.A.), secs. 5, 100, 129, 130. There was no strike within the meaning of sec. 5 or at common law. But if unlawful means were employed the combination might give rise to a claim for damages (*Vasey* v. *Port Adelaide Working Men's Associate Branch of the Waterside Workers' Federation of Australia* (1); *Williams Bros. (Hull) Ltd.* v. *Naamlooze Vennootschap W. H. Berghuys Kolenhandel* (2); *Sorrell* v. *Smith* (3)). The Union acted lawfully, and for the purpose of advancing its own benefit. The questions of law in issue are (1) whether lawful means were employed, and (2), assuming that no unlawful means were employed, were the men entitled to act as they did. The *William Bros. Ltd. Case* (4) is distinguishable as it was based on certain findings of fact which do not apply here. On the question of jurisdiction counsel referred to *Farrer* v. *Close* (5); *Russell* v. *Amalgamated Society of Carpenters and Joiners* (6). Whatever harm was inflicted on an individual, it is clear that the action was directed towards a class and for the purpose of benefiting those who inflicted the harm, and not for the purpose of injuring those on whom the harm was inflicted. [Counsel referred to *Sorrell* v. *Smith*; *Lumley* v. *Gye* (7); *Allen* v. *Flood* (8); *Quinn* v. *Leathem* (9); *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (10); *Conway* v. *Wade* (11); *Davies* v. *Thomas* (12); *Ware & De Freville Ltd.* v. *Motor Trade Association* (13); *Reynolds* v. *Shipping Federation Ltd.* (14); *Hardie & Lane Ltd.* v. *Chilton* (15); *White* v. *Riley* (16).]

Skipper, for the respondents. In this case, the shipowners having agreed with the Union that only unionists should be employed, objection would not have been raised if McKernan had gone to the employers and objected to the employment of these men as being unfinancial members of the Union; but pressure was brought to

(1) (1923) S.A.S.R. 235, at p. 242.
(2) (1915) 86 L.J. K.B. 334.
(3) (1925) A.C. 700.
(4) (1915) 86 L.J. K.B., at pp. 335, 356.
(5) (1869) L.R. 4 Q.B. 602, at p. 612.
(6) (1912) A.C. 421, at pp. 435-436.
(7) (1853) 2 E. & B. 216; 118 E.R. 749.
(8) (1898) A.C. 1, at pp. 163-164, 166.
(9) (1901) A.C. 495, at p. 514.
(10) (1902) 2 K.B. 732, at p.737.
(11) (1909) A.C. 506, at pp. 511, 518.
(12) (1920) 2 Ch. 189, at p. 198.
(13) (1921) 3 K.B. 40.
(14) (1924) 1 Ch. 28.
(15) (1928) 2 K.B. 306.
(16) (1921) 1 Ch. 1.

bear on the shipowners under which the employers were compelled to discharge the respondents. The appellant destroyed the engagement, even putting it short of contract. The unionists used a strike and coercive means and successfully sought to force the employers to break the agreement. The means adopted by McKernan were coercive, and such as were not justified in law. Under the agreement the Union had made with the shipowners, the Union was bound to supply a crew and to give the shipowners free selection. Fraser was engaged to serve on the *Manunda* under the ship's articles, and McKernan caused a breach of that agreement (*Niesmann* v. *Collingridge* (1)). The articles had been signed by the shipping-master and the respondents had a good cause of action against the shipping company. [Counsel referred to *Giblan* v. *National Amalgamated Labourers Union of Great Britain and Ireland* (2) and *Brisbane Shipwrights' Provident Union* v. *Heggie* (3).] The acts of interference here are deliberate, and are not incidental to carrying on any business and are not accidental. It does not matter whether the terms of the contract were explicit or not. There were an offer and an acceptance, and a contract had been made. The men were willing to sign the articles and would have done so if they had not been interfered with (*Salmond on Torts*, 7th ed., pp. 599, 605). McKernan tried persuasive measures and, those failing, he threatened a strike which was in violation of the South Australian *Industrial Code*. Had he merely endeavoured to dissuade the employers from taking these men, and had there been no concluded contract, the respondents might not have been entitled to succeed. They have, however, proved a combination with intent to injure and a combination wrongfully to injure, though the means may have been justified if the provision in the *Industrial Code* had not existed, but that Act makes the action illegal. To complete the contract there was nothing for the parties to negotiate about, though the articles had to be signed before the ship went to sea.

Nelligan, in reply.

Cur. adv. vult.

(1) (1921) 29 C.L.R. 177.
(2) (1903) 2 K.B. 600.
(3) (1906) 3 C.L.R. 686.

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The following written judgments were delivered :—

GAVAN DUFFY C.J. AND STARKE J. The plaintiffs in this action are greasers and they brought an action in the Local Court at Port Adelaide against the defendant, who is the secretary of the Seamen's Union there. In their claims the plaintiffs alleged three causes of action. The first was that the defendant induced the master and owners of the motor-ship *Manunda* to break their contracts with the plaintiffs engaging them as greasers on the ship for a period of six months at a monthly wage of £18 7s. 6d. The second was that the defendant maliciously, and wrongly, and with intent to injure the plaintiffs, intimidated and coerced the master and owners of the *Manunda* not to enter into contracts with the plaintiffs for the service of the plaintiffs, whereby they lost employment. The third was that the defendant, Henry Martin, Daniel Hannah and others combined or conspired together, with intent to injure the plaintiffs in their calling as greasers, (a) to induce the master and owners of the ship to break their contracts of employment with the plaintiffs, (b) or to intimidate or coerce the said master and owners to break the said contracts, (c) or to intimidate or coerce the said master and owners not to enter into contracts with the plaintiffs for their service, whereby the plaintiffs were damaged.

The Special Magistrate who heard the action entered judgment for each plaintiff for the sum of £100. He found for the plaintiffs in respect of the first and third causes of action alleged in their claim. On appeal to the Supreme Court of South Australia all the Justices held that the judgment might be supported on the ground that the means by which the defendant procured the shipowners to break their contracts or to refuse to enter into any contract with the plaintiffs, as the case might be, involved an illegal act under the *Industrial Code* 1920. But *Piper* J. also held that a contract was entered into between the plaintiffs and the master and owners of the ship *Manunda* which the defendant induced them to break.

In our opinion, the judgment should be supported. It does not appear to us necessary to consider whether any contract of service was concluded between the master or owners of the *Manunda* and the plaintiffs, who were selected, or " picked up " as the phrase is, for engagement. Nor is it necessary to inquire whether the defendant

used unlawful means under the *Industrial Code* in inducing the master and owners of the ship *Manunda* not to employ the plaintiffs as greasers. Since the decision of the House of Lords in *Sorrell* v. *Smith* (1) it must be taken as settled in English law that "a combination of two or more persons wilfully to injure a man in his trade or calling is unlawful and, if it results in damage to him, is actionable. If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues." According to Lord *Dunedin* in the same case (2), the effect of *Allen* v. *Flood* (3) and *Quinn* v. *Leathem* (4) is "to settle beyond dispute that in an action against an individual for injury he has caused to the plaintiff by his action, the whole question is whether the act complained of was legal, and motive or intent is immaterial; but that in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy." The tribunal "must be satisfied that there has been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade" (5).

The facts in the present case are not in dispute, though possibly all minds would not draw the same inferences from these facts. The plaintiffs and the defendant belonged to an association known as the Federated Seamen's Union. The defendant was the secretary of that Union at Port Adelaide. The Union has been registered as an organization under the *Commonwealth Conciliation and Arbitration Act* but its registration had been cancelled, apparently owing to its misconduct or that of its members, and it was an unregistered body at all times material to this action. The plaintiffs were desirous that the association should again become a registered organization and refused to pay the contributions required by its rules until it

(1) (1925) A.C. 700.
(2) (1925) A.C., at p. 724.
(3) (1898) A.C. 1.
(4) (1901) A.C. 495.
(5) (1925) A.C., at p. 721.

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again became a registered body. They were thus unfinancial members but had not ceased to be members of the Union. Further they promoted, or at least, joined another body known as the Australian Seamen's Union, which attempted to register itself as an organization under the *Commonwealth Conciliation and Arbitration Act*. About January of 1929 the Adelaide Branch of the Seamen's Union resolved that members of the Seamen's Union refuse to sail with members who refused to pay up their contributions and that shipowners and all branches be so informed. Sometime in May the defendant informed the manager of the Adelaide Steamship Company that trouble might arise on the water-front because there were two factions among the seamen and if members of one faction were engaged then members of the other faction might cause trouble. The fact that some members of the Seamen's Union were refusing to pay their contributions to the Union, and so were unfinancial members, may have been referred to, but that it was at the root of the trouble does not appear to have impressed itself upon the manager of the shipping company. The matter, however, came to a head on the 23rd of May 1929 when the Company proceeded to "pick up" or select men for engagement on the motor-ship *Manunda*. The plaintiffs were "picked up" or selected, but the defendant said in substance to the officer who had "picked up" or selected them:—"You can't sign them on; they are unfinancial. If you take these two men the other crowd won't sign on, and the sailors won't go into the yard." The Superintendent under the *Navigation Act* was prepared to allow the plaintiffs to sign the ship's articles and so was the picking-up officer; but he communicated with his head office, and ultimately told the defendant that he would ask the other selected men whether they would "sign on" with the plaintiffs. The picking-up officer thus states what followed:—"I went out in the yard with the eight men and the rest of the men were standing near by. I said to the six men who had been selected with Stapleton and Fraser: 'Will you sail if the other two men sign on?' The defendant repeated these words after me. There was a hesitation. One man spoke up and asked what the conversation over the phone was between Hayter and the Company's office. I replied that has nothing to do with the question asked. I repeated the request,

'Will you men sign on if these other two men sign on also?' After several minutes one man said: 'I won't sign on'; then a couple of minutes later the rest of them said: 'We won't sign.' I then handed back the discharges to Stapleton and Fraser and selected two fresh men. I could not accept them. It would mean holding up the ship."

It is clear enough on these facts that the defendant and members of the Seamen's Union were all acting together, i.e., in combination, as the phrase is. It is quite legitimate in many circumstances for a set of men to object to work with another man or another set of men and so to inform an employer (*White* v. *Riley* (1)). But they are not justified in combining to prevent and in fact preventing a workman from obtaining any employment in his trade or calling merely because they wish to punish him. So we understand *Sorrell* v. *Smith* (2) and *Giblan* v. *National Amalgamated Labourers' Union &c.* (3). The case, therefore, reduces itself to the question whether the defendant and his fellows combined together to withdraw the services of men of the Seamen's Union from the shipowners with intent to injure the plaintiffs.

The Special Magistrate, who saw and heard the witnesses, had no doubt that the men, instigated by the defendant and acting with him, refused their services to the shipowners with intent to injure the plaintiffs. "I have come to the conclusion," said he, "that all this talk about the plaintiffs being unfinancial is absolutely insincere. It is all moonshine. The real reason of the animus against the plaintiffs is that they were active in trying to get a rival union registered in the Federal Arbitration Court. The plaintiffs could not be attacked on personal grounds, so the assertion that they were unfinancial, although true as regards defendant's Union, was merely a pretext to damage them." This finding, we think, is open on the evidence. The Union rules doubtless provided what privileges and rights should be withdrawn from members who are unfinancial, and, if the Union were registered, contributions payable under its rules might be recovered in any Court of competent jurisdiction (*Commonwealth Conciliation and Arbitration Act* 1904-1930, sec. 68). According to the Special Magistrate the overdue contributions on the part of

(1) (1921) 1 Ch. at p. 13. (2) (1925) A.C. 700.
(3) (1903) 2 K.B. 600.

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each plaintiff only amounted to a sum of £1. In the face of facts such as these, it is difficult to believe that the action of the defendant and his fellows was dictated solely or at all by a desire to forward or protect their own interests. The real object of that action was to punish the plaintiffs and prevent them obtaining employment as greasers anywhere in the Commonwealth. The combination, the intent to injure the plaintiffs and the resulting damage were established to the satisfaction of the Special Magistrate and on evidence upon which any reasonable man might act, and we see no reason to disturb his findings.

Consequently, in our opinion, the judgment below should be supported and this appeal dismissed.

RICH J. I have read the judgment of my brother *Dixon* and agree with it.

DIXON J. The Federated Seamen's Union of Australasia was registered as an organization under the *Commonwealth Conciliation and Arbitration Act*. In the year 1925 its registration was cancelled. It thereupon became a voluntary association of persons, unless and so far as it possessed or obtained a corporate or quasi-corporate character from some State enactment. In fact it appears that the Union, or some branches of it, had been registered under Part I. of the *Industrial Arbitration Act* 1912 *to* 1922 of New South Wales and under the *Industrial Conciliation and Arbitration Act* of Queensland.

In 1925 an agreement was made between the Union "for and on behalf of itself, its officers and members," and the Commonwealth Steamship Owners' Association "for and on behalf of itself and its members" including the Adelaide Steamship Company. This agreement described in detail the rates of pay and the conditions of employment to prevail upon vessels of the shipowners in respect of members of the Union. It contained an undertaking and agreement by the Union for itself, its officers and members, to man all vessels as soon as required to do so by the owners, and not to interfere with the free selection and engagement of crews or individual members of crews. The registration of the Union in New South

Wales and Queensland did not, in my opinion, change its status elsewhere, nor did it affect the operation of the agreement upon members employed or engaged outside those States, at any rate if they were not members of the New South Wales and Queensland branches. Accordingly in South Australia the agreement amounts to a contract made by the persons appointed to manage a voluntary association for and on behalf of its members. It follows that, although the agreement may bind the funds of the Union, an individual member is not contractually bound unless, being a member at the time of the agreement, he authorized or ratified its making or was bound by rules which authorized the Committee of Management to contract in such a matter on his behalf. It does not appear whether any such rule existed or not.

In the year 1928 the officials holding office in the Union were "recalled" by a general meeting or meetings and others were appointed in their stead. Among those so appointed was the appellant, who became secretary of the South Australian Branch of the Union. His right to assume office was not undisputed, but it does not appear that the removal of the previous secretary and the appointment of the appellant were irregular. The Branch consisted of some five hundred members, and of these about one hundred seem to have been opposed to the policy of the new régime. A rival union was set up and both Unions applied for registration under the *Commonwealth Conciliation and Arbitration Act*. Many members of the old Union, who espoused the new Union, refused to pay their subscriptions to the old Union upon the ground that it had "lost its status" and ought no longer to be recognized. Among those who took this course were the two respondents. On 8th January 1929 a meeting of the Branch discussed the matter. In the course of the discussion one of the respondents was referred to by name. The meeting resolved that if the men who had refused to pay their subscriptions were picked up, the members of the Union would refuse to sail with them and instructed the secretary "to inform the shipowners not to pick up any of these men as it will cause unnecessary trouble," and "to inform all branches of these men's names." On 17th January 1929 a special meeting of the Branch adopted another resolution, "that all members who

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refused to pay their contributions would either have to pay up or leave their ship," and requested other members of the crew not to sail with them. On 26th March 1929, at a stop-work meeting of the Branch, it was resolved that " these men be asked to leave the meeting and all branches be informed of the names of the men who refused to pay their contributions." In May 1929 a crew was needed for the m.s. *Manunda,* owned by the Adelaide Steamship Company, and on 27th May the articles of the ship were opened by the Master. On or shortly before that date the appellant interviewed the acting manager of that Company and informed him of the rival factions in the Union and of the attempt to form another union, and gave him to understand that if their opponents were picked up the others would cause trouble ; probably he said that the men had instructed him to say that they would not sail with " unfinancial " members. On the following day, for the purpose of engaging the engine-room staff and afterwards the crew, the engineer of the ship and an officer of the Company, a shipping-clerk, attended at the place near the Mercantile Marine Office in Port Adelaide where it was customary to pick up or engage seamen. The ordinary practice was observed. A notice was chalked on a board outside the yard giving the name of the ship and the ratings that she required. The men gathered opposite. The appellant was present as Union secretary. He came in response to a message from the Company. The selection of eight greasers for the engine-room was the first task. The appellant told the crowd of men that eight greasers were wanted and a large number of men, about fifty, came into the pick-up yard, among them the two respondents. The engineer picked out men, one by one, who appeared suitable. As he picked out a man he called for and examined his discharge. If he decided to select him he handed his discharge to the shipping-clerk to hold and he told the man to stand on one side. After four greasers had been selected in this manner, the engineer picked out the respondent Fraser, examined his discharge, handed it to the shipping-clerk and told Fraser to stand aside. The appellant immediately asked him for his Union book and, having obtained it, turned to the engineer and told him he could not take the man because he was " unfinancial." The engineer replied that he had nothing to do with that. Fraser left

the yard to see the Superintendent, and returned saying that the shipping-master said his papers were in order and he could sign on. Two more men were then chosen, but the seventh greaser picked out by the engineer was the respondent Stapleton. The appellant objected to him on the same grounds and received the same answer. Stapleton saw the Superintendent and returned with the same report. When the eighth greaser had been selected, the appellant said that two more must be picked up in lieu of the respondents, that the other men would not sign the articles with them and that sailors would not come into the yard for engagement. The shipping-clerk and the engineer then went to the telephone in the shipping-master's office to communicate with the acting manager of the Company. The appellant went with them and heard what was said to the acting manager but not what was said by him. The shipping-clerk said that the secretary of the Union objected to two of the men picked up for the engine-room, and, unless two men were picked up in their place, the others would not sign on and there would be no picking-up of sailors. The acting manager, after consideration, said the ship must get away, and instructed him to ask the other men themselves whether they would sign on, and, if they refused, to pick up two other men in lieu of the respondents. They returned to the yard and the engineer asked whether the other men selected would sail if the respondents signed on. The appellant repeated the question. One man in the yard asked what had taken place in the office. The engineer replied that it had nothing to do with the question. Another said there were plenty who would sail if they did not; but at length one man said he would not sign on if the respondents did, and then the rest of the greasers also refused to sail with them. The respondents' discharges were thereupon handed back to them and two more greasers were selected, the sailors came into the yard, a full crew was selected and the articles were signed.

The respondents then sued the appellant in the Local Court of Port Adelaide for damages representing loss of wages and sustenance, which they recovered upon causes of action alleging that the appellant wrongfully and maliciously procured the shipowners to break contracts entered into by selecting them as greasers, and that the

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appellant had conspired with two of the greasers and others to injure the respondents or to intimidate and coerce the shipowners to break their engagements or not to enter into contracts with the respondents. The judgment of the Local Court was affirmed in the Supreme Court of South Australia, whence this appeal has been brought by special leave.

The first question for consideration is whether a contractual relationship was established between the respondents and the shipowners by what took place in the yard before they agreed to replace the respondents by two other greasers. There are decisions to the effect that, notwithstanding the provisions of the *Merchant Shipping Act* upon which secs. 46 and 47 of the Commonwealth *Navigation Act* 1912-1926 are based, a valid contract of service may be made by a seaman before signing articles although service at sea is included in the contract (*Vickerson* v. *Crowe* (1) and *Haws* v. *Brown* (2); and see *Thomson* v. *Hart* (3) and *Re Great Eastern S.S. Co.* (4); but compare *Bell* v. *Mansfield* (5)). But assuming the statute allows a seaman to make such a contract of service, or at any rate to make with the shipowner a mutually binding contract to sign articles, the question remains whether upon a proper interpretation of what took place in the yard the shipowners by their engineer and shipping-clerk did then and there make such a contract immediately with each of the respondents. The wages and conditions of employment had been established by the agreement of 1925 between the Union and the shipowners, the ship was in a trade in which running agreements with the crew are made of the maximum duration, namely, six months, her articles had been opened and in any case were not likely to contain any unusual stipulations. Thus, in the nature or terms of the engagement there was no obstacle to the parties immediately giving their final mutual assent. On the other hand, the practice of picking up seamen was regulated, not merely by custom, but also in some respects by express provisions of the agreement between the Union and the shipowners. The place of engagement is fixed (subject to some exceptions) at the

(1) (1914) 1 K.B. 462.
(2) (1917) 117 L.T. 408.
(3) (1890) 18 R. (Ct. of Sess. Cas. 4th ser.) (Just. Cas.) 3.
(4) (1885) 53 L.T. 594.
(5) (1893) 19 V.L.R. 165; 14 A.L.T. 300.

Mercantile Marine Offices or the adjacent buildings or land. The evident purpose of this provision is that articles may be signed before the Superintendent as soon as the men are selected. A clause provides that if a seaman is "engaged" and the ship's officer holds his discharge and "he is afterwards not engaged" the seaman shall be paid the sum of fifteen shillings. This provision shows that before the clause was adopted shipowners and seamen were considered to have a *locus pœnitentiæ* after picking up. The pick-up, then, could not have been regarded as amounting to a concluded agreement to serve or to sign articles. The whole agreement bears internal evidence of having originated in the industrial regulation of the Commonwealth Court of Conciliation and Arbitration which doubtless governed the relation between shipowner and seamen until the Union's registration was cancelled. The intention of the clause does not appear to be that picking-up shall amount to a contract with the man to pay him fifteen shillings if he is not signed on, but it rather seems to recognize that picking-up amounts in itself to no contract, and to impose upon the shipowner an external obligation as an award might do, but by way of contract with the Union. When all this is considered with the supervisory control of the contract of service and its making which the statute confers upon the Superintendent, the proper conclusion appears to be that picking-up is merely preliminary to a contract and does not itself amount to a contract. From this it follows that no contractual relations were established between the respondents and shipowner and, so, that no breach of such relations was procured by the appellant.

It therefore becomes necessary to consider the respondents' cause of action in conspiracy. This cause of action is put upon more than one ground. It is said that the appellant was party to a combination to interfere with the respondents in the exercise of their calling by the use of unlawful means, or by the threat of unlawful means. The pressure which the appellant brought to bear upon the shipowners to induce them to refrain from taking the respondents upon the ship's articles is alleged to amount to or to involve an actual or threatened violation of sec. 100 of the *Industrial Code* 1920 of South Australia. This section makes penal

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the doing of any act or thing in the nature of a strike. Secs. 129 and 130 render liable, as principal offenders, persons who are concerned in the commission of such an offence, or incite, instigate or counsel or encourage its commission, and persons who attempt to commit it. The statute defines "strike," but "without limiting the meaning of the term" (sec. 5). What was done or threatened does not fall within the description contained in the statutory definition, because, in refusing to sign the articles or offer for or accept engagement, the men would be doing no more than refusing to begin a new employment. But the Judges of the Supreme Court considered that there had been a general concerted refusal of the greasers to work and a threat of a general concerted refusal by the sailors, because of an alleged grievance affecting or connected with their employment, and that this amounted to a strike within the common understanding of the term. It is not easy to know what is necessary to constitute a "strike." The word "does not represent any legal definition or description" (per Lord *James of Hereford, Denaby and Cadeby Main Collieries Ltd.* v. *Yorkshire Miners' Association* (1)); and perhaps it has no certain connotation which is settled or accepted. When the accustomed course of the supply of commodities or services is interrupted or disturbed because labour is withdrawn or withheld, those who are affected by the consequence and are not much concerned with the cause naturally tend to call it a strike without further inquiry or discrimination. But it is noticeable that, in most of the attempts to state what amounts to a strike, prominence is given to the cessation or relinquishment of work, or at least the failure to resume work after a normal interruption or suspension. See the definition in *New Oxford Dictionary*, s.v. "strike," sub. § 9 and verb § 24, the passage in the judgment of *Hannen* J. in *Farrer* v. *Close* (2) and in that of *Kelly* C.B. in *King* v. *Parker* (3). It is true that in the *Commonwealth Conciliation and Arbitration Act* 1904-1930 the word is defined to include "the total or partial refusal of employees, acting in combination, to accept work, if the refusal is unreasonable": but it is to be observed that in *Australian Commonwealth Shipping Board* v. *Seamen's Union of Australasia* (4), where seamen refused in combination to accept employment on

(1) (1906) A.C. 384, at p. 405.
(2) (1869) L.R. 4 Q.B., at p. 612.
(3) (1876) 34 L.T. 887.
(4) (1925) 35 C.L.R. 462, at p. 483.

a ship until particular members of a crew were dismissed, *Higgins* J. said that if it were not for this definition "the refusal in combination to *accept* work would not be a strike at all. The ordinary meaning of strike is confined to ceasing work—'downing tools.'" There is nothing opposed to this view in the judgment of *Sankey* J. (as he then was) in *Williams Bros. (Hull) Ltd.* v. *Naamlooze Vennootschap W. H. Berghuys Kolenhandel* (1), which was relied upon by *Piper* J. in the Supreme Court rather upon the sufficiency of the purpose of the abstention from work. The word "strike" may have more extensive meanings in commercial instruments, and its application may differ in the case of trades or callings in which the workmen ply for hire as luggage porters do, or work upon a succession of jobs as wharf-labourers do. But in a penal provision it ought not to receive an interpretation wide enough to include the concerted refusal of men to enter into a new employment of long duration, even although that employment is offered according to a regular customary practice by which labour is habitually obtained. For these reasons I do not think illegal means were actually adopted or were threatened at the place of engagement. The resolutions passed by meetings of the Branch were wide enough to include refusals to sail with "unfinancial members" in circumstances involving a strike within the statutory definition or breaches of sec. 100 and sec. 103 of the *Navigation Act* 1912-1926. But, at most, this amounts to a combination for a purpose to be effected by a lawful means or, if necessary, by unlawful means. The occasion did not arise for resorting to or threatening to resort to unlawful means, and no circumstance occurred in which such means could have been employed against the respondents. No attempt was made to rely upon the agreement of 1925 between the Union and the shipowners as making the means employed unlawful. The appellant himself cannot be considered as procuring a breach of this agreement by the Union (see *Said* v. *Butt* (2) and *G. Scammell & Nephew Ltd.* v. *Hurley* (3)), and there is no evidence that the appellant himself was bound by the obligation of the agreement.

But on behalf of the respondents the cause of action in conspiracy was also supported upon the ground that the appellant was party

(1) (1915) 86 L.J. K.B. 334.
(2) (1920) 3 K.B. 497, at p. 506.
(3) (1929) 1 K.B. 419, at pp. 443 and 449.

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to a combination which had for its object the wilful infliction of damage upon the respondents. This assumes that the end is not in itself unlawful, that the means are not unlawful, and that no threat of an illegality is made in furtherance of the combination. It appears now to be settled that, for a combination or acts done in furtherance of the combination to be actionable in such circumstances, the parties to the alleged conspiracy must have been impelled to combine, and to act in pursuance of the combination, by a desire to harm the plaintiff, and that this must have been the sole, the true, or the dominating, or main purpose of their conspiracy. At any rate so I understand the doctrine which has slowly won its way to final acceptance by the House of Lords (*Sorrell* v. *Smith* (1)). To adopt a course which necessarily interferes with the plaintiff in the exercise of his calling, and thus injures him, is not enough. Nor is it enough that this result should be intended if the motive which actuates the defendants is not the desire to inflict injury but that of compelling the plaintiff to act in a way required for the advancement or for the defence of the defendants' trade or vocational interests. There is some evidence in the present case that the appellant was embittered towards one at least of the respondents: but a consideration of the whole evidence establishes, in my opinion, that what actuated the meetings of the Branch and the appellant in pursuing the policy which the Branch adopted and he probably advocated, was the desire and the purpose of compelling the promoters of the rival Union to desist from the project by depriving them of employment and making manifest to their followers the unwisdom of adhering to them. Because in the struggle the opponents of those in charge of the old Union refused to contribute to its funds, their "unfinancial" status became at once the means of identifying and describing them, and the pretext for disciplining them. When the Local Court finds "that the defendant's real, as distinguished from his ostensible, objection to the plaintiffs was not that they were unfinancial but that they had been active in supporting a rival union," I do not think it states the facts with precision, but the finding does not, in my view, advance the plaintiffs' case. I think the cause of action in conspiracy was not established.

The appeal should be allowed. The order of the Local Court should be set aside and judgment be entered for the defendants.

(1) (1925) A C. 700.

EVATT J. In November 1928 the appellant, Peter McKernan, was appointed secretary of the Federated Seamen's Union of Australasia. This was a union of employees which had been in existence since 1885. At the time it had 6,000 members in the Commonwealth, including about 500 in the State of South Australia.

Shortly before McKernan's appointment, two persons named Woodsford and Rigby were prominent officials in the South Australian Branch of the Union. For some reason or other they were recalled from office by the members. Not content with the decision, they set about the formation of another organization. The new body was duly launched and called the Australian Seamen's Union. The promoters met with some little success, and enrolled about 100 members in the State of South Australia. The old Union had once been registered as an organization under the *Commonwealth Conciliation and Arbitration Act*, but it was deregistered in 1925. In 1929 the new Union was attempting to obtain such registration for itself. During the period under review, both Unions covered the same class of employee. Each claimed the exclusive right of representing the seamen of Australia.

When McKernan arrived in Adelaide to assume the duties of secretary, Rigby and Woodsford were smarting at their replacement. As they were prominent in the control of the new Union, considerable difficulties faced McKernan in carrying out the organizing work of the old Union.

From one aspect, this litigation itself is but another incident of the struggle between the old Union and the new. The plaintiffs in the present action, Fraser and Stapleton, were protagonists of the new body. Their costs in the litigation were borne by it. Woodsford, who had been secretary of the old Union, was provisional secretary of the new. He and Rigby seem to have been closely associated with the institution and direction of the present legal proceedings against McKernan. There is nothing wrong about that. But it evidences the undoubted fact that when Fraser and Stapleton brought their present action against McKernan in the Local Court at Port Adelaide, they were doing so, not merely to protect their own civil rights, but to strike a blow on behalf of the new body.

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Fraser and Stapleton were awarded £100 damages each, against McKernan. They sued in respect of certain supposedly tortious acts committed against each of them individually. Their case is put most favourably by stating that they relied upon three alternative causes of action, namely :—

1. That McKernan conspired with two greasers named Martin and Hannah and others to injure the plaintiffs by preventing their being employed on the m.s. *Manunda* ;
2. That McKernan procured the owners of such vessel to break actual contracts of service which had been entered into between each plaintiff and the owners ; and
3. That McKernan was a party to a combination to prevent the plaintiffs from being employed on the vessel by means which were unlawful as being prohibited by the *Industrial Code* 1920 of South Australia.

I omit from this statement much of the verbiage of the filed particulars of claim. The interests of justice usually require that when allegations of conspiracy are levelled, particulars should be given. The persons charged should know what is the case alleged against them and what overt acts are intended to be proved. The requirement of particulars in cases of criminal conspiracy has recently been affirmed in this Court (*R.* v. *Weaver* (1)). The reasons for applying the practice to cases of civil conspiracy are almost as cogent because, apart from special dispensation given by statute, it now seems clear that the tort of civil conspiracy cannot be established unless the plaintiff proves (*inter alia*) the existence of a conspiracy punishable in criminal jurisdiction.

Administration of the law of conspiracy in its relation to trade competition and industrial disputes has been impeded by the frequent use of words of praise and blame. Both *Atkin* L.J. (as he then was) and *Scrutton* L.J. have forcibly pointed out the dangers of this tendency (*Ware and De Freville Ltd.* v. *Motor Trade Association* (2)). In the present case, the temptation to characterize the conduct of McKernan and the old Union proved irresistible to the Local Court. Its judgment is strewn with question-begging phraseology. According to the Magistrate, the agreement between

(1) (1931) 45 C.L.R. 321. (2) (1921) 3 K.B. 40.

the shipowners and the old Union "shows up the defendant *and everybody connected with him* in a most baneful light"; the defendant and those associated with him "have not *played the game*," the plaintiffs "for their egregious sin in not paying up their Union subscriptions amounting to £1 each have been *black-listed* in all ports of the Commonwealth." These are a few of the instances where light is sacrificed to heat.

It is vital to the application of the principles of law to this case, that the facts should be seen in their proper perspective. The evidence of the responsible officer of the steamship company, Mr. G. R. Hayter, and others, shows that, throughout the trouble, McKernan's behaviour was marked with great restraint. I pass by for the moment the attempt made to discredit him, by calling evidence suggesting that he had a personal spite against Fraser, one of the plaintiffs. McKernan's evidence gave a very different complexion to the incidents, and the Magistrate in no way based his judgment upon this minor part of the case. Nor did the plaintiffs call the witnesses who could have corroborated Fraser's version of the matter.

Fortunately, the main facts of the case are not in substantial dispute. I have already explained how the conflict between the two rival Unions commenced in November and December 1928. Both the plaintiffs joined the new Union. Fraser, although not resigning from the old Union, paid no dues to it after September 1928. He was quite frank about his attitude. He stated in evidence that his reason for not paying was not because he was unemployed or in financial difficulties but merely because he "did not recognize" the old Union. "Stapleton and I," he said "were members of both Unions but supported the new." Fraser was active in trying to induce members of the old Union to join the new body. Stapleton was not actively concerned with the organizing work of the new Union. That McKernan was hostile to Stapleton personally, was not suggested. Stapleton had never seen him before May 23rd, 1929, when the important incidents of the "pick-up" for the *Manunda* took place. Fraser at one part of his evidence said: "I would not say I was on unfriendly terms with McKernan on 23rd May."

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Throughout the years 1928 and 1929 the old Union had a working arrangement with the shipping companies under which an official of the Union would attend, when it was proposed to "pick up" or select seamen for the purpose of being signed on for service on board vessels leaving Adelaide. After his appointment as secretary, it became McKernan's practice to attend these "pick-ups." He always did so at the request of the representative of the shipowners. The owners also recognized the old Union, by acting upon the terms of a written agreement between them. This agreement laid down the general terms and conditions governing the employment of seamen in the industry. At no time was there any open recognition by the owners of the new Union, which was no party to the working agreement and was never represented at any "pick-up."

The majority of Adelaide seamen remained loyal to the old Union. They resented the attempt of a defeated minority to destroy or impair the status of their industrial organization. The danger to the old Union was not lessened but increased because the members of the rival Union did not formally terminate their membership. The evidence shows that McKernan himself did not have a vote at meetings of the Union. But he was entitled to speak at the meetings. He advised against any attempt on the part of members to adopt measures of retaliation against Rigby, Woodsford, Fraser and the others associated with them. Rigby and Woodsford do not appear to have been actively employed as seamen during the period in question. No doubt the organization of the new Union took up all their available time.

But McKernan's advice was not acceptable to his Union. On January 8th, 1929, a special meeting adopted a resolution "that in the event of these men, meaning Fraser and other unfinancial members, being picked up in the yard, we, the members of the Seamen's Union will refuse to sail with them and we instruct our secretary to inform the shipowners not to pick any of these men up as it would cause unnecessary trouble. We also instruct the secretary to inform all branches of these men's names." The men referred to in the resolution were Fraser and others who had refused to pay their Union dues, because they supported the new Union.

On January 17th, 1929, another resolution was carried to the effect "that all members who refused to pay their contributions would either have to pay up or leave their ship and we request other members of the crew not to sail with these men." On March 26th, 1929, a resolution was passed as follows: "that these men be asked to leave the meeting and all branches be informed of the names of the men who refused to pay their contributions." No trouble ensued as a result of these resolutions before the *Manunda* pick-up on May 23rd, 1929.

On May 22nd the *Manunda* required eight greasers, twenty-two A.B.'s and a boatswain. The articles were duly opened at the office of the shipping-master, Port Adelaide. At all material times on May 23rd, the articles were ready for signature at the office by the persons selected to complete the crew. It is part of the case made against McKernan, that on May 22nd the members of the old Union were determined not to sail on the *Manunda* if the owners decided to engage any members who were refusing to pay their Union dues because of their association with the rival body. To this class Fraser and Stapleton belonged.

The existence of this determination on the part of members of the old Union cannot be disputed. On May 22nd McKernan saw Mr. Harris, acting manager of the steamship company, and conveyed to him that such was the decision of the Adelaide members who remained loyal to the old Union. "I will not deny," says Harris, "that McKernan said that the men had instructed him that they would not sail with unfinancial members. I was given to understand that there might be trouble with the men. At that time there were two factions among the Seamen's Union. The idea was that if we picked up men of the opposing section the others would create trouble. . . . We had a friendly chat about conditions generally, and consequently I gathered the impression that defendant wished to warn me that if I picked up men of one section there would be trouble with the other."

On May 23rd, in the morning, Mr. Hayter, who was the representative of the shipowners at the pick-up, telephoned to McKernan "as the recognized secretary of the Union," and the latter came to the shipping office. It was then agreed that Mr. Hayter would

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"pick up" eight greasers for the *Manunda*. At this time, no one was present in the yard. McKernan made a sign to those awaiting selection, and 30 or 40 came into the yard. Middleton, Hayter's assistant, selected 3 or 4 men. He next "selected" Fraser, but McKernan at once objected, saying: "This man cannot sign on, he is unfinancial." Middleton said: "That has nothing to do with me." Fraser then left the yard and returned to say that the shipping-master said "he could sign on." Middleton went on selecting. In his evidence Hayter says :—

> "He came to Stapleton, the other plaintiff. McKernan said:—'That man cannot sign on, he is unfinancial. If you take these men, the other crowd will not sign on and the sailors will not go into the yard.' Stapleton then went away, and also announced on his return that 'the shipping-master will sign me on.'"

Middleton picked up the eighth greaser, and McKernan then said to Hayter: "You will have to pick up two more men in place of Fraser and Stapleton." Hayter said: "I cannot do that until I receive instructions." Hayter then telephoned to Mr. Harris and told him what had happened, saying that "the others will not sign on unless we pick up two other men." It was then decided between Harris and Hayter that the selected men would be asked if they would sign on with Fraser and Stapleton, and, if they were not willing, two others would be selected.

Hayter, Middleton and McKernan then re-entered the pick-up yard, and Middleton asked the six greasers selected: "Will you men sign on with these two men Fraser and Stapleton?" One of the greasers asked what conversation had taken place in the office. Middleton refused to tell him. Another greaser at once said "No" in answer to Middleton. Then McKernan repeated Middleton's question, and all the men said that they would not sign on with Fraser and Stapleton. Two other greasers were then picked up, and a full crew of sailors was also selected. All selected went into the shipping office, where the articles were read pursuant to the requirements of the *Navigation Act*, and the crew all signed on.

It appears from Hayter's evidence that he was told by McKernan on the previous day, that if the unfinancial members associated with the new Union were picked up with a view to being signed on the *Manunda's* crew, the Union members would not sail with them.

It follows that, when McKernan repeated Middleton's question to the six men about signing on, their refusal was merely in accordance with what the shipowners had already been informed.

The following facts are established by the evidence:—

(1) The immediate object of the resolutions of the Union was to prevent all unfinancial members associated with the new Union, from obtaining employment on ships;

(2) The representatives of the shipowners were aware of the fact that the greasers and sailors belonging to the old Union were determined not to enter into binding contracts of service or "sign on" the articles, if the class they objected to, or any of them, were "signed on" with them;

(3) Fraser and other members of the new organization had, before and on May 23rd, refused to recognize the status of the old Union; Fraser described it as "a somewhat lawless body as it is not registered";

(4) All persons present at the pick-up, including Fraser and Stapleton, and the representatives of the shipping company, regarded the "signing on" of the persons selected for engagement as an essential condition to the coming into existence of a binding contract of employment. The visit of Fraser and Stapleton to the shipping office in order to ascertain whether they might "sign on," shows that they treated such act as the commencing point of any engagement to serve as greasers. The phrase "sign on" was used repeatedly to indicate something deemed necessary to the making of any concluded agreement either to employ or be employed.

The facts mentioned under (4) are sufficient to dispose of any cause of action based upon the finding that McKernan procured a breach by the shipping company of two binding contracts of employment, namely, between the company and each of the plaintiffs. Cases have been referred to in order to show that, under certain circumstances, the verbal engagement of a seaman without the execution of the written agreement mentioned in sec. 46 of the *Navigation Act*, may constitute a binding contract of service. Mr. *Nelligan*, in his able argument, did not dispute this fact. He said that, in the present case, everybody assumed that the signing of the articles in accordance with the *Navigation Act* was a necessary

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condition of any contract to employ or be employed on the *Manunda*. I think that his argument on this branch of the case was unanswerable. The " picking-up " was treated by all concerned as provisional. In all the circumstances, the " selection " of the eight greasers was not a final engagement but only an approval of the suitability of applicants for employment. It is not possible to accept the view that if, when the articles came to be read out at the shipping office, a sailor thought that unusual or unknown or undesirable conditions were contained in the agreement, he would still have been bound to sign. Nor would the shipping company have become liable as upon a concluded contract, until the articles were signed. The presence of McKernan at the " picking-up " place was known to both Fraser and Stapleton, and I am strongly disposed to think that they, as well as the shipping company, regarded such presence as implying a right to make representations to the owners upon the subject of an applicant's suitability from a Union point of view, before a binding contract was entered into. It is unnecessary to pursue this further, because the whole of the surrounding circumstances make it clear that no binding contract was come to with Fraser or with Stapleton.

The Magistrate also came to the conclusion that there was a combination to which McKernan was a party, the object of which was to prevent each of the plaintiffs from being employed, and that the real ground of objection to the plaintiffs was, not that they were unfinancial, but that " they were active in trying to get a rival union registered in the Federal Arbitration Court." He added that " All of this talk about the plaintiffs being unfinancial is absolutely insincere. It is all moonshine."

The finding of fact that the old Union and its members objected to Fraser and Stapleton because of their activity in trying to get a rival union registered, is substantially correct. But the fact is better and more accurately expressed by saying that members of the old Union were determined to act against those of its members who would not pay their dues, because they desired to promote the interests of the rival body. The mere failure to pay subscriptions was not the main complaint. What was objected to, was the deliberate abstention from payment as a means of destroying or weakening the old body and strengthening the new. Curiously

enough, it is this part of the Magistrate's judgment which most assists McKernan and those found to be combined with him.

The Magistrate added the rhetorical question: "Where on earth was there any obligation on the part of the plaintiffs to continue their subscriptions to a union, especially as their chief reason was that it had become deregistered?" In the implications of such a question, the Magistrate has revealed his opinion that Rigby, Woodsford, Fraser and all those promoting the new Union, were justified from their own point of view in combining to destroy the old Union; but that the old Union and its members had no justification for ending all industrial co-operation with their rivals.

I should have thought it obvious that there was as much moral right for McKernan and his associates to act, by defence and counter-attack, as there was for their opponents to further the interests of the new Union at the expense of the old. With Viscount *Cave's* observations in *Sorrell* v. *Smith* (1) prominently before him, the Magistrate might well have remembered the words of the old French song which at once embodies and dismisses the complaint of the aggressor who seeks a fight and finds that he has to retire in discomfort—

> "*Cet animal est très méchant;*
> *Quand on l'attaque, il se défend.*"

But the claim of each plaintiff that there was damage inflicted on him by means of "conspiracy to injure" need not be examined at all, if the combined action taken on May 23rd at the "pick-up" proved an agreement between McKernan and the six greasers to induce the Company not to employ the plaintiffs, and such agreement was executed by means of acts rendered unlawful by the provisions of the *Industrial Code* 1920. It was upon this footing that the majority of the Supreme Court affirmed the judgment in favour of the plaintiffs, though little attention was devoted to the point in the Local Court.

Having regard to the particulars of claim and the way the case was conducted before the Magistrate, the plaintiffs should not be allowed to rely upon any supposed element of unlawful means in the actions of the combination, except that detected by the Supreme Court of South Australia. If so, the question is whether what

(1) (1925) A.C., at p. 715.

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was done on May 23rd was either a strike or in the nature of a strike. Sec. 100 of the *Code* makes it an offence for any person to do anything in the nature of a "strike" or take part in any "strike." There is an elaborate definition of the word "strike" in sec. 5 of the *Code*, but it is not, and cannot be suggested, that what McKernan and the greasers did, before any contracts of service were entered into, amounted to a "strike," unless by reason of the general words "(without limiting the meaning of the term)," which commence the statutory definition. Does the ordinary meaning of the word "strike" include such action as was taken at the "pick-up"?

Sec. 5 of the New South Wales *Industrial Arbitration Act* 1912 defined a "strike" by reference to certain specified acts, but the definition also commenced with the phrase "without limiting its ordinary meaning." In *Attorney-General* v. *Whiteman* (1) the facts disclosed that a body of men regularly employed in the industry of wharf-labouring, were assembled at the place where they were "habitually called upon by their habitual employer in that industry to work" (2). They then, in response to a resolution of their union, in concert and under a common understanding, refused to work for "such usual and habitual employer," until "such time as the terms of the agreement were abided by." Judge *Scholes* held that there was a "strike" within the ordinary meaning of the term, although at the moment under consideration, no contractual relationship existed between the wharf-labourers and their "habitual employer." In 1914, Judge *Edmunds* dealt in the same way with the action of certain ironworkers at Morts Dock, Sydney. They were casual labourers and engaged by the day only, although they were usually kept at work for long periods, and in that sense had "constant work." Acting in concert, they refused to work when it was being offered in the usual way (*Minister* v. *Wilson* (3)). The learned Industrial Court Judge held that there had been a "strike" within the ordinary meaning of the word.

On the other hand, in *Farrer* v. *Close* (4), *Hannen* J. said: "A strike is properly defined as 'a simultaneous *cessation of work* on

(1) (1912) 11 A.R. (N.S.W.) 137.
(2) (1912) 11 A.R. (N.S.W.), at p. 144.
(3) (1914) 13 A.R. (N.S.W.) 117.
(4) (1869) L.R. 4 Q.B., at p. 612.

the part of the workmen.'" The Royal Commission on Trade Disputes presided over by Lord *Dunedin*, when reporting in the year 1906, seems to have regarded a strike as involving combined action "*to desist from working*" (par. 64). The *Encyclopædia Britannica* (1911), 11th ed., says that "A strike in the labour sense is a *stoppage of work* by common agreement on the part of a body of workpeople for the purpose of obtaining or resisting a change in the conditions of employment." *Webster's Dictionary* (1910) defines it as "a *stopping of work* by workmen in order to obtain or resist a change in conditions of employment." The last edition of the *Britannica* (1929), 14th ed., says: "A 'strike' may be defined as a voluntary stoppage of work on the part of a body of workpeople, by common agreement or by order of their society or union, for the purpose of obtaining or resisting a change in the conditions of employment." And *Higgins* J., probably the greatest authority on Australian industrial law, said in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union* (1) that "The ordinary meaning of strike is confined to *ceasing work*—'downing tools'."

Australian Legislatures have usually approached questions of industrial disputes, the regulation of industrial conditions, and the combined action of workmen, from a standpoint very different from that of England, where the mere act of "striking" has not been penalized by Act of Parliament. Here, the act of striking has frequently been made punishable. This has not been because Australian legislative bodies have been hostile to the claims of organized labour. The reason is that they have established Courts, tribunals and boards, for the very purpose of making recourse to the instrument of strike and lock-out unnecessary. Collective bargaining has always had behind it the actual or implied threat of strike or lock-out. But such bargaining has to a very large extent been replaced by compulsory fixation of industrial conditions by a specified tribunal. It is as a logical corollary, that recourse to lock-out or strike has been made unlawful.

There has also been a concurrent tendency on the part of Australian Parliaments to widen the scope of matters dealt with by industrial

(1) (1925) 35 C.L.R., at p. 483.

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tribunals. In the year 1876 *Kelly* C.B. in *King* v. *Parker* (1) said of the word "strike":

> "There is no authority which gives a legal definition of the word . . . but I conceive the word means a refusal by the whole body of workmen to work for their employers, in consequence of either a refusal by the employers of the workmen's demand for an increase, or of a refusal by the workmen to accept a diminution of *wages* when proposed by their employers."

This limitation of the concept of "strike" to wage disputes, appears strange in Australia, where the area of industrial dispute and wages board regulation, has covered almost every possible demand which is in an employer's power to grant to employees. Industrial tribunals have been empowered to control and regulate the conditions under which persons usually engaged in an industry shall apply for employment and employers shall employ them, to determine whether members of a specified trade or industrial union shall be employed in preference to all others, and the extent of such preference, e.g., the order in which employers in the industry shall dismiss his employees. Some tribunals have been empowered to compel an employer who dismisses or reduces an employee in grade or status, to re-employ or reinstate him, although this is in the nature of an order for specific performance of a contract for service. Legislatures have also made the decisions of industrial tribunals as to whether they are acting within the limits of their statutory charter, not merely unappealable, but unchallengeable in any Court of Judicature. To industrial tribunals, in short, has been committed the final determination of all matters which can fairly be regarded as affecting the mutual relation of employers and the body of employees who from time to time are engaged in an industry.

As a consequence of this wide field of jurisdiction, there has been a tendency to regard everything which impedes the smooth carrying on of work in the industry as being, if done by employees, a strike or something in the nature of a strike, if done by employers, a lock-out or something in the nature of a lock-out. As a matter of course, there has been included in the denotation of a "strike," every stoppage of work. But difficulties have been felt in cases where there has been a combined refusal by employees to accept employment on the terms offered by an employer. The two New South

(1) (1876) 34 L.T., at p. 889.

Wales cases I have mentioned, holding that the action taken amounted to a "strike," both emphasize that the persons concerned therein, although no longer under contract to the employer, had been usually employed by him. The question becomes still more difficult when the persons concerned have not previously been employed by the particular employer who is offering work to them.

The problem has also arisen in relation to the *Commonwealth Conciliation and Arbitration Act*. Until the year 1930, the Act made it an offence for persons to do anything in the nature of a strike. But the general principle of alternative redress was observed, and what was prohibited was striking, either in relation to an industrial dispute which the Federal arbitrator had jurisdiction to prevent or settle, or against the award in which some settlement was embodied. No strike was punished or prohibited unless the parties concerned in it could have, or at least might have had, their grievances settled by the Court.

Until 1920, the definition of "strike" in the Federal Act was limited to the cessation of work by employees acting in combination, in order to enforce compliance with demands made. In the year 1916 this Court decided the case of *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1), and held that no breach of a Federal award had been committed by workers in an industry who, acting in common, refused to accept employment at the minimum rate of wages prescribed by the award of the Federal Court of Conciliation and Arbitration. No duty to accept employment at such rates was sought to be imposed by the award. It was not suggested that any breach of the statutory prohibition against striking had been committed. *Higgins* J. had previously announced that "a refusal to *accept* work on the lines of an award is not a breach of the award, or a strike within the Act, just as a refusal to *give* work on the lines of an award is not a breach of the award or a lockout." (*Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2)).

The Federal Parliament finally passed the Act No. 31 of 1920, and included in the definition of strike "the total or partial refusal of employees, acting in combination, to accept work, *if the refusal*

(1) (1916) 21 C.L.R. 642. (2) (1916) 10 C.A.R. 255, at p. 260.

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is unreasonable." This amendment became law on October 11th, 1920, shortly before the passing of the South Australian *Industrial Code* (December 9th, 1920). Sec. 103 of such Code provides that a person is to be deemed to commit an act in the nature of a lock-out or strike who, being bound as to the terms of employment by an award or order of the Court or by an industrial agreement, duly published under the Act, " without reasonable cause or excuse, refuses or neglects to offer or accept employment " upon the terms of such award, order or agreement. It is possible, but not likely, that a combination of persons usually employed in an industry, to refuse to accept employment, is intended to be punished by sec. 100 of the *Code*, whether their act has reasonable cause or excuse or not and whether or not they are bound by awards and agreements made under the Act.

This part of the present case is not free from difficulty. No doubt the " strike " hit at by the Act, looks to the interruption of an industrial rather than a contractual relationship, and a combined cessation of work by employees in an industry, each of whom gives formal notice terminating his contract of service, but who all desire to induce their employers to alter the conditions of employment in the industry, is no less an offence because no breach of contract is committed. Indeed, such a case is covered by the express terms of the definition section itself.

But it is one thing to perceive that the end aimed at is the prevention of all dislocation of work in industry. It is another thing to infer that the mere existence of an industrial relationship between persons ordinarily engaged in an industry, forbids the employees from acting jointly for the purpose of negotiating the terms on which they shall accept offers of employment made by a particular employer, in whose service none of them are, or have recently been, engaged.

Combined refusal by employees of offers of employment may be associated so closely with actual cessation of work by members of the same industrial group, that the act of refusing employment can be truly described as conduct in the nature of a " strike." There may be a demand common to those actually at work and those who are not. In such cases the facts will require close scrutiny.

The number of persons concerned, and the probable attitude of the particular employer to the demand made, will need investigation. It may be objected that this means inquiry into the reasonableness of the concerted refusal. It is rather a question of the nature of the threatened or probable obstruction to the work of the industry. It may be that the conditions of actual employment are not in any way in controversy. If workers in one union will not accept employment under any conditions at places where non-unionists or members of a rival group are employed, the burning question may be, not between employers and workers, but between opposing groups of workers. No doubt, such cases ordinarily include a demand made upon employers that they shall not engage members of the rival group; but the unionists are saying in effect: "We do not object to the terms and conditions of the employment offered; but we offer for employment upon the condition that the members of our union alone shall be employed; we, as a group, offer to man your ship on the existing terms, but the offer is a collective offer and you must accept or reject it as such." I am of opinion that it is impossible to say that *every* concerted refusal of workers to accept offers of employment, is a "strike" punishable under the *Industrial Code*.

In the present case, there was no existing regulation by the South Australian Arbitration Tribunal of the mutual relations of employer and employee in the industry, nor was the working agreement given the special sanction of the *Industrial Code*. This is important, because there is something to be said for the view that sec. 103 is the sole measure of penal liability for refusals of employees to accept employment in an industry. Moreover, the questions at the pick-up did not relate to any attempt to vary the terms or conditions of actual employment, there was never any real probability that the demand made would not be acceded to, no actual dispute ever came into existence between employers and employees and the action taken by the employees was not accompanied by any cessation of work. The actual or probable success of combined action or the threat of it, does not, of course, negative the existence of a strike. None the less it may, as here, show that the demand acceded to, is of so little importance to an employer, that actual interference with

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his operations is extremely unlikely. Further, the working agreement in force on May 23rd, was an agreement between the Federated Seamen's Union and the shipowners, and the undertaking to man vessels was an undertaking by the Union. The trouble at the pick-up may, not unreasonably, be regarded as a minor difference in the method of selecting crews in the course of carrying on the agreement between owners and the Union.

On the whole, I am of opinion that what took place at the "pick-up," did not amount to an act on the part of McKernan and the greasers which was unlawful under the *Industrial Code*. What occurred might well be termed a "hold-up," because the work of selection for engagement was interrupted for some little time. It has been described with much colour by the Local Magistrate, and others have called it "direct action," "job control" and "coercion." The use of all these substantives really tends to confess the fact that, in the circumstances, there was not a "strike."

It therefore becomes necessary to examine the third suggested ground of liability—that McKernan and the six greasers, although not employing unlawful means, combined for the purpose of inflicting damage upon each of the plaintiffs by depriving him of the opportunity of employment, and the combination amounted to a "conspiracy to injure."

The law of conspiracy in relation to that of civil wrongs has assumed some of its greatest complexities in its application to combinations which, having as part of their object the intentional infliction of temporal harm upon another, are duly carried into effect and inflict such harm, but which are unaccompanied by breach of contract, tortious or other unlawful acts. To what extent are the parties to the combination liable to be sued in tort by the person who has suffered harm? Is the damage sustained the "gist" of the action and the combination merely an aggravation of the injury done? Does the plaintiff prove a prima facie case by showing that the defendants intentionally caused him injury? Or must he also show, as part of his case, that the "object," "purpose," "motive" or "intention" of the defendants was to injure him out of personal malice or some other bad motive? How far is the desire to protect "legitimate" trade, professional or industrial

interests an answer to the claim in tort? Must the defendants prove the existence of such desire or fail? Or will the plaintiff fail if he leads evidence which points as much to the existence of such a desire as it does to that of malicious injury? And what is "malice" in such connection?

The questions which arose following upon the three decisions of the House of Lords in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), *Allen* v. *Flood* (2) and *Quinn* v. *Leathem* (3) caused many acute differences of opinion amongst eminent Judges and students of English law. Early in the present century, Lord *Dunedin* presided over the Royal Commission on Trade Disputes. Its report stimulated keen interest, and older controversies were renewed. The passing into law of the *Trade Disputes Act* in 1906 had the practical effect of preventing the recurrence of many of the most important questions. It had been, in the main, the collective action of members of labour unions which had enabled injured plaintiffs to succeed in actions of "civil conspiracy" based upon the decisions in *Temperton* v. *Russell* (4) and *Quinn* v. *Leathem*. As it was in relation to trade disputes that the combined action of the unionists usually took place, the protection given by the new statute to acts done in furtherance of such disputes presented an almost insuperable obstacle to would-be plaintiffs.

It was the decision in *Pratt* v. *British Medical Association* (5) which suddenly revived interest in the tort of "conspiracy to injure," and parties began to reissue words from the old mint. The judgment of *Atkin* L.J. (as he then was) in *Ware & De Freville Ltd.* v. *Motor Trade Association* (6), evidencing general agreement with the principles of the 1906 report of Lord *Dunedin* and his colleagues, struck a considerable blow at the generalizations of certain distinguished commentators. Certain other trade union cases were decided, and, finally, in *Sorrell* v. *Smith* (7) the questions came once again before the House of Lords.

But the judgments of their Lordships did not set all controversy at rest. For instance, Sir *Frederick Pollock* commented that "the

(1) (1892) A.C. 25.
(2) (1898) A.C. 1.
(3) (1901) A.C. 495.
(4) (1893) 1 Q.B. 715.
(5) (1919) 1 K.B. 244.
(6) (1921) 3 K.B. 40.
(7) (1925) A.C. 700.

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vexed question whether there is any magic in 'plurality' will never be settled until some powerful corporation (being, of course, only one person in law) does some of the things which (it is still said by respectable authority) one person may do with impunity but two or more may not" (41 L.Q.R. 369). Viscount *Cave's* speech deliberately left such question open (1), and with Lord *Cave*, Lord *Atkinson* agreed. Lord *Buckmaster's* judgment was in agreement with the principles stated in that of Lord *Dunedin*. And the fifth member of the House, Lord *Sumner*, whilst restricting his opinion to the rather clear case under consideration, raised certain questions of profound interest, without fully indicating his own final judgment.

In the Australian States, this subject of "conspiracy to injure" has seldom arisen. This has been for a very different reason. Here (unlike England), there has been no general attempt to cover with the law's special protection, actions performed by members or officials of trade unions during strikes or industrial disputes. On the contrary, as has been shown, the system of compulsory industrial arbitration has usually been accompanied by the imposition of severe penalties for the act of striking. But this, in its turn, has tended to prevent the more important questions of common law principle from being investigated. Where strikes have occurred, liability to penalties has resulted. Therefore the element of unlawfulness in combined union action resulting in damage to a plaintiff has seldom been found wanting. As a consequence, there have been very few pronouncements upon the general principles of liability for combined action taken to the hurt of a plaintiff, without the use of unlawful means.

In my opinion the cases establish four main propositions of law:—

(1) A lawful act done by one, does not become unlawful if done with an intent to injure another (per *Atkin* L.J. in *Ware's Case* (2), approved by Lord *Dunedin* in *Sorrell* v. *Smith* (3) and Lord *Buckmaster* (4)).

(2) An otherwise unlawful act done by two or more in combination, does become unlawful if done not only in combination but also with intent to injure another (per *Atkin* L.J. (5), and approved by Lord *Dunedin* in *Sorrell* v. *Smith* (3)).

(1) (1925) A.C., at p. 713.
(2) (1921) 3 K.B., at p. 90.
(3) (1925) A.C., at p. 719.
(4) (1925) A.C., at p. 747.
(5) (1921) 3 K.B., at p. 91.

(3) Such tort of "conspiracy to injure," is established only by proof of a criminal or an indictable conspiracy, followed by actual damage (Lord *Dunedin* in *Sorrell* v. *Smith* (1)).

(4) The true distinction between cases like the *Mogul Steamship Case* (2), where the combination inflicted injury without liability arising, and like *Quinn* v. *Leathem* (3), where liability resulted, is "essentially a matter of motive" (Lord *Sumner* in *Sorrell* v. *Smith* (4)). Whilst it is "just the motive or intention . . . that makes the difference" (per Lord *Dunedin* in *Sorrell* v. *Smith* (5), these phrases and "intent to injure" in propositions 1 and 2 require further analysis.

These four main propositions are not consistent with the view of Sir *Frederick Pollock* "that all damage wilfully done to one's neighbour is actionable unless it can be justified or excused" (*Torts*, 13th ed., p. 337); and although, if his view had prevailed, the rules would possibly have been more logical, it is too late to "leave off talking about conspiracy and malice" (cf. 20 L.Q.R. 3).

A question which must first be referred to, is the doubt implied by Lord *Sumner* in *Sorrell* v. *Smith* (6) when he said at p. 741: "I do not at present accept the *Mogul Steamship Co.'s Case* (2) as limited to those engaged in the struggle of competitive trade." If that case were so limited, it would follow that combined action taken by members of a trade union which caused damage to another, could not be defended upon the ground that it was taken in order to further or defend the interests of the union and its members.

It is an undoubted fact that the application of this part of the law of civil wrongs to combinations of workmen inflicting injury or damage without the use of unlawful means, has frequently resulted in liability, whereas in analogous cases of trade combinations, liability has seldom, if ever, resulted. Between *Gregory* v. *Duke of Brunswick* (7), where a conspiracy to ruin the professional career of an actor was deemed actionable upon the allegations in the plaintiff's declaration but was not proved at the trial, and *Temperton* v. *Russell* (8) in 1893,

(1) (1925) A.C., at p. 725-726.
(2) (1892) A.C. 25.
(3) (1901) A.C. 495.
(4) (1925) A.C., at p. 739.
(5) (1925) A.C., at p. 726.
(6) (1925) A.C. 700.
(7) (1843) 6 Man. & G. 205, 953; 134 E.R. 866, 1178.
(8) (1893) 1 Q.B. 715.

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combinations of workmen had often been punished by criminal prosecution and conviction. "Previous to 1871 the Courts had in certain cases (of which *R.* v. *Rowlands* (1) is an example), in applying the law of conspiracy, treated, as criminal combinations, ordinary strike proceedings which did not involve the commission of anything, which, if done by one person, would be forbidden by either the criminal or the civil law" (*Royal Commission on Trade Disputes*, Cd. 2825, par. 51). The British Legislature endeavoured to meet the protests of workmen, first in the Act of 1871, and then in the Act of 1875, sec. 3 of which enacted that a combination to do or procure acts in furtherance of a trade dispute between employers and workmen, should not be indictable as a conspiracy, providing that such acts if done by an individual would not be criminal. But it turned out that this section conferred exemption only from criminal and not from civil liability (*Quinn* v. *Leathem* (2)).

The *Mogul Case* (3) was decided in 1891, without authoritatively dealing with combinations of workmen, but, in the next year, in *Temperton* v. *Russell* (4), for the first time in the history of English law, a plaintiff succeeded in a cause of action for civil conspiracy causing damage, although, on this part of the case, there was no unlawful element in the act which caused damage. The contrast between the decisions provoked immediate comment.

> "In England," said Mr. Justice *Holmes*, "it is lawful for merchants to combine to offer unprofitably low rates and a rebate to shippers for the purpose of preventing the plaintiff from becoming a competitor, as he has a right to do, and also to impose a forfeiture of the rebate, and to threaten agents with dismissal, in case of dealing with him. But it seems to be unlawful for the officer of a trade union to order the members not to work for a man if he supplies goods to the plaintiff, for the purpose of forcing the plaintiff to abstain from doing what he has a right to do" (8 *Harvard L.R.* 7).

And a later commentator said :—

> "It is scarcely possible to deny that combinations of workmen have been treated more severely by the Courts than combinations of traders or employers. This is unjustifiable theoretically, and the advantage that waiting power generally gives capital in competition with labour does not render it more defensible practically" (29 *Harvard L.R.* 88).
>
> "I am unable," said Mr. Justice *Holmes* in *Vegelahn* v. *Guntner* (5), "to reconcile *Temperton* v. *Russell* (4) and the cases which follow it, with the *Mogul Steamship Company Case* (3)."

(1) (1851) 17 Q.B. 671; 117 E.R. 1439.
(2) (1901) A.C. 495.
(3) (1892) A.C. 25.
(4) (1893) 1 Q.B. 715.
(5) (1896) 167 Mass. 92, at p. 108.

The difficulty of "reconciling" some of the decisions, has generally been overcome by distinguishing the facts of the cases, or rather by regarding each case as depending on its own *finding* of fact. This is how the *Mogul Case* (1) was regarded in relation to *Quinn* v. *Leathem* (2) by the Royal Commission of 1906. Lord *Dunedin*, for instance, said (*House of Commons Papers*, 1906, vol. 56):

> "At first sight doubtless, the forcing of the dismissal of the agents" (in the *Mogul Case* (1)) "bears a strong similarity to the act of the forcing of the dismissal of the servants in *Quinn* v. *Leathem* (2), which act was held an indication of a conspiracy to injure" (Cd. 2825, Note on *Mogul Case* by Chairman, p. 19).

After discussing the case further, he said:

> "It is, I think, apparent that the dismissal of the agents in the *Mogul Case* was not looked upon as *on the facts* an ultroneous attack like the withdrawal of Munce's workmen if he took Leathem's beef" (*ibid.*, p. 19).

It is only by a similar distinction, that *Temperton* v. *Russell* (3) can be reconciled with the *Mogul Case* (1). It appears probable that the cause of action in *Temperton* v. *Russell* based upon the combination to induce persons not to enter into contracts with the plaintiff, would not have succeeded, had the more recent statement of principles been then available.

This opinion rests, however, upon the assumption that the Mogul principle applies to the facts proved in *Temperton* v. *Russell* (3). Lord *Sumner's* words in *Sorrell* v. *Smith* (4) suggest a doubt whether cases of combination in the course of ordinary trade competition, and in the course of such other transactions as industrial disputes, are sufficiently analogous to justify the generality of the application of the *Mogul Case* (1). In 1906 Sir *Godfrey Lushington* emphasized this lack of certainty in the law. He said:—

> "As the prima facie tort is indefinite, so is the justification. With one exception, there is nothing settled as to what shall constitute justification. The exception is competition. Otherwise the justification required is what the Judges and jury may think in their discretion amounts to justification; in other words, it is moral justification" (Cd. 2825, by Sir *Godfrey Lushington*, pp. 87-88).

The same authority gave the true reason for the various judgments against union members and officials in cases of alleged strike conspiracies.

(1) (1892) A.C. 25.
(2) (1901) A.C. 495.
(3) (1893) 1 Q.B. 715.
(4) (1925) A.C., at p. 741.

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"A strike being an industrial war," he said, "there are present of necessity all the elements of a conspiracy to injure, viz. : harm, intention to do harm, combination to do harm. For justification the defendants have nothing to offer but the plea of self-interest. To rebut this (or, if such is the law, to complete the proof of a prima facie tort) the plaintiff alleges bad motive. This too can never be wanting. For every strike, every act of every strike, is necessarily a hostile operation . . . " (p. 88, per Sir *G. Lushington*).

A priori, there would seem to be no satisfactory distinction between combinations of workmen for the purpose of procuring acts to be done for improving or preventing the lowering of their standard of living, and combinations of traders for their own betterment or protection. *Holmes* J. was one of the first to state the analogy in clear terms.

"If it be true," he said, "that working men may combine with a view, among other things, to getting as much as they can for their labour, just as capital may combine with a view of getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control."

Holmes J. added :—

"Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way" (*Vegelahn* v. *Guntner* (1)).

Before this enunciation of principle and before the decision in *Temperton* v. *Russell* (2), an English Divisional Court decided the case of *Jenkinson* v. *Nield* (3). A civil action of "conspiracy to injure" was brought by a working tailor against the president of the Sheffield branch of the Master Tailors' Association. The defendant had circulated a "black-list" asking the master tailors of Great Britain not to employ any of the men who had been locked out from certain tailoring firms in connection with a dispute, which had resulted in a strike and affected nearly the whole of the master tailors. The master tailors of the Sheffield Branch had agreed together "to pledge themselves not to employ members of the Amalgamated Society of Journeymen Tailors until they should accede to the terms desired by the masters." In order to carry out this combination, the list was printed and circulated amongst the members of the branch and the plaintiff was refused work as a

(1) (1896) 167 Mass., at p. 108. (2) (1893) 1 Q.B. 715.
(3) (1892) 8 T.L.R. 540.

consequence. The Court (*Mathew* J. and *A. L. Smith* J.) dismissed the appeal, applying the *Mogul Steamship Case* (1), saying :—

"There was no evidence that the defendants were actuated by any other motive than self-interest. If that were so, and they were not desirous of injuring the plaintiff, that was not actionable" (2).

This case applied the decision in the *Mogul Case* (1) to a case of an employers' combination directed, not against rival traders, but against workmen who were in dispute with them. Such combinations are seldom referred to.

"We rarely hear," said *Adam Smith*, "of the combinations of masters . . . But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labour" (*Wealth of Nations* (ed. Cannon I., 68)).

The law requires that the principle of the *Mogul Case* (1) should apply uniformly. In *Allen* v. *Flood* (3) Lord *Shand* said :—

"In the like manner and to the same extent as a workman has a right to pursue his work or labour without hindrance, a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition—competition which is in itself lawful, and which cannot be complained of where no unlawful means (in the sense I have already explained) have been employed. The matter has been settled in so far as competition in trade is concerned by the judgment of this House in the *Mogul Steamship Co. Case* (1). I can see no reason for saying that a different principle should apply to competition in labour. In the course of such competition, and with a view to secure an advantage to himself, I can find no reason for saying that a workman is not within his legal rights in resolving that he will decline to work in the same employment with certain other persons, and in intimating that resolution to his employers" (4).

Lord *Herschell* said :—

"The object which the appellant and the ironworkers had in view was that they should be freed from the presence of men with whom they disliked working, or to prevent what they deemed an unfair interference with their rights by men who did not belong to their craft doing the work to which they had been trained. Whether we approve or disapprove of such attempted trade restrictions, it was entirely within the right of the ironworkers to take any steps, not unlawful, to prevent any of the work which they regarded as legitimately theirs being entrusted to other hands" (5).

The Report of the 1906 Royal Commission is based upon the view that the same legal principle governs the *Mogul Case* (1), a trade combination, and *Quinn* v. *Leathem* (6), a case of union combination.

(1) (1892) A.C. 25.
(2) (1892) 8 T.L.R., at p. 541.
(3) (1898) A.C. 1.
(4) (1898) A.C., at pp. 166-167.
(5) (1898) A.C., at p. 131.
(6) (1901) A.C. 495.

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Lord *Dunedin*, Lord *Buckmaster* and Lord *Atkin* all regard the *Mogul Case* (1) as establishing a principle not limited to trade competition, although neither *Ware's Case* (2) nor *Sorrell* v. *Smith* (3) was an actual case of trade union combination. But the *Mogul Case* was treated as applying to a trade union combination in *Giblan's Case* (4), where judgment was given for the plaintiffs and, more important, it has also been applied to cases where judgments have been recovered by the defendants.

For instance, the Court of Appeal (Lord *Sterndale* M.R., *Warrington* L.J. (as he then was) and *Younger* L.J. (as he then was) applied the decision in the *Mogul Case* (1) to the case of trade union combined action in relation to a dispute between unions (*White* v. *Riley* (5)). So, too, *Peterson* J. in *Hodges* v. *Webb* (6), another case of rival workmen's unions, applied the *Mogul Case*. The case of *Reynolds* v. *Shipping Federation* (7) is more akin to that of *Jenkinson* v. *Nield* (8), but *Sargant* J. (as he then was) obviously regarded the Mogul principle as extending beyond mere cases of trade competition. Further, in *Thompson* v. *New South Wales Branch of the British Medical Association* (9) the Privy Council treated the *Mogul Case* as justifying action taken by an organized body of professional men to keep up the discipline and "moral" of its own members.

The judgments of the Court of Appeal in *White* v. *Riley* (5) and of *Peterson* J. in *Hodges* v. *Webb* (6) differ most from those in *Temperton* v. *Russell* (10) and *Quinn* v. *Leathem* (11), in their frank recognition of the special status which has been won by the trade unions after years of industrial strife. This is only in accordance with the view adopted by all modern students of economic and social history.

> "The workpeople had only achieved something like equality of bargaining power by dint of unremitting struggle, first for the right of association, then for the recognition by the employers of their organizations as their authorized mouthpieces" (*Encyclopædia Britannica*, 13th ed., vol. II., p. 455).

(1) (1892) A.C. 25.
(2) (1921) 3 K.B. 40.
(3) (1925) A.C. 700.
(4) (1903) 2 K.B. 600.
(5) (1921) 1 Ch. 1.
(6) (1920) 2 Ch. 70.
(7) (1924) 1 Ch. 28.
(8) (1892) 8 T.L.R. 540.
(9) (1924) A.C. 764.
(10) (1893) 1 Q.B. 715.
(11) (1901) A.C. 495.

"The principal object of every trade union is to protect the trade interests of its members, and to strengthen their position in bargaining with their employers with regard to the conditions under which they work" (*Encyclopædia Britannica*, 11th ed., vol. XXVII., p. 145) . . . "their methods and features vary greatly in detail. Among the objects most frequently met with . . . are . . . the securing of a monopoly of employment for members of the union by a refusal to work with non-unionists" (*ibid.*, p. 146).

They are "a powerful instrument for preventing 'sweating,' and for enabling the whole body of workmen to exact at the earliest moment and retain to the latest moment the full amount of the wages which a given state of trade and prices will enable the industry to support" (*ibid.*, p. 149). "The growth of trade unionism has meant that the trade unions have become an integral part of our social machinery. . . . The State itself regards trade unions as responsible representative bodies. They are called into consultation by the Government in times of dispute . . . The trade unions have won for themselves a definite place in the system of 'industrial government' and they are parties to the industrial agreements which govern the relations between employers and employed, lay down the methods of consultation and negotiation, and determine wages and working conditions" (*Encyclopædia Britannica*, vol. III., 13th ed., p. 807).

We are justified in assuming that the possible doubt implied in the words of Lord *Sumner* (1) must be resolved in favour of the extension of the principle of the *Mogul Case* (2) beyond mere cases of competitive trade, so as to apply to the combined action of members of trade unions. But does the same principle apply when such action is aimed, not against employers as such, but against a rival group of unionists in the same industry? In the present case the action of McKernan and the members of the Union was not directed at the employers at all. The Union's relationship with the employers is of importance because it was by means of that special relationship that the object of McKernan was achieved. But the combination was deliberately aimed and directed against the rival Union and its members. For the moment, the employers were not concerned in the real struggle.

But such cases present a closer analogy to the clash of rival trading interests, the struggle between trader and trader, than those of combined action on the part of unionists against employers in the industry. Here, as in the *Mogul Steamship Case* (2), the competitive element was prominent. The struggle for survival was between groups which both formed part of the larger class of employees.

(1) (1925) A.C., at p. 741. (2) (1892) A.C. 25.

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No doubt, the old Union and its members considered that, in the long run, it would be of direct benefit to the seamen if the old Union should alone represent them. They thought that the ultimate result of their action would be to maintain or improve conditions of employment. None the less, the agreement which was alleged in order to establish the case of civil liability against the appellant, had for its immediate object, not any improvement of industrial conditions, but the destruction of the new Union and the disciplining of those of its members who were not considered loyal.

Of conduct closely akin to that of McKernan and his Union, Sir *Godfrey Lushington* said :—

> " No practice is more characteristic of trade union policy . . . To trade unionists non-unionists are permanent rivals ; acting in their own interests they undersell them in the labour market, take the side of the employer against the unionists in time of strike, and if the strike is successful seek to share the fruits obtained by the sacrifices of the unionists " (Cd. 2825, Report by Sir *Godfrey Lushington*, p. 90).

Mr. *G. R. Askwith* (as he then was), in giving evidence before the 1903-1906 Royal Commission, said that the desire to work with unionists only, was equally a matter of self-interest to trade unionists as an increase of wages, the reduction in hours or the prevention of sweating conditions. *Younger* L.J. in *White* v. *Riley* (1) said

> that the actions of the defendants " merely manifested what they conceived to be their justifiable objection to the continued employment at these works of the plaintiff who did not belong to their union, by exercising what they say is their undoubted right of refusing to continue to work for their employers unless the cause of their objection was removed."

Not only therefore is the combined action of union members, when directed against non-unionists or rival unionists, action taken for the ultimate promotion or protection of their trade interests ; it is also action much more closely akin to that taken by the shipping combination in the *Mogul Case* (2), than if the unionists' immediate aim is to increase wages or prevent an increase in the hours of labour. This point is of importance when disputes occur between rival groups of unionists, or between unionists and non-unionists. Lord *Herschell* stressed it in *Allen* v. *Flood* when he said (3) :—

> " What was the object of the defendant, and the workmen he represented, but to assist themselves in their competition with the shipwrights ? A man

(1) (1921) 1 Ch., at p. 28. (2) (1892) A.C. 25.
(3) (1898) A.C., at p. 141.

is entitled to take steps to compete to the best advantage in the employment of his labour, and to shut out, if he can, what he regards as unfair competition, just as much as if he was carrying on the business of a shipowner. The inducement the appellant used to further his end was the prospect that the members of his union would not work in company with what they deemed unfair rivals in their calling. What is the difference between this case and that of a union of shipowners who induce merchants not to enter into contracts with the plaintiffs, by the prospect that if at any time they employ the plaintiffs' ships they will suffer the penalty of being made to pay higher charges than their neighbours at the time when the defendants' ships alone visit the ports? In my opinion there is no difference in principle between the two cases."

It is the truth of such facts, which made it so difficult for *Holmes* J. to reconcile the decisions in the *Mogul Case* (1) and *Temperton* v. *Russell* (2). To the latter case, *Scrutton* L.J. would probably also add the jury's finding of fact in *Quinn* v. *Leathem* (3):—"I understand," he said, "*Quinn* v. *Leathem* to decide that a combination to injure another in his trade and business, not in furtherance of the trade interests of those combining, but out of spite against the person injured, is actionable, and I must take it that the noble Lords who decided *Quinn* v. *Leathem* thought that the acts there proved were subject matter which might reasonably justify the finding of the jury. Of those acts the inducement to break an existing contract with Dickie would clearly support an action, but I have great difficulty in seeing why the other acts were not in furtherance of the trade interests of the combiners. The workmen took the view that it was important for the interests of workmen that all members of their trade should be members of their union" (*Ware's Case* (4)). And in *Pratt* v. *British Medical Association* (5) *McCardie* J. said: "In *Quinn* v. *Leathem* the defendants were subject to heavy damages, although the substantial object of the defendants was the advancement of their trade interests."

The view taken by *Scrutton* L.J. and *McCardie* J. of the *facts* in *Quinn* v. *Leathem* (3) brings us to a consideration of the question of "intent," which must be determined in all actions of "conspiracy to injure." Assuming that trade unionists are entitled to combine for the purpose of protecting or advancing their industrial interests

(1) (1892) A.C. 25.
(2) (1893) 1 Q.B. 715.
(3) (1901) A.C. 495.
(4) (1921) 3 K.B., at p. 67.
(5) (1919) 1 K.B., at p. 267.

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to the same extent as employers, traders or professional men, assuming that trade unionists combine for the purpose of keeping rival unionists out of employment in the industry and carry such combination into effect, what "motive" on the part of the trade unionists has to be proved by those deprived of employment, in order to entitle them to damages in a civil action? The action which *Scrutton* L.J. regarded as motived by a desire to protect trade union interests was called by *O'Brien* L.C.J. in the Queen's Bench Division of Ireland "great and galling oppression" (*Leathem* v. *Craig* (1)), and a "vindictive abuse of authority and influence over union men for the punishment and injury of an individual" (2).

It is obvious from such divergent opinions upon the same set of facts, that it is almost always possible to regard trade union action to prevent the employment in the industry of non-unionists or rival unionists, from two points of view, first as a combination for the purpose of damaging or injuring the non-unionists, secondly as a combination to protect or advance the interests of the union.

What is the test for ascertaining the "motive" of a combination which inflicts injury upon a plaintiff?

It is convenient to refer to some of the methods of approaching the question which Judges have adopted or impliedly suggested.

1. In *Sorrell* v. *Smith* (3) Viscount *Cave* L.C. said "If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it," no wrong is committed.

This statement seems to assume that there can only be one "real purpose" of the combination, and that the "purpose" cannot be to forward or defend the trade interests of the participants *and* to injure another.

2. In *Thompson* v. *New South Wales Branch of the British Medical Association* (4) Lord *Atkinson* said of an intra-professional rule:

> "The object of the rule is, in their Lordships' view, not to penalize or impoverish or injure Dr. Thompson, or any former member, but solely to keep up the discipline of and 'moral' of the members of the association to protect and promote its interests, though indirectly and as an entirely undesigned result some injury may incidentally be sustained by an expelled member in the practice of his profession."

(1) (1899) 2 I.R. 667, at p. 727.
(2) (1899) 2 I.R., at p. 726.
(3) (1925) A.C., at p. 712.
(4) (1924) A.C., at pp. 769-770.

But the resulting injury to such an expelled member, may often be deliberately designed, although the object of the rule is also to keep up the discipline of the professional body.

3. Lord *Atkinson* also added :—

"The difference between two such intentions is well established in trade competition. A trader may deliberately with the object of securing and developing his trade, by advertisement, lowering of prices or suchlike means, do something which may result in injuring the trade of a rival trader, but if that be not the designed and intended results of the first trader's action, but only an undesigned incidental consequence of it, the first trader is blameless" (1).

But the very purpose and intention of many trade combinations is not merely injury to, but the complete extermination from the trade, of the rival. Such a combination was that of the shipowners in the *Mogul Case* (2). It would seem that design, purpose or intention to injure opponents and rivals, merely in the sense mentioned, does not make a combination unlawful.

4. In *Reynolds* v. *Shipping Federation Ltd.* (3) *Sargant* J. said :—

"In the first place, the agreement or combination here was not against a particular individual, but merely operated to exclude such individuals as might not from time to time satisfy a qualification which was within the reach of any one who desired employment. The exclusion, that is, was against a class, to which any one at any time might cease to belong."

Applying the *Mogul Steamship Case* (2) *Sargant* J. came to the conclusion that

"The motive of the exclusion was not a malicious desire to inflict loss on any individual or class of individuals, but a desire to advance the business interests of employers and employed alike . . . ."

This distinction between combined action against a class and an individual, is very important in point of fact. In the former case, the aspect of personal spite and hatred usually yields place to that of class struggle and economic competition.

5. In *Giblan's Case* (4) *Walton* J. directed the jury in substance that the two alternatives before them were :—

(a) "If it were done for the purpose of protecting or advancing the interests of members of the union . . . even though a necessary consequence of such action would be to injure the plaintiff," or

(b) "if it was done, not to advance the interests of the members of the union, except perhaps in some remote and indirect way, but directly and primarily for the purpose of injuring the plaintiff" (Cd. 2825, Appendix II., p. 111).

(1) (1924) A.C., at p. 770.
(2) (1892) A.C. 25.
(3) (1924) 1 Ch., at p. 39.
(4) (1903) 2 K.B. 600.

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This summing-up suggests that the true inquiry is—what is the "direct and primary" purpose of the combination. The defendants may be shown to be combining, "primarily" for trade, professional or union interests although their combined action must necessarily injure the plaintiff. If so, the defendants succeed. If, on the other hand, the persons are combining "primarily" for the purpose of causing harm to the plaintiff, *Quinn* v. *Leathem* (1) applies and not the *Mogul Case* (2).

6. In the Court of Appeal in *Giblan's Case* (3) *Romer* L.J. thought that the object of the combination was "merely because they wish to compel him to pay a debt due from him" (4).

This is a view of the facts which is in accord with the special finding of the jury, that no union policy whatever was involved in the action taken against the plaintiff. The purpose of the combination was not related to the real desires of the trade union members. It was a combination of a few individuals, merely to victimize the plaintiff.

7. In the *Mogul Case* (5) *Bowen* L.J. (as he then was) said that the defendants

> "have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share" (6). "It must also be taken that the defendants had no personal ill will to the plaintiffs, nor any desire to harm them except such as is involved in the wish and intention to discourage by such measures the plaintiffs from sending rival vessels to such ports" (7).

Although this statement of the facts tends to minimize what the combination did, it sufficiently appears that the admitted purpose of the defendants was to drive the plaintiff out of the trade in which he was threatening their interests. The actual harm done to him was deliberately conceived and remorselessly carried out. But the injury done was a means to a further end, namely the advancement of the defendants' interests.

(1) (1901) A.C. 495.
(2) (1892) A.C. 25.
(3) (1903) 2 K.B. 600.
(4) (1903) 2 K.B., at p. 619.
(5) (1889) 23 Q.B.D. 598.
(6) (1889) 23 Q.B.D., at p. 614.
(7) (1889) 23 Q.B.D., at pp. 611-612.

8. In the same case, *Fry* L.J. said :—

"The defendants did not aim at any general injury of the plaintiffs' trade, or any reduction of them to poverty or insolvency : they only desired to drive them away from particular ports, where the defendants conceived that the plaintiffs' presence interfered with their own gain. The damage to be inflicted on the plaintiffs was to be strictly limited by the gain which the defendants desired to win for themselves " (1).

The same judgment pointed out that the case was not one of "competition used as a mere engine of malice " (1).

These observations of *Fry* L.J. lend further point to the last comment. When it is said that the defendants "only desired to drive them away " from the ports, the word "only " tends to nullify the fact that this desire was to put an end to the plaintiff's existing business, by causing him enormous losses. *Fry* L.J.'s statement shows clearly enough that, in the sense of a deliberate intention to injure, there was "malice." Such "malice " entered, however, as an incident of trade rivalry, not as personal spite, hatred or bitterness.

9. Lord *Watson* said in the same case :

"If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object," a very different question would have arisen (2).

Here the test is presented as that of ascertaining the "main design " of the combination for the purpose of determining whether its harmful results to a plaintiff give rise to a cause of action.

10. Lord *Field* said the defendants' action was "purely of a commercial and in no way of a personal character " (*Mogul Case* (3)).

This distinction is between combined action taken purely to satisfy personal vindictiveness and action taken to further commercial interests, which also causes harm to, and perhaps ruins, a rival trader.

11. Lord *Hannen* said :—

"I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure the plaintiffs whether they, the defendants, should be benefited or not. This is a question on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves " (4).

(1) (1889) 23 Q.B.D., at p. 625.
(2) (1892) A.C., at p. 42.
(3) (1892) A.C., at p. 54.
(4) (1892) A.C., at p. 59.

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This suggests that the "malicious" nature of the combination which is actionable, may be measured to some extent by ascertaining whether the defendants stood to gain any advantage by their deliberate infliction of injury.

12. In *Temperton* v. *Russell* (1) Lord *Esher* M.R. said the defendants

> "were not, I think, actuated in their proceedings by spite or malice against the plaintiff personally in the sense that their motive was the desire to injure him, but they desired to injure him in his business in order to force him not to do what he had a perfect right to do" (2).

Part of the decision in *Temperton* v. *Russell* (1) affirmed liability in the defendants for combining to prevent the plaintiffs from obtaining employment, the other part (based on *Lumley* v. *Gye* (3)) merely affirmed liability for a conspiracy carried out by inducing unlawful breaches of contract. Since the decision in *Ware & De Freville* v. *Motor Trade Association* (4) and *Sorrell* v. *Smith* (5), a finding of fact like that of Lord *Esher*, would probably result in absolving defendants acting in like manner, from liability under the first head. The fact that such defendants are not actuated by personal spite gives them a "perfect right" to take action adverse to the plaintiff's interests, providing such action is not accompanied by unlawful acts.

13. In *Bulcock* v. *St. Anne's Master Builders' Federation* (6), the Divisional Court said that there was no evidence of any act done "with an intention to injure the plaintiff, and that there was no evidence of anything except acts by the defendants to further their own purposes."

Here the defendants' action was intended to cause temporal harm to the class of which the plaintiff was one, but the obvious trade interest of the employers made the Mogul principle applicable.

14. In *R.* v. *Rowlands* (7) *Erle* J. directed the jury as follows:—

> "But I consider the law to be clear so far, only, as while the purpose of the combination is to obtain a benefit for the parties who combine: a benefit which by law they can claim. I make that remark because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing

(1) (1893) 1 Q.B. 715.
(2) (1893) 1 Q.B., at pp. 725-726.
(3) (1853) 2 E. & B. 216; 118 E.R. 749.
(4) (1921) 3 K.B. 40.
(5) (1925) A.C. 700.
(6) (1902) 19 T.L.R. 27.
(7) (1851) 17 Q.B., at p. 686 (n); 117 E.R., at p. 1445.

them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another."

Perhaps some of the phrases in this summing-up require further definition in the light of the later decisions. In a very real sense, the combination in the *Mogul Case* (1) was "for the purpose of injuring another," and was "directed personally against the party to be injured." Yet it was not an unlawful conspiracy. But the value and importance of the summing-up lies in the contrast between a combination entered into by persons "for the purpose of obtaining a lawful benefit to themselves," and one entered into in the absence of such object.

15. In *Boots, Cash Chemists (Lancashire) Ltd.* v. *Grundy* (2) *Phillimore* J. (as he then was) said:—

"In other words, given the confederacy, the motive and purpose make all the difference. If a number of persons, because of political or religious hatred, or from a spirit of revenge for previous real or fancied injury, combine to oppress a man and deprive him of his means of livelihood for the mere purpose of so-called punishment, I think the sufferer has his remedy. If the combination be to further their own prosperity, if it be constructive, or destructive only as a means to being constructive, the case is otherwise" (3).

This was a dissenting judgment, but the distinction made by Lord *Phillimore* anticipates many of the later cases. Destructive combinations entered into for the "mere" purpose of victimization or punishment are tortious if followed by damage. On the other hand, the combination is lawful if its "motive and purpose" be to obtain some "constructive" good.

16. *Dicey's* view was that the three decisions of the House of Lords (*Mogul Co.'s Case* (1), *Allen* v. *Flood* (4) and *Quinn* v. *Leathem* (5)) showed that

"acts done by X and Y, who are acting in concert, *solely* for the purpose of protecting and extending their trade and increasing their profits, and which do not involve the employment of any means in themselves unlawful, are not actionable, even though these acts cause damage to A." The defendants failed in *Quinn* v. *Leathem* "not because their *motive* for exercising their own rights was bad or malicious, but because they were pursuing an *object* which in itself was unlawful, namely damage to A . . . with, be it added, the further and equally unlawful object of punishing A's servants for not having joined a trade union" (18 L.Q.R., pp. 1-2).

(1) (1892) A.C. 25.
(2) (1900) 16 T.L.R. 457.
(3) (1900) 16 T.L.R., at p. 458.
(4) (1898) A.C. 1.
(5) (1901) A.C. 495.

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Dicey's distinction between "motive" and "object" must be reviewed in the light of the later decisions; and his suggestion that persons acting in combination escape, only if their "sole" purpose in inflicting injury upon a plaintiff is that of protecting and extending their trade, was doubted by Lord *Sumner* in *Sorrell* v. *Smith* (1). Defendants may in combination deliberately inflict damage upon A (as the defendants in the *Mogul Case* (2) did), providing that they also are pursuing their own trade advantage. If "punishing" other employees in the industry for not having joined a trade union, only means, excluding them from employment with the end of inducing them to join the union or of procuring a monopoly of work in the industry for union members, it is difficult to say that such motive of "punishing" makes the combined action unlawful.

17. In the case of *Sorrell* v. *Smith* (3) Lord *Buckmaster* was of opinion that the plaintiff must prove, as part of his case, that the purpose of the combination "deliberately interfering with a man's trade" was "spiteful and malicious" (4).

This view is that the plaintiff must prove not only that the combination was entered into for the deliberate purpose of interfering with his trade, but also that it was of a "spiteful" character.

18. In *Vegelahn* v. *Guntner* (5) *Holmes* J. said that although "the immediate object" of the combination was "to injure their antagonist," there might be nothing unlawful, if the infliction of such injury was "for the sole object" of prevailing in the struggle for better industrial conditions.

The opinion means, I think, that even if "the immediate object" is injury, what has to be investigated is the ultimate object. If so, persons taking part in a combination of organized labour may succeed in their defence, although they agree to do acts which are harmful and are intended to be so. It has taken many years to give effect to the implications in this opinion.

19. In *White* v. *Riley* (6) *Warrington* L.J. (as he then was) said: "The evidence is quite clear that the men had no personal grudge whatever against the plaintiff, and that all that they were anxious for was that he should join the Curriers' Union."

(1) (1925) A.C., at p. 743.
(2) (1892) A.C. 25.
(3) (1925) A.C. 700.
(4) (1925) A.C., at p. 748.
(5) (1896) 167 Mass., at p. 109
(6) (1921) 1 Ch., at p. 25.

This statement shows that there must occasionally be inquiry into the cause of the "objection" to a plaintiff entertained by a combination. Does the objection really spring from economic, or from personal hostility?

20. In the same case *Younger* L.J. (as he then was) said there was an absence of "any malicious or vindictive feeling towards the plaintiff as a man" (1), and the action taken was "in the interests . . . of craft unionism in general and the Curriers' Union in particular" (1).

In these words Lord *Blanesburgh* implies that there may be strong hostility shown against an individual by the combination, without its becoming unlawful on such account. Such dislike may often have its source in actions taken by the plaintiff or his group against the interests or supposed interests of the trade group to which the defendants belong. No one would call such motive, a feeling against the plaintiff "as a man."

21. In *Nann* v. *Raimist* (2) *Cardozo* C.J. said of a struggle between rival labour unions competing for supremacy :—

> "A genuine controversy exists between two competing groups as to the effectiveness and sincerity of the methods of one of them. . . . The plaintiff does not prevail by showing that the defendant's criticism is wrong. . . . What is wrong must be so clearly wrong *that* only 'disinterested malevolence' (*American Bank & Trust Co.* v. *Federal Reserve Bank* (3)) or something closely akin thereto, can have supplied the motive power."

The phrase "disinterested malevolence" is valuable as pointing to malice which is irrelevant to any trade, professional or union interest possessed by the defendants.

22. In *Leathem* v. *Craig* (4) *Andrews* J. said :

> "Acts done for the sole purpose of lawfully benefiting those who do them, and which have a harmful effect on others, are obviously very different from acts done with the purpose of inflicting harm on others, in order to compel them to abandon their freedom of action in lawfully carrying on their own trade according to their own discretion."

23. In the same case (5) *Holmes* L.J. said :—

> "In the present case *FitzGibbon* L.J. put the very point to the jury. He told them the questions to be considered included in particular the intent of the defendants to injure the plaintiff in his trade as distinguished from the intent of legitimately advancing their own interests."

(1) (1921) 1 Ch., at p. 31.
(2) (1931) 255 N.Y. 307, at p. 319.
(3) (1921) 256 U.S. 350, at p. 358.
(4) (1899) 2 I.R., at p. 680.
(5) (1899) 2 I.R., at p. 777.

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24. In *Quinn* v. *Leathem* (1) Lord *Shand* said of the defendants: "Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade."

The last three quotations indicate broadly the special finding of fact which alone enables the *Mogul Case* (2) and *Quinn* v. *Leathem* (3) to be fitted into the same principle of law. Lord *Shand* asserts the existence in *Quinn* v. *Leathem* of a combination intended to cause harm, and causing it, for the "sole purpose" of hurting the plaintiff. If such finding is a condition precedent to liability in these cases, it approximates closely to the "disinterested malevolence" referred to by *Cardozo* C.J.

Whilst it is necessary for a plaintiff to show, not only that the acts injuring him are those of a combination entered into for such purpose but that the combination possesses the additional character or quality of being "malicious," no recognized formula has yet been adopted by the Courts in order to ascertain such character or quality.

I think that some light is thrown upon the question of principle by attempting an analysis of the evidence that is usually led in a case of "conspiracy to injure." It is seldom that any criminal conspiracy can be proved by direct evidence of the making of the agreement; usually, the inference as to the fact of agreement, must be drawn from the proved actions of the defendants. In civil cases of conspiracy to injure, the existence of a combined purpose is sometimes shown by giving evidence of the actual terms of a decision come to by a professional or trade organization. It is almost impossible to suppose that an intention to cause injury for a merely malicious purpose would appear from the terms of such a resolution. The aspect of policy, as distinct from the personal aspect, is usually found predominant in the records of such bodies. The present case is no exception.

Before liability can attach to defendants for conspiracy to injure, there must be evidence to support a finding of fact as to the object or motive animating the parties to a combination which intentionally causes temporal harm to a plaintiff. Three possible types of case may arise:—

(1) (1901) A.C., at p. 515. (2) (1892) A.C. 25.
(3) (1901) A.C. 495.

I. Where the agreement to cause damage or loss is made solely with the object or motive of causing such damage. It is not easy to picture such a case, because it supposes the deliberate entry by persons into an agreement and its execution, for no reason at all beyond the mere infliction of injury. The whole thing would be stamped with wantonness, almost with absence of meaning or significance. But if such a case arose, the defendants would, no doubt, be held liable, and the combination would be regarded as possessing the necessary malicious character.

II. Where the agreement to cause damage or loss is made, *all* the parties seeking to carry out some object or satisfy some motive, beyond the mere infliction of damage. This case assumes the existence of a similar object or motive in all the parties to the agreement.

III. Where the agreement to cause damage or loss is made, each one of the parties seeking to carry out some object or satisfy some motive beyond the mere infliction of damage, but one or more acting solely from one object or motive, others acting solely from a different object or motive, and others still, acting from more than one object or motive.

I pause here to refer to the suggestion of Lord *Sumner* in *Sorrell* v. *Smith* (1) that the terms "object" and "purpose" in relation to the "aggressive action of a combination," stand in need of strict definition. He added that "the tests, by which the definition is to be applied, seem to me not to have been as yet sufficiently examined" (2).

In the present examples, I am assuming that the defendants have combined to do certain acts which must necessarily cause temporal harm or injury to a plaintiff or a class of which the plaintiff is one. I have also assumed that the harm to the plaintiff is "intended" by all parties to the agreement. The infliction of such harm may also be called their "object" or "purpose." Each of these two words indicates the conscious pursuit of some end or goal, or the presentation to the actors of such end or goal as a desirable thing. It may be more accurate to call the immediate end or goal the "purpose" of the combination and the ultimate end or goal sought,

(1) (1925) A.C. 700.

(2) (1925) A.C., at pp. 741-742.

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the "object" of the person who enters the combination. If each party has the same ultimate "object," that is also the "object" of the combination. In this sense, the "object" desired by each and all, is also the "motive," both of each individual and of the combination. It may be that the "intention" or immediate "purpose" of the persons combined is to inflict harm, but their "motive" or ultimate "object" is the furtherance of their trade interests. It may be, on the contrary, that the "motive" or ultimate "object" beyond the immediate "purpose" or "intention" of the combination, is to do harm because the plaintiff is hated for some personal reason and his harm or ruin is desired as an end to be achieved by means of inflicting harm upon him.

I am quite aware that with this terminology, many psychologists would not rest satisfied. But the difficulty is, as the references I have already given show, that the Courts have not separately defined a number of these expressions. In certain relations, the words employed tend to have the same meaning, but in other relations, they have meanings which are quite distinct.

> "Though it is easy," said Lord *Dunedin*, "on the strict view of the meaning of the words to draw a distinction between motive and intention yet the meaning of the one runs into the other, and in the set of cases I have quoted I think they are used as synonymous" (*Sorrell* v. *Smith* (1)).

So long, however, as the meaning of the words used is kept clear, the substance of Lord *Sumner's* suggestion will be followed. I therefore return to the illustrations already enumerated.

Further information is required before it is possible to pronounce of either Case II. or Case III. whether any or all of the parties are liable to a plaintiff who sustains injury through the carrying out of the agreement. If in II. the common object or motive be the satisfaction of a personal hatred or grudge by means of the ruin or impoverishment of the plaintiff, liability is clear. If it be the protection or advancement of trading, professional or economic interests common to the defendants, there is no liability. If it be the carrying out of some religious, social or political object, the law prefers to examine the motive or object in each case before pronouncing an opinion. The pursuit of economic ends is most favoured.

(1) (1925) A.C., at p. 724.

It will be noted that Case II. assumes that all the parties intend to inflict damage. The existence of such agreement or common design assumes that damage is inflicted deliberately and not accidentally. Not only was such deliberate infliction of injury characteristic of the *Mogul Case* (1); the fact of agreement itself excludes the possibility that the injury inflicted is accidental and not designed. Before the defendants can be held liable, we must ascertain the object or motive of the combination beyond the immediate intention or purpose of inflicting injury. The question requires closer examination.

Case III. is typical, even of the cases where, if all parties had the one object or motive, there would either be clear liability or clear absence of it. Take the following illustration:—A, B, C, D, E and F agree to inflict damage on X. A and B agree, because they desire to protect the standards of the professional body to which A, B, C, D, E and F all belong, and have no other object or motive. C and D wish to revenge themselves on X for some personal quarrel, concealing this motive from the other parties to the agreement and from each other. E. and F act from mixed motives: they genuinely wish to maintain the professional ideals of their body, but they also have a strong dislike to X and it can truly be said that they are gratifying it when they enter into the agreement.

In such case, the only state of mind which is *common* to A, B, C, D, E and F is the immediate intention or purpose of inflicting damage upon X. But there are the other facts mentioned. Who is liable for conspiracy to injure? In my opinion A and B, not knowing of the malicious motives animating C and D or the strong dislike felt to X by E and F, are not liable. C, D, E and F are not the agents of A and B so as to alter the nature and character, the object or motive, of the common agreement.

The example presented by the position of E and F is typical of these group activities. But it is convenient first to examine the question of liability in C and D. Each has agreed with five others, and each is inspired by personal malice. But the fact of the existence of such malice is not made known by either to the other, and it is also unknown to the other parties to the agreement. It is not

(1) (1892) A.C. 25.

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possible to say that C and D *alone* are liable for conspiracy to injure, except on the basis that there has been an agreement come to by them alone. But the only agreement entered into, has six parties not two. The position might be different, if it could be shown that C and D, for the purpose of satisfying their hatred of X, agreed between themselves to procure acts to be done by A, B, E, F, and themselves all in association, for the purpose of causing harm to X. Such agreement would be a separate conspiracy to injure, carried out by using the other persons as instruments for effectuating their own design. In such a case C and D would be liable. But, in the absence of such a separate agreement between them, the uncommunicated existence of an evil motive in each towards X, would not make themselves alone liable to X. This view is, however, subject to a further contention shortly to be mentioned, and, I hope, disposed of.

Upon the same footing, E and F would not be liable, because no separate understanding between them is shown. In Case III. therefore, subject to the same contention, neither A, B, C, D, E, nor F is liable as for "conspiracy to injure."

One question raised by Lord *Sumner* in *Sorrell* v. *Smith* (1) does not concern the special series of difficulties raised by Case III., but only the question in II. Suppose that A, B, C, D, E and F agree to inflict damage on X. All intend to injure X and X is injured. All desire to protect or advance their common economic interests so that, if such were their only motive, object or desire, no liability would attach to them. But all heartily dislike X and are gratified and pleased both at the decision to inflict harm on him and its actual infliction. Is there liability in such a case? Words are deceptive. "Dislike" is a relative term. The person injured by the combination may be "disliked," "unpopular," even "detested," because he has not observed the standards of the group with which he has been associated, or because he threatens their economic well-being. In such cases, it is as difficult to say that the feeling of dislike makes the agreement unlawful, as to infer, from the exhibition of strong indignation on the part of a defendant whose reputation is attacked by a plaintiff and who strongly counter-attacks, that such defendant must be actuated by "express malice."

(1) (1925) A.C. 700.

Lord *Dunedin's* decision is that a Court or jury should be able to say what is the real motive which lies at the root of every common design to cause hurt or harm to another. The question for the jury is:—

> "You must consider whether the act or acts complained of which caused loss and hurt to the plaintiff were done with the purpose of injuring the plaintiff. Was such a purpose the real root of the acts that grew from it, or was the true motive of the acts something else, such as, for instance, the furtherance of the defendant's own business?" (per Lord *Dunedin* in *Sorrell* v. *Smith* (1)).

If this principle applies, the question is approached by asking whether the predominant motive or object of the defendants is to protect or defend their association, trade or professional interests; any proved hostility or dislike to the plaintiff must be further analyzed, in order to ascertain whether it is a motive related to a clash of economic or professional interests and arises from strong opinions as to the plaintiff's own conduct in relation thereto; whether, on the other hand, the hostility or dislike is not a result of the feelings and attachments of the defendants to the economic and professional interests which they allege they are advancing or defending, but has its true source in personal hatred or bitterness.

Sir *Godfrey Lushington* said, in special reference to combined action against employers or non-unionists on the part of unionists, that to ask the question whether they acted to defend their own trade interests or to injure their economic adversary for the time being, is equivalent to asking of a soldier who shoots to kill in battle, whether he does so for the purpose of injuring his enemy or of defending his country. The analogy is sound, because combined strike action is usually undertaken for the purpose, both of causing harm to the employers and for the improvement or maintenance of the standards of the unionists. As Lord *Sumner* said in *Sorrell* v. *Smith* (2): "All well planned and successful commercial action of this kind must prejudicially affect the rival and is intended to do so." Such is the commencing and not the finishing point of the relevant inquiry.

Sir *Godfrey Lushington's* further comment was that strong feelings are always present when unionists enter upon a struggle against employers or non-unionists, and, therefore, actual ill will is never

(1) (1925) A.C., at p. 717. (2) (1925) A.C., at p. 734.

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absent if the struggle lasts—so that overt acts indicating "malice" are often available for the purpose of extracting a finding from a jury that the unionists acted "maliciously," "vindictively," or in order to "punish."

The truth implicit in this observation has gradually been recognized. This is shown in some of the references I have given from the leading decisions. Words and acts which, at first glance, indicate malice, hatred and all uncharitableness may, in the circumstances of a keenly fought industrial contest, be evidence of the clash and opposition of economic interests. The malicious object which must characterize a combination to make it both a criminal conspiracy, and a necessary ingredient in the proof of the tort of civil conspiracy, must be a malevolence which is much more than a sign of the reality and persistence of the trade, industrial or professional struggle between the defendant and the plaintiff or the group with which he is associated.

Adopting the broad test suggested by Lord *Dunedin*, it appears clearly that "the real root" of the action taken by McKernan and the greasers against the plaintiffs was that of furthering the interests of the old trade Union and its members, by the method of preventing the members of the rival Union from gaining employment in the industry. Whatever dislike or hostility was displayed to Fraser or Stapleton was at once the result of the struggle for supremacy between the rival groups and the best evidence of the keenness of such struggle. It was a struggle for survival. To say that McKernan and those acting with him were eager to deprive Fraser and Stapleton of all chances of employment in the industry is true enough; but they cared nothing for Fraser and Stapleton as individuals. Their intention and purpose was to carry out their Union's policy against each and every member who was engaged in the attempt to destroy it. Whatever "malice" or "malevolence" arose in the struggle, had its source in the opposing interests of the two economic groups, and depended upon such conflict for its continuance and vitality.

The combination was not imbued with "independent malevolence" (Lord *Sumner's* expression) or "disinterested malevolence" (the quotation of *Cardozo* C.J.). No doubt, the combination had an "animus" against the opposing group, and wished to "punish" or

"discipline" them. But the resentment and indignation of McKernan and those joined with him against Fraser, Stapleton and all the members of the rival Union were intimately bound up with their sentiment of loyalty to their trade organization.

This conclusion would be sufficient to dispose of the cause of action against McKernan based upon "conspiracy to injure." But so much has been made of McKernan's personal "animus" and "hostility" in the affair, that his liability may be discussed upon the assumption that he was acting, merely to gratify a private hatred or grudge.

In dealing with Case III. I reserved consideration of the important point of law which now arises. In the case of an agreement between A, B, C, D, E and F to inflict injury upon X, the position supposed is that, out of the six participators in the combination, five desire to protect their industrial interests, but one (say F) has no such desire or motive or object and is entering into the agreement solely out of a personal grudge against X not connected with the economic interest common to all defendants. It has been suggested that A, B, C, D and E are liable to X as parties to a conspiracy to injure him because the evil motive of F is imputed by law to all parties to the common agreement.

The illustration may be discussed upon the basis that F is identical with McKernan, that he was consumed with a personal hatred of Fraser and Stapleton, and that his actions at the "pick-up" were tainted with such motives.

The argument is that although, in the absence of unlawful acts, such motives would not make McKernan alone liable in tort, the fact that he was acting in combination with the greasers at the pick-up, has the legal result that his motives are to be attributed to all members of the combination. It is then said that the combination possesses the quality of malevolence essential to a conspiracy to injure, all parties to it are jointly and severally liable, the non-joinder of the other parties is immaterial and that McKernan's personal liability remains.

In *Pratt* v. *British Medical Association* (1) *McCardie* J. said: "I may incidentally add that, had it been necessary to decide the point,

(1) (1919) 1 K.B., at p. 279.

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I should hold that where persons are acting in combination to achieve such a purpose as that which is shown in the present case, then the proved malice of one or more may be attributed to the other participants in the combination." *McCardie* J. based this opinion upon two cases of defamation: *Smith* v. *Streatfeild* (1) and *Thomas* v. *Bradbury Agnew & Co.* (2).

In *Smith* v. *Streatfeild* (1) a writer and printer caused to be published a pamphlet, which was defamatory of the plaintiff. Between the writer and the person to whom the publication was made, there existed such a relationship that the occasion was privileged in favour of the writer. The law therefore entitled him to publish his defamatory pamphlet on one condition. The same right was sought to be availed of by the printer. He was held to be entitled to it, as well as the writer. But the right was subject to the same condition. The condition was that the person in whom the privilege was vested, should not abuse it by displaying express malice. But it appeared that the writer was animated by express malice. The condition subject to which the privilege came into existence was broken. Both writer and printer were therefore joint publishers of a defamatory document without the protection of privilege. Such a case has little bearing upon the supposed imputation to every member of a combination of the motive or spite of one member of it. The editor's malice was not "imputed" to the printer: it merely defeated the privilege.

In *Thomas* v. *Bradbury Agnew & Co.* (2) a defamatory book review was defended by the proprietors of *Punch* and the writer, upon the ground of fair comment. The Court of Appeal held that the defence could not be sustained if the commentator was affected by malice. Evidence was admitted which showed that the writer of the review was on bad terms with the plaintiff. "Comment distorted by malice," said *Collins* M.R. (3), "cannot . . . be fair on the part of the person who makes it." Such case merely illustrates the principle that the immunity attached to defamatory publications upon the ground of "fair comment" is not absolute, but is defeasible upon proof that the comment is inspired by

(1) (1913) 3 K.B. 764.
(2) (1906) 2 K.B. 627.
(3) (1906) 2 K.B., at p. 642.

malice. If there is a right to publish defamatory matter upon conditions, those conditions must be strictly observed.

Where two or more persons are proved to have jointly committed a tort, their liability is joint and several, and each is liable for the entire amount of damages sustained. And, if action is brought against several persons in respect of a tort said to be committed jointly, but the facts show that one only is a tortfeasor, a verdict and judgment may be recovered against him alone for the whole damage sustained by the plaintiff. But, in a case of civil conspiracy against A and B for damage caused by the carrying out of an agreement between them, it is not possible (except in the rare instances where evidence admissible against one party only, authorizes a finding to be made against him alone) to adjudge that A conspired with B, but that B did not conspire with A. As a general rule, unless both are liable, neither is liable.

In such connection, the question whether "conspiracy" as such is the "gist" of the tort, does not matter. Acts done in pursuance of the agreement causing temporal damage to the plaintiff must be proved, as well as the agreement itself. But the plaintiff must prove the alleged conspiracy or agreement, implying that "the external act of the crime is concert, by which mutual consent to a common purpose is exchanged" (Sir *William Erle* on *Trade Unions*, p. 31). The general rule is that he must fail against both parties, unless he succeeds against both.

When, therefore, *McCardie* J. says that "the proved malice of one or more may be attributed to the other participants in the combination," the authorities cited do not bear out the general statement, and principle is not consistent with the application of the statement to the tort of conspiracy to injure. The question is always—what has been agreed upon?—what is the nature of the combination?—it must be possible to say of the combination as such that it is of a "malicious" character. I do not see how malice is imputable to all participators in a design merely because it exists in one. The existence of a common purpose gives no authority to every party to it, to act as he thinks best on behalf of the other parties, for the attainment of the common purpose. If an agreement or a common design is proved, each participant is the authorized

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agent of the others for the purpose of carrying out what is the design or agreement, but not otherwise.

I am of opinion that, if a number of traders or professional men or members of a trade union agree to do acts which must cause harm or damage to A, the fact that the sole motive of one member of the combination is a purely personal hatred of A and a desire for his ruin as an end in itself, does not convert such combination into an unlawful conspiracy. No doubt, overt acts or words indicating such personal malice may be of such frequent occurrence in and about the execution of the common agreement, and so well known to and accepted by all participators in it, as to furnish some evidence of the malicious nature of the whole combination. But acts or words indicating malice in one or two or more, are merely evidentiary, in order to prove the general motive or object. The evil motive proved to exist in one or two or more is not imputable to the other members of the combination. Each party is the agent of the others, only for the purpose of carrying out the agreed plan. If the plan is imbued with personal spite against a plaintiff, the nature or quality of the agreement may be termed "malicious." If there is an agreement to perform acts to A's detriment, and the motives of some participators are merely to protect or advance their professional organization or their trading interests or their trade union, the additional fact that one or more other participators are not really pursuing such objects or motives, but merely desire to satisfy their personal hatred, does not give a different quality to the agreement. In short, such hatred or grudge does not, on any principle of law, become a motive imputable to those who are either unaware of it, or who, being aware of it, condemn.

This principle would itself be sufficient to find in McKernan's favour, even if it were found (which it is not) that his object at the "pick-up" was to wreak some personal vengeance upon Fraser and Stapleton. He is under no liability for conspiracy to injure unless in respect of an agreement between himself and the six greasers to injure the plaintiffs. It must be possible to say, not only of McKernan but of the common design, that it was infected with, or sprang from, personal hatred and malice against the plaintiffs. But there is no evidence of any knowledge by the greasers or other

members of the old Union, of any personal hostility to Fraser or Stapleton on the part of McKernan. There is no evidence of any personal hostility to the plaintiffs on the part of any member of the old Union except McKernan. It is not true to say that the combined action taken at the "pick-up" had its source in personal malice, even if McKernan was so inspired. Indeed, the Magistrate's view was that the greasers acted against the plaintiffs because McKernan forced them to do so. The only "common" design proved was to carry out the Union policy of not accepting engagements with members of the rival Union. McKernan was, at most, constituted the agent of the other participants to carry out this design. He could not act so as to bind them, except in pursuance of what had been agreed upon. He was not the agent of all to possess on their behalf, still less to have possessed in the past, a wish or object or desire or animus or motive to do the plaintiffs harm, merely to satisfy such wish or object or desire or animus or motive.

The result of such considerations is that there cannot be a finding that McKernan was a party to an executed conspiracy or agreement to injure, even if he himself was actuated by a purely personal grudge. *Allen* v. *Flood* (1) shows that his own bad motives cannot affect the lawfulness of what he did, considered merely as personal action. If the bad motives of McKernan in doing certain lawful acts, do not affect the lawfulness of his conduct, the further fact that his conduct was in pursuance of a combination to which others without bad motives were also parties, does not make McKernan liable for the tort of conspiracy to injure, unless the others are equally liable with him. Their good motives make it impossible to predicate of the combination that it was an agreement entered into for the purpose of satisfying personal malice. Assuming an agreement of the parties to induce the shipping companies not to employ Fraser or Stapleton, it was not an agreement characterized by personal malevolence. The greasers did not know of, much less approve or share, such malevolence.

I agree that the result of this opinion is that, if members of a professional or trade organization acting together at their meetings, decide upon action adverse to a plaintiff or his group upon some

(1) (1898) A.C. 1.

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ground of association policy, it will be very difficult to prove a case of conspiracy to injure against the association or its members. There will always be available as evidence in favour of the defendants the avowed objects of the association, and the attempted pursuit by members of such objects will seldom be possible of denial. In the second place, proof of spite, hatred or malicious feelings on the part of some members of the organization towards the individual or class injured by the collective action, will not be sufficient to prove the malicious quality of the combination. As it must be shown that the combination was entered into, "ultroneously" (the phrase of Lord *Dunedin*) or with "'disinterested malevolence' or something closely akin thereto" (per *Cardozo* C.J. in *Nann* v. *Raimist* (1)) or with "independent malevolence" (per Lord *Sumner*, *Sorrell* v. *Smith* (2)), the proof of personal malice on the part of some members of the association will not show that the ultimate object or motive of the members combining is malicious. Usually it will show that the *common* object is not malicious.

We are approaching a stage at which this anomalous cause of action, and the anomalous crime which must be proved as part of the cause of action, will rarely be susceptible of proof in trade or professional combinations. Unless there are numbers engaged in carrying out a common purpose, no crime and no cause of action will be established. The greater the number engaged in such an enterprise, the less likely is it that the purpose which is really common, is to gratify personal hatred. And if the persons combined are associated together in some trade or professional organization which is either recognized by law or not unlawful, the only common purpose which will ordinarily be proved, will be that of protecting or advancing the collective interests of the organization.

One school of thought may contend that this conclusion should lead to reconsideration of the principle of *Allen* v. *Flood* (3). It may be that if A, inspired by bad motives, does an act which is not unlawful but which designedly causes injury to B, a proper system of jurisprudence should hold A liable. Professor *Goodhart* has recently pointed out the importance in this connection of sec. 226

(1) (1931) 255 N.Y., at p. 319. (2) (1925) A.C., at p. 737.
(3) (1898) A.C. 1.

of the *German Civil Code*, which declares that "the exercise of a right which can have no purpose except the infliction of injury on another is unlawful."

If *Allen* v. *Flood* (1) had been decided differently and if the system indicated prevailed, it would be possible to visit with liability those participators in a common design to inflict injury who act from bad motives, and to allow those whose motives are pure, to go free. The former, having been parties to the intentional infliction of damage for private ends, would not escape because of those whose honest co-operation they have abused. But these fascinating questions are now matter for legislative intervention, not judicial reaction.

And as it is, it would hardly be reasonable to make members of a trade group, acting bona fide and in the supposed interests of the group, liable in damages at the suit of A, merely because they enter into an agreement resulting in harm to A and some members bear A a personal and private grudge.

If, in such a case, those who bear such malice also escape liability, it must be remembered (1) that they have not made a separate agreement to inflict such injury; (2) that only one agreement exists and it is impossible to make them liable as parties to the agreement unless the other parties to it are also liable; and (3) that it is no more unreasonable that they should escape liability, than that an individual should escape on the principle of *Allen* v. *Flood* (1).

On the "conspiracy to injure" part of the claim, McKernan succeeds because the common design had as its "real root," the desire of all the greasers and McKernan himself to advance the interests of the old Union, and to protect it and its members against the strong opposition of the new. The facts show that the defence of the organization and its economic and industrial interests in relation to the hostile operations of the rival Union, was the primary and substantial object of the action taken against Fraser and Stapleton. Such action deprived them of the chance of being employed, but it was not inspired by personal hatred of either of them. Any dislike evinced to them by McKernan or the members of the Union was the result of what was considered to be their

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disloyalty to the old-established trade union. Even if McKernan was inspired by hatred of the plaintiffs in the sense of "independent malevolence" (and the evidence does not establish this), such malice cannot be imputed to the greasers who acted in combination with him at the pick-up. They, certainly, entered into the agreement from motives of Union policy. They are not liable for conspiracy to injure the plaintiffs. And if they are not, neither is McKernan.

All three causes of action have failed, the appeal should be allowed and judgment entered for the defendant.

McTIERNAN J. I am of the opinion that the appeal should be allowed. I have read the judgment of my brother *Dixon*, with which I agree.

Appeal allowed with costs. Judgment of the Supreme Court discharged and in lieu thereof appeal from Local Court allowed with costs and judgment entered for defendant with costs.

Solicitors for the appellant, *Nelligan, Hague & Parsons.*
Solicitors for the respondents, *Scammell, Hardy & Skipper.*

H. D. W.