TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS IN THE NINETEENTH CENTURY: THE TRANSFORMATION OF PROPERTY, CONTRACT, AND TORT

Lawyers make light of revolution, especially revolutions in legal ideas. Legal argument emphasizes the doctrinal continuity of law despite radical changes in legal thought. Yet law embodies not only rules but also the justifications for those rules. When a set of legal rules can no longer be justified by appealing to tradition, jurists either change the rules or develop a new theory to justify them. The nineteenth century development of the tort of interference with contractual relations illustrates first the emergence and then the disintegration of a theory that legitimated the rules of the tort.

Traditional teaching about the development of the tort of interference with contractual relations maintains that it emerged in 1853 with the landmark case of *Lumley v. Gye*.[1] According to this view, although the tort had antecedents in the ancient doctrine permitting masters to sue third parties for enticing their domestic servants away, *Lumley* divorced the tort from its foundation in the master-servant relation and extended protection to all contracts. In addition, the orthodox view emphasizes the continuity of the post-*Lumley* development of the tort rules and theoretical justifications. The intellectual context out of which these decisions sprang, the profound rethinking of the tort's conceptual foundation, and the legal debate surrounding its use against the labor movement of the late 1800's are all overlooked by traditional commentators.

In contrast to the traditional view, this Note argues that the interference tort is best understood in the context of three stages of nineteenth century legal thought.[2] In Stage I, prior to 1850, relationships that we label contractual had been protected from certain forms of interference — such as enticement, fraud, and slander. There was no single, unified justification

[1] 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853); *see, e.g.*, 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 431 (2d ed. 1937); Pingrey, *Interference of Third Parties in Contracts of Others*, 48 CENT. L.J. 113 (1899). *See also* Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 667 (1923).

[2] *See* D. Kennedy, History of American Legal Thought (Jan. 1978) (unpublished manuscript on file at the Harvard Law School Library). While some reference is made to societal changes — such as industrialization — that increased the number of interference suits, the Note leaves to future research the project of linking the transformation within the legal universe to developments in the society at large.

for these protections, however. Each of the shielded relations was uniquely conceptualized. The fragmented nature of the forms of action — and their emphasis on controlling defendant behavior — obscured the quasi-property protection given contractual interests of plaintiffs.

In Stage II, between 1850 and 1890, the old forms of action gave way to a new conception of "tort" and "contract" from which a unified tort of interference emerged. During this period contract theory developed into an abstract doctrine of property, worthy of protection from all forms of interference. Because of the formalistic reasoning of the nineteenth century legal world, a contract — once identified as property — had to be afforded absolute protection. This idea — that every contract creates a property right that deserves protection from third party interference — emerged in *Lumley v. Gye* as a means of unifying and justifying the tort. Nevertheless, the tort remained confined to the master-servant context until courts found it necessary to control the concerted activities of labor unions in the late nineteenth century. Jurists then expanded the theory of contractual property to include not only nonemployment contracts, but also prospective agreements.

Finally, in Stage III, after 1890, courts acknowledged that the "right" of plaintiffs to protect contractual property from third-party interlopers conflicted with the "privilege" of defendants to compete actively in the marketplace. Recognition of the incompatibility of these interests contributed to the demise of the formal modes of legal analysis and spawned a new type of reasoning — interest balancing — by which jurists sought to reconcile the conflict.

I. ANTECEDENTS OF THE TORT

In Stage I, before 1850, courts did not recognize a formal tort of interference with contractual relations.[3] Rather, they assumed that redress for injury resulting from a willful breach of contract could be won only against the other party to the contract.[4] Despite this theory, jurists found many ways effec-

[3] *See* Sayre, *supra* note 1, at 667; Boston Glass Manufactory v. Binney, 21 Mass. (4 Pick.) 425, 427 (1827). This conclusion may also be inferred from the absence of any such action in the case reports. This Note argues that this absence reflects a different conceptual structure than that which emerged during the latter half of the 19th century. *Cf.* White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671, 672 (1977) (emergence of torts in America in mid-19th century "owed as much to changes in jurisprudential thought as to the spread of industrial machines").

[4] *See* Lumley v. Gye, 2 El. & Bl. 216, 246, 118 Eng. Rep. 749, 760 (Q.B. 1853) (Coleridge, J., dissentiente) ("in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties"); Morris v. Langdale,

tively to protect interests we consider contractual from third-party interference. This difference reflects a unique conception of contract, property, and tort held by early nineteenth century lawyers. This conceptual scheme allowed courts to shield exchanges of goods as well as domestic and employment relations from a variety of third-party interferences without acknowledging that the aggregation of these safeguards embodied a distinct category of protected contractual interests.

At the turn of the nineteenth century, contracts were envisioned primarily as devices for transferring title to particular physical objects from one person to another; contracts dealt with the exchange of ownership rather than the exchange of obligations.[5] The Blackstonian model considered a contract for sale of goods, for example, as creating in each party a *chose in action*, that is, a right to possess an object not presently in possession.[6] One party to the contract promised to transfer title to the goods, while the other promised to transfer "title" to the payment for the goods.[7] An extensive body of law developed around the question of *when* title had passed.[8] This was an important question, for its answer determined when an action could be maintained against a third party for interfering with the owner's rightful possession of the object. Under the Blackstonian model, therefore, interference

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2 Bos. & Pul. 284, 289, 126 Eng. Rep. 1284, 1287 (C.P. 1800). However, as early as 1830, in the context of slanderous words causing breach, Thomas Starkie criticized the view limiting a plaintiff to an action against the other party to the contract where a third party was responsible for the libel. 1 T. STARKIE, A TREATISE ON THE LAW OF SLANDER AND LIBEL 205–06 & n.x (2d ed. 1830).

[5] 2 W. BLACKSTONE, COMMENTARIES *440–70; 2 J. KENT, COMMENTARIES ON AMERICAN LAW *277–87, *363–401; 1 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 380–81 (1795); *see* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 162–63 (1977). *But see* Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 543–47 (1979) (arguing Blackstone's treatment of contract reflects merely an organizational scheme and not a substantive view of contract). For a critical treatment of Blackstone's view of contract, see Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 321–25, 337–42 (1979).

[6] 2 W. BLACKSTONE, *supra* note 5, at *396–97; *accord*, Bibb v. M'Kinley, 9 Port. 636, 644 (Ala. 1839). *See also* Dial v. Gary, 14 S.C. 573, 581 (1880) ("a chose in action, then, embraces two ideas; first, a visible, tangible thing, and, second, the right to sue for and recover that thing").

[7] *See* Kennedy, *supra* note 5, at 337–42. This doctrine often worked to the buyer's disadvantage. For example, in Tarling v. Baxter, 6 Barn. & Cress. 360, 108 Eng. Rep. 484 (K.B. 1827), the purchaser of a haystack promised to pay for it in a month and agreed not to remove the hay until then. Unfortunately, fire destroyed the haystack. The court held the buyer liable for the payment: title to the stack had passed to him.

[8] For a discussion of the passing of title, see 2 J. KENT, *supra* note 5, at *363–401.

by a third party with the performance of a contract was treated as interference with property rather than as an attempt to prevent the performance of an obligation. Thus, actions such as trespass and trover could be used by parties to the contract to recover damages from interfering third parties.[9]

Since, in theory, contracts in the early nineteenth century primarily exchanged titles to physical objects and not intangible obligations, many employment agreements were not thought of as contracts, but as status relations.[10] These status relations were often quite personal and intimate; they included not only the employment relations between masters and their domestic servants,[11] apprentices,[12] and journeymen,[13] but also the legally analogous familial ties between husband and wife, parent and child, and guardian and ward.[14] In general, once

[9] Stevens v. Wilson, 6 Hill 512 (N.Y. 1844); Kimball v. Harman, 34 Md. 407, 411–12 (1871) (where the plaintiff sued an interloper for interfering with his contract to purchase bedsteads, if they "had been so far delivered to the plaintiffs as to vest in them the right of possession, then, for any unauthorized obstruction of or interference with that right . . . the actions of *trespass* or *trover* were the appropriate remedies for the recovery of damages").

[10] *See* 1 W. BLACKSTONE, *supra* note 5, at *422–66; 3 *id.* at *138–43. *See generally* 4 W. HOLDSWORTH, *supra* note 1, at 379–87; H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).

[11] At early common law, the master-servant label was attached only to domestic servants who were "engaged to perform work within the house, or to render services to the household or to members of the family in connection with the home establishment." Anon., *On the Contract of Domestic Service*, 19 J. JURIS. 81, 86 (1875); *see* Seavey, *Liability to Master for Negligent Harm to Servant*, 1956 WASH. U.L.Q. 309; Burgess v. Carpenter, 2 S.C. 7, 9 (1870) (at common law in England the master stood in loco parentis to the servant).

[12] *See* Barber v. Dennis, 6 Mod. 69, 87 Eng. Rep. 828 (K.B. 1794).

[13] Hart v. Aldridge, 1 Cowp. 54, 55–56, 98 Eng. Rep. 964, 964 (K.B. 1774) ("A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece."). Lofft 493, 98 Eng. Rep. 764 (K.B. 1774). *See also* Boston Glass Manufactory v. Binney, 21 Mass. (4 Pick.) 425 (1827) (assuming journeymen-pieceworkers were servants), where the court held that no enticement action could be maintained because the plaintiff's workers had been persuaded to leave after their term of service had expired. William Nelson interprets this case as a refusal by the Massachusetts court

> to extend the concepts of property with which the courts analyzed cases involving apprentices, children, and other servants to a new legal category — that of industrial laborers. The plaintiffs, in short, were attempting to extend rules inherited from the economically restrictive medieval guilds to the newly arising industries of nineteenth century America.

W. NELSON, AMERICANIZATION OF THE COMMON LAW 161 (1975). However, from the context of the decision, it is clear the court did consider these workers to be "servants"; it simply determined that no enticement had occurred. Moreover, the great early 19th century treatise writer, Chancellor Kent, clearly regarded hired persons such as journeymen to be covered by the law of master and servant. 2 J. KENT, *supra* note 5, at *258.

[14] *See generally* 1 W. BLACKSTONE, *supra* note 5, at *422–32; H. WOOD, *supra* note 10.

the relation had been created, each party's rights were governed by a well-developed set of legal rules. For example, a master was obliged to provide food, shelter, and security for his servant, while the servant in return was expected to provide personal service.[15] Servants were legally identified with their masters, and so possessed little individuality and personal independence. The common law permitted a master to maintain an action for loss of services against a third party who unreasonably detained or beat his servant.[16] In accord with the master's paternalistic obligation to provide care for his servant, the law granted a master damages for the additional expense of caring for the servant if he was legally responsible for the servant's health.[17]

In order to fulfill his expectations of service, a master was given the power to direct a servant's activities and even to discipline him for disobedience.[18] The law strengthened a master's control over his servants by preventing others from interfering with the relationship during the term of service.[19] An action for enticement[20] was available against a third party

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[15] *See generally* 1 W. BLACKSTONE, *supra* note 5, at *422–28; 2 J. KENT, *supra* note 5, at *258–66; C. SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT (1852).

[16] 3 W. BLACKSTONE, *supra* note 5, at *142; *see* Dennis v. Clark, 56 Mass. (2 Cush.) 347, 350 (1848) (dictum); Woodward v. Washburn, 3 Denio 369, 371 (N.Y. Sup. Ct. 1846); Jones v. Brown, 1 Esp. 217, 170 Eng. Rep. 334 (K.B. 1794) (injuring servant by either intentional or negligent acts, depriving a master of his services, renders defendant liable for the loss); H. WOOD, *supra* note 10, at 436–39. There is some authority that where a master was not responsible for the servant's care, he could not maintain an action for the injury, but for only the loss of service. *Id.* at 440–45. The servant, however, could maintain an action for assault and battery in his own right. *Id.* at 440–41. It should be emphasized that recovery for harm to another person was confined to cases involving one of the four domestic relations. For example, in Anthony v. Slaid, 52 Mass. (11 Met.) 290 (1846), a plaintiff under contract with a town to support at a fixed rate all the town paupers "in sickness and in health" could not maintain an action against a defendant whose wife assaulted one of the paupers, thereby putting the plaintiff to increased expense for his care and support.

[17] Woodward v. Washburn, 3 Denio 369, 371 (N.Y. Sup. Ct. 1846).

[18] *See* 2 J. KENT, *supra* note 5, at *211. Kent urged that the master's right to "correct" his servant be limited to apprentices and menial servants, and not extended to journeymen.

[19] The legal implications of recognizing a master-servant relation were enormous. Where the relation existed, for example, a third party who enticed a servant was not permitted to interpose any defenses the servant might have offered to challenge the right of the master to the service. *See, e.g.*, Keane v. Boycott, 2 H. Bl. 511, 126 Eng. Rep. 676 (C.P. 1795).

[20] *See* cases cited note 13 *supra*; 3 W. BLACKSTONE, *supra* note 5, at *142; Gunter v. Astor, 4 J.B. Moore 12 (C.P. 1819). In Haight v. Badgeley, 15 Barb. 499 (N.Y. App. Div. 1853), the plaintiff was permitted to recover damages for loss of service as an aggravation of a trespass. *See also* Aldridge v. Stuyvesant, 1 Hall 210 (N.Y. Sup. Ct. 1828) (an action lies in favor of a landlord against any person who wrongfully disturbs his tenants so they abandon their lease).

who persuaded a servant to leave his employment before the expiration of his term, while an action for harboring[21] could be lodged against any person who continued to employ a runaway servant after receiving notice of his premature departure from another servitude. These suits sought to deny servants any opportunity for alternative employment during the term of their service.[22] Unable to feed themselves or their families if they left their masters, servants had little choice but to obey them for the duration of the agreement.[23]

The early nineteenth century master-servant action of enticement differed in three fundamental respects from our current understanding of tortious third-party interference. First, there was no requirement that the master, as plaintiff, prove the existence of a contract between himself and his servant. Instead, the master had merely to show that a "subsisting" relation of service existed.[24] Second, the master received protection from enticement only after the service had actually begun. The enticement action did not extend to promises for future service.[25] Third, though masters could sue third parties for enticing their servants away, servants could not sue third parties for procuring their dismissal.[26] The purpose of the

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[21] *See* Stuart v. Simpson, 1 Wend. 376 (N.Y. Sup. Ct. 1828); Blake v. Lanyon, 6 T.R. 221, 101 Eng. Rep. 521 (K.B. 1795); *cf.* Milburne v. Byrne, 17 Fed. Cas. 283 (D.C. Cir. 1805) (employment of the servant by the defendant is prima facie evidence of enticement); Winsmore v. Greenbank, Willes 577, 125 Eng. Rep. 1330 (C.P. 1745) (the procuring of a breach of marriage contract of a wife is actionable by the husband even though the wife cannot be sued).

[22] Not surprisingly, the actions for enticement and harboring originated in England to stem the rise in wages and the breakdown of feudal authority created by the labor shortages that accompanied the Black Plague. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459–64 (4th ed. 1936); Sayre, *supra* note 1, at 665. The actions for enticement and harboring were included in the Statute of Laborers in 1350 to remedy alleged deficiencies in the common law. However, most jurists by the end of the 18th century assumed that these statutory actions had become incorporated into the common law. *Id.* at 666.

[23] A servant could make a contract to begin work at the conclusion of his current term. *See* Boston Glass Manufactory v. Binney, 21 Mass. (4 Pick.) 425 (1827); Nichol v. Martyn, 2 Esp. 732, 170 Eng. Rep. 513 (K.B. 1799).

[24] *See* J. SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS § 487 (1st ed. 1870); Peters v. Lord, 18 Conn. 337 (1847); Maltby v. Harwood, 12 Barb. 473 (N.Y. App. Div. 1852) (although an apprenticeship contract is void, the relation of master and servant exists while the parties reside together); Sykes v. Dixon, 9 Ad. & E. 693, 112 Eng. Rep. 1374 (K.B. 1839); *cf.* Evans v. Walton, 36 L.J.C.P. (n.s.) (1867) (enticing of child).

[25] *See* Haight v. Badgeley, 15 Barb. 499, 501 (N.Y. App. Div. 1853).

[26] This result probably reflected economic reality: masters were unlikely to recover damages from penurious, albeit breaching, servants. *See* 4 W. HOLDSWORTH, *supra* note 1, at 386. The servant, on the other hand, could maintain an action against the master for his wrongful dismissal. Successful suits by servants were rare, probably because masters were usually able to discover some flaw in the servant's performance justifying termination of the relation. *See, e.g.*, Vicars v. Wilcocks, 8 East 1, 103

action in enticement — preventing a servant from leaving his service before the expiration of his term — did not require that the right against third-party interference be reciprocal.[27]

Not only did the law prior to 1850 protect certain types of agreements — master-servant relations and exchanges of title in tangible property — from third-party interference, but also it protected all types of agreements from certain forms of behavior — slander and libel,[28] fraud,[29] coercion,[30] and civil

Eng. Rep. 244 (K.B. 1806). In *Vicars*, the defendant procured an employee's dismissal from a term contract by allegedly slandering him, after which another employer also refused him work. The court held that the action could not be maintained because "special damage" could not be shown to have resulted directly from the spoken words. His dismissal was a consequence of his employer's wrongful act, not the libel. And the plaintiff's inability to obtain another job was likely to have resulted more from the dismissal than the libel. *Id.* at 3–4, 103 Eng. Rep. at 245. *Compare* Kelly v. Partington, 5 B. & Ad. 645, 110 Eng. Rep. 929 (K.B. 1833) (domestic servant refused work by a person intending to hire her not permitted to recover special damages against former master who accused her of stealing), *with* Kelly v. Partington, 4 B. & Ad. 700, 110 Eng. Rep. 619 (K.B. 1833) (action of slander maintainable where former master gave libelous per se character reference maliciously), *and* Knight v. Gibbs, 1 Ad. & E. 43, 110 Eng. Rep. 1124 (K.B. 1834) (special damages resulting from dismissal recoverable from third party who unreasonably influenced employer's will). The first case in which a servant successfully sued a third party for procuring his dismissal by otherwise lawful means is Chipley v. Atkinson, 23 Fla. 206, 1 So. 934 (1887); *see* pp. 1525–26 *infra*. *See generally* T. COOLEY, A TREATISE ON THE LAW OF TORTS 278–82 (1879).

[27] *See* 3 W. BLACKSTONE, *supra* note 5, at *141–43; 1 *id.* at *429. Blackstone explained this result as follows: the master purchased the service of his domestics for a period; this gave him a property right to the labor of the servant. But the servant had no property right in the "company, care or assistance of the superior . . . and therefore the inferior can suffer no loss or injury [if the relation is terminated]." 3 *id.* at *142–43.

[28] *See* 1 T. STARKIE, *supra* note 4, at 205–07 & n.x (plaintiff whose contract has been devalued by slanderous words of defendant causing promisee not to perform may be able to maintain an action for special damage). It appears that the slander had to be actionable per se, and that special damage due to the independent acts of contracting parties reacting to the slander could not be shown. Kelly v. Partington, 4 B. & Ad. 700, 110 Eng. Rep. 619 (K.B. 1833); Kelly v. Partington, 5 B. & Ad. 645, 110 Eng. Rep. 929 (K.B. 1833); Morris v. Langdale, 2 Bos. & Pul. 284, 126 Eng. Rep. 1284 (C.P. 1800).

[29] White v. Merritt, 7 N.Y. 352 (1852) (false representation); Snow v. Judson, 38 Barb. 210 (N.Y. App. Div. 1862); Green v. Button, 2 C.M. & R. 707, 150 Eng. Rep. 299 (Ex. 1835) (where plaintiff had no action against the seller, he could maintain action against defendant who by means of a false claim of lien and by words discrediting plaintiff, induced one who had sold goods to plaintiff to refuse to deliver them). *See also* Adams v. Paige, 24 Mass. (7 Pick.) 542 (1829) (fraudulent conveyance destroying value of plaintiff's contract right); Penrod v. Morrison, 2 Pen. & W. 126 (Pa. 1830) (holding actionable a conspiracy between a debtor and a third person to defraud a creditor by the debtor's delivering property over to the third party and then taking the benefit of the insolvency law).

[30] Tarleton v. M'Gawley, Peake 270, 170 Eng. Rep. 153 (K.B. 1793) (frightening African natives so they would not trade with plaintiff held actionable); Garrett v. Taylor, Cro. Jac. 567, 79 Eng. Rep. 485 (K.B. 1621) (action on the case maintainable where defendant threatened plaintiff's workmen and customers so they desisted from

"conspiracy"[31] — committed by third parties. Thus, even contracts that were not generally shielded from outside interference were protected from defamatory statements that undermined the agreement. For instance, a shopowner successfully sued for slander a defendant who had induced a supplier to stop delivery of goods to the plaintiff by falsely claiming that he held a lien on them.[32] Moreover, damages for defamation and fraud were not limited to those resulting from the breach of enforceable contracts. Damages were awarded if illegal behavior occasioned the breach of unenforceable or at will contracts,[33] or caused injury to ongoing business relationships.[34] Therefore, even though the contract was void under the statute of frauds, a seller of hogs was permitted to maintain an action for fraud against a third party who had deprived him of a likely sale by falsely telling a buyer who had tentatively agreed to purchase the hogs that they had already been sold to another buyer.[35] By protecting this agreement from fraud, the court permitted a tort remedy against the deceitful third party even though no contract remedy was available against the misinformed expected buyer.

In addition to these civil actions, the criminal law of conspiracy was often invoked before 1850 to punish and deter certain behavior that threatened contractual interests. During the first half of the nineteenth century, large numbers of journeymen who had formerly worked in homes or small workshops were brought together by entrepreneurs into manufactories.[36] When groups of these laborers organized associations to press for higher (or merely stable) wages, their bosses sometimes responded by initiating criminal actions to prevent these labor organizations from interfering with the employment of nonunion workers.[37] For example, the New York Supreme

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working or trading with him); *see* 1 M. BACON, A NEW ABRIDGMENT OF THE LAW 83 (1st Am. ed. 1811).

[31] *See* Gregory v. Duke of Brunswick, 6 Man. & G. 205, 134 Eng. Rep. 866 (C.P. 1843) (conspiracy to heckle plaintiff and thus prevent him from performing as an actor); Clifford v. Brandon, 2 Camp. 358, 170 Eng. Rep. 1183 (C.P. 1810) (same).

[32] Green v. Button, 2 C.M. & R. 707, 150 Eng. Rep. 299 (Ex. 1835).

[33] *See* Riding v. Smith (Ex. ca. 1876), *reported in* 13 ALB. L.J. 441 (1876). *See also* cases cited note 29 *supra*.

[34] *See, e.g.*, Gregory v. Duke of Brunswick, 6 Man. & G. 205, 134 Eng. Rep. 866 (C.P. 1843). *See also* cases cited note 30 *supra*.

[35] Benton v. Pratt, 2 Wend. 385 (N.Y. Sup. Ct. 1829).

[36] *See* J. RAYBACK, A HISTORY OF AMERICAN LABOR 48–50 (1966).

[37] *See, e.g.*, Commonwealth v. Pullis (Philadelphia Mayor's Ct. 1806) (Philadelphia cordwainers), *reprinted in* 3 J. COMMONS & E. GILMORE, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (1910). Commons and Gilmore note that there were 17 trials for labor conspiracies prior to 1842. 3 J. COMMONS & E. GILMORE, *supra*, at 19. Reports of these cases have been reprinted in volumes three and four of their work.

Court in 1835 sustained an indictment for "conspiracy to disrupt trade or commerce" against members of an association of journeymen who attempted to procure the dismissal of a nonmember by organizing a walkout of their employer.[38] Although these conspiracy cases rested more on worries about the potential labor market power of organized workers than on concerns about the integrity of individual employment agreements,[39] they nonetheless effectively shielded such agreements from third-party interference.

Thus, despite the absence of a formal interference tort prior to 1850, relationships that we describe as contractual were guarded from a variety of third-party interferences. Nevertheless, two important types of agreements — personal service contracts not of a master-servant nature and executory contracts not involving illegal behavior — were generally left unprotected from outside interference. If, for instance, a person agreed to sing in the plaintiff's theater for a season, the plaintiff could not maintain an enticement action against a third party who injured the singer, forcing him to quit before the season was completed.[40] Similarly, if one party to an executory contract was merely *persuaded* to breach, the promisee had no present right to the goods or services, and therefore could not maintain an action against the third party.[41] And in executory agreements for goods and services, unless the injured party could show that the nonperforming party was defrauded, slandered, libeled, or coerced in some way, he was limited to proceeding against the other party to the contract.

That personal services and executory contracts were often left unshielded from third-party interference is explained, in part, by the "intervening will" view of causation that held sway during Stage I.[42] This theory of causation severely limited liability by discouraging judges from looking beyond the

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[38] People v. Fisher, 14 Wend. 9 (N.Y. Sup. Ct. 1835). In 1842, the Massachusetts Supreme Judicial Court decriminalized labor union activities that did not seek unlawful ends, or lawful ends by unlawful means. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842). *But see* pp. 1529–37 *infra*.

[39] *See* J. RAYBACK, *supra* note 36, at 54–60.

[40] Taylor v. Neri, 1 Esp. 386, 170 Eng. Rep. 393 (C.P. 1795); *see* Hart v. Aldridge, 1 Cowp. 54, 56, 98 Eng. Rep. 964, 964–65 (K.B. 1774) (dictum) (Mansfield, J.) (a journeyman who works in own home for a number of people is not the servant of any particular master).

[41] *See* Haight v. Badgeley, 15 Barb. 499, 501 (N.Y. App. Div. 1853). The rules regulating bailments, whereby the bailor was permitted to maintain an action against an interfering third party for recovery of the object, may be the sole exception. *See* 2 W. BLACKSTONE, *supra* note 5, at *452–53. However, since the bailor, the rightful owner, obtained his title independently of the bailment contract, bailments may be distinguished from the situation discussed in text.

[42] *See generally* H.L.A. HART & A. HONORE, CAUSATION IN THE LAW (1959). Synonyms for causation in 18th and 19th century decisions included consequences,

"last wrongdoer," such as a freely breaching party, in assessing legal responsibility for injuries.[43] Thus, in *Ashley v. Harrison*,[44] a singer refused to perform in the plaintiff's theater for fear that the audience would mistreat her as a result of the defendant's allegedly libelous publication about her. The court refused to hold the defendant liable for the singer's nonperformance because the latter's refusal to sing "might have proceeded from groundless apprehension of what never might have happened."[45] In short, the singer's will was not, or should not have been, overborne by the defendant's acts. On the other hand, third-party actions for fraud, defamation, and coercion were generally permitted where such illegal behavior reasonably overcame the informed will of the nonperforming party.[46]

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remoteness, "some connection with the damage," "resulted from," "damage ensuing from" some act, and "natural and immediate result." Of course, the explanation of causation sketched in the text does not completely explain why master-servant protection was not extended to, for example, personal services contracts. Even if a contractor engaged for a term was beaten by the defendant and thereby prevented from performing, a court would refuse to permit the other party to bring an action for loss of services on the ground that the personal services contractor was not a "servant." Taylor v. Neri, 1 Esp. 386, 170 Eng. Rep. 393 (C.P. 1795) (singer not a servant).

[43] As later formulated by Lord Justice Brett in Bowen v. Hall, 6 Q.B.D. 333, 338 (1881), the rule (which he disputed) is that "the law implies that the act of the [nonperforming] . . . party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendants' act." The notion of an intervening free will was a particular instance of remote causation. *See generally* Beale, *Recovery for Consequences of an Act*, 9 HARV. L. REV. 80, 81 (1895); Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 106–11 (1911). An explanation of causation similar to that in the text is suggested by the editor's note to Vicars v. Wilcocks, 8 East 1, 103 Eng. Rep. 244 (K.B. 1806), in 2 J. SMITH, A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW 536 (6th Am. ed. 1866).

[44] 1 Esp. 48, 170 Eng. Rep. 276 (K.B. 1793) (action on the case not maintainable against third party). *See also* Ashley v. Harrison, Peake 256, 170 Eng. Rep. 148 (K.B. 1793) (theater owner cannot maintain *libel* action against publisher; damage too remote); Vicars v. Wilcocks, 8 East 1, 103 Eng. Rep. 244 (K.B. 1806) (third party's slander resulting in servant's wrongful dismissal from term contract not actionable as the servant can sue the master).

[45] 1 Esp. at 49, 170 Eng. Rep. at 276. That Lord Kenyon was especially concerned that the fragile will of the actress in this case was the true "cause" of the harm is further supported by his opinion in the earlier action brought by the same party under a libel theory. According to Lord Kenyon, if the action were to be permitted, it would "depend entirely on the nerves of the actress; if she chooses to appear on the stage again, no action can be maintained; if she does not, her refusal is to be followed with an action." This result he rejected. Ashley v. Harrison, Peake 256, 258, 170 Eng. Rep. 148, 149 (K.B. 1793). *See also* Kelly v. Partington, 5 B. & Ad. 645, 651, 110 Eng. Rep. 929, 931 (K.B. 1833) (nondefamatory words cannot be the direct cause of a master's failure to hire plaintiff; instead the master's "caprice" caused plaintiff's injury).

[46] *See* pp. 1516–17 *supra*. *Compare* Vicars v. Wilcocks, 8 East 1, 103 Eng. Rep. 244 (K.B. 1806) (plaintiff's action for slander against a third party for causing his

This notion of causation seems inconsistent with the action of enticement. To recover damages from third parties for enticement, it was unnecessary to prove the servant's will had been overborne. The wronged master had only to show the servant was in another's employ, or had left at the third party's urging. Blackstone defended this result on the grounds that the servant's performance of his duties constituted property "trespassed" upon by a third-party interferor.[47] Yet it would have been possible to ground the master's property right in the contract rather than in the status relation. As this Note will show later,[48] the reconceptualization of the enticement action as an interference tort involved precisely that shift in legal thought. In Stage I, an abstract theory of contract had not yet become the central organizing principle linking status relations to exchanges of tangible goods.[49] In short, there would be no generalized tort of interference with contractual relations until lawyers transformed the notion of contract into an abstract embodiment of property entitlements, rather than merely an instrument exchanging titles or obligations.

By the end of Stage I, important social and theoretical developments began to force a reevaluation of the law of third-party interference. First, the centralization of journeymen into manufactories marked the transition between the paternalistic master-servant relation of the eighteenth century and the depersonalized industrial employment contract of the late nineteenth century.[50] Unlike the domestic servant, the industrial worker did not maintain a personal relationship with his employer, nor live in his house. And the master was not chargeable with the worker's "[m]oral indoctrination, Christian train-

dismissal not maintainable because his master exercised independent judgment in discharging him), *with* Knight v. Gibbs, 1 Ad. & E. 43, 110 Eng. Rep. 1124 (K.B. 1834) (landlord's slanderous words causing tenant to dismiss plaintiff from his service actionable because the tenant disbelieved the slander so the landlord "caused" the dismissal through his power over the tenant-employer). That jurists in Stage I were aware of the problem of causation is apparent; yet there was little theoretical development of causality until the mid-19th century. Hence the line between conduct "reasonably" overcoming the will of the breaching party and that "unreasonably" influencing him was extremely fuzzy. Accordingly, one finds cases like Crain v. Petrie, 6 Hill 523 (N.Y. 1844) (no action maintainable for lost profits where defendant sold plaintiff, a butcher, diseased sheep representing them to be healthy whereby third parties breached their contracts to purchase plaintiff's meat), in which the causation limitation was invoked, but where the court seemed to demand a very high standard of "reasonableness."

[47] *See* note 27 *supra*; Lumley v. Gye, 2 El. & Bl. 216, 245–53, 118 Eng. Rep. 749, 760–62 (Q.B. 1853) (Coleridge, J., dissentiente).

[48] *See* pp. 1523–28 *infra*.

[49] *See* G. GILMORE, THE DEATH OF CONTRACT 11–12 (1974).

[50] *See* 3 J. COMMONS & E. GILMORE, *supra* note 37, at 19–58. *See generally* J. RAYBACK, *supra* note 36.

ing and instruction in literacy."[51] The rise of this new type of worker forced courts to decide whether to classify them as "servants," with attendant protection against third-party interference, or under some other category. Even more important, the classification of industrial workers as "servants" would undermine the rationale for protecting paternalistic master-servant status relations. If the master no longer cared for the "servant" as he would a child or a wife, permitting him to sue for "enticement" began to appear antiquated. And once masters could not justify the enticement tort by analogy to interferences with property rights, a new justification for the enticement action had to be developed.

Second, an understanding of contract as creating mutually enforceable obligations emerged that made the title exchange view of contract virtually obsolete.[52] The increasing importance of executory contracts during Stage I hastened the demise of the title exchange theory; such contracts were not easily described as passing present "title" even to tangible physical objects.[53] Pressures built to find some means of protecting the expectations generated by these contracts from nonparty interlopers. Thus, the emerging theory no longer defined master-servant relations as a legal category wholly distinct from contract, but as a subset of contract.[54] Master-servant relations, like personal services, insurance, and sale of goods agreements, became viewed as simply different types of contracts. In the process, some of their common features — such as consent and consideration — formed the basis for a general theory of contract.[55] Yet the placement of master-servant relations, historically protected against enticement, within a legal category dominated by executory contracts, which provided no acknowledged safeguards against interference, was a contradiction that could not easily be tolerated in a coherent conceptual system of contract. A fusion of the opposing views into one general theory was likely to occur, but it was still uncertain at the end of Stage I what form that theory would take. A consistent approach would either have extended to all contracts the master-servant action of enticement, or extended to all master-servant relations the contract notion that redress was available only against a contracting party.

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[51] B. BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY 30–31 (1960); *see* M. HORWITZ, *supra* note 5, at 207–09.

[52] M. HORWITZ, *supra* note 5, at 161–74.

[53] *Id.*

[54] *See, e.g.*, 1 T. PARSONS, LAW OF CONTRACTS 518–36 (1st ed. 1853); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 466 (1973).

[55] *See generally* 1 T. PARSONS, *supra* note 54, at 353–408.

II. *Lumley v. Gye* AND THE THEORY OF CONTRACTUAL PROPERTY

In Stage II, 1850–1890, of the development of the tort of interference with contractual relations, jurists began to integrate the substantive rules of master-servant and contract. First, courts extended the action of enticement to protect all employment relations from interference. Second, the enticement action was reconceptualized as one resting on the contract, not the master-servant relation. Executory agreements, formerly excluded from master-servant enticement actions, came under the umbrella of the reformulated contractual action. And since contracts, unlike relations, brought together parties of formally equal status, by the end of Stage II a *servant* was allowed to maintain an action for interference to protect *his* interest in the contract.

The reformulation of the law of third-party interference blossomed in 1853 with the landmark case of *Lumley v. Gye*.[56] A noted opera singer had signed an executory contract with a theater operator, Lumley, to perform exclusively for a definite term. Before the performance of the contract had begun, Gye, a rival theater operator, persuaded the singer to break her contract and sing for him. A majority of the four-judge court characterized the opera singer as a "servant," and therefore permitted Lumley to sue Gye for third-party interference under the master-servant doctrine of enticement.[57]

The *Lumley* decision transformed the law of third-party interference in three significant ways. First, the *Lumley* court initiated protection for an executory contract from interference by persuasion. In Stage I, master-servant agreements had been conceptualized as status relations, not as contracts, and the relation did not exist until the service had actually com-

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[56] 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853). Each of the four judges sitting, Crompton, Erle, Wightman, and Coleridge delivered opinions; only Coleridge dissented.

[57] *Id.* at 227–29, 231–32, 239–44, 118 Eng. Rep. at 753–55, 758–59. The rule against procuring a servant to depart from his master's service "applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue." *Id.* at 224–25, 118 Eng. Rep. at 753 (Crompton, J.). "[W]here a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant . . . ." *Id.* at 229, 118 Eng. Rep. at 754 (Crompton, J.). "[T]he right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same." *Id.* at 231, 118 Eng. Rep. at 755 (Erle, J.). The employer's right to maintain an action for enticement "extends to the class of persons who have contracted for personal service for a time . . . ." *Id.* at 240, 118 Eng. Rep. at 758 (Wightman, J.).

menced. Thus, no action in enticement was available against a third party who convinced a servant to leave his master before beginning performance for the agreed term. The *Lumley* court, however, shielded a master-servant relationship between the theater owner and the opera singer even though the time for performance had not yet arrived.[58]

Second, by labeling an opera singer a servant, a court for the first time broadened the action of enticement to include an impersonal employment contract between parties of equal status. Once the meaning of servant was no longer limited to employment relationships that were domestic, personal, and paternalistic,[59] third parties could be prevented from enticing industrial employees and other workers. Thus, in 1871, in *Walker v. Cronin*,[60] the Massachusetts Supreme Judicial Court extended the enticement action to workers engaged in the manufacture of boots. The same year, in *Salter v. Howard*,[61] the Georgia Supreme Court applied the action to sharecroppers. After *Walker* and *Salter*, the distinction between domestic servants and other employees gradually disappeared from the law of third-party inducement; the enticement action became available to all employers whose employees were persuaded to leave their service.[62]

Third, expanding the scope of enticement to all employment relations produced an abstract conception of third-party interference that eventually would permit extending the enticement action to nonemployment contracts as well. Abandoning the distinction between master-servant relations and other forms of service agreements made clear that it was the abstract contract rather than the particular status relation that was the source of protection.[63] Without this distinction, the master-servant relation would meld with these other agreements that traditionally enjoyed no general third-party protection. Yet, rather than abolish the action of enticement as an anachronism, the *Lumley* court advanced a general theory

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[58] *See also* Salter v. Howard, 43 Ga. 601 (1871).

[59] *See, e.g.*, Evans v. Walton, 36 L.J.C.P. (n.s.) 307 (1867) (enticing of daughter).

[60] 107 Mass. 555 (1871).

[61] 43 Ga. 601 (1871); *see* Lee v. West, 47 Ga. 311 (1872); Haskins v. Royster, 70 N.C. 601 (1874); Huff v. Watkins, 15 S.C. 82 (1881). *But see* Barron v. Collins, 49 Ga. 580 (1873).

[62] *See* Johnston Harvester Co. v. Meinhardt, 60 How. Pr. 168, 174 (N.Y. Sup. Ct. 1880); Frank v. Herold, 63 N.J. Eq. 443, 52 A. 152 (1902) (any person who works for another for a salary is a "servant" in the eyes of the law).

[63] *See* 2 El. & Bl. at 232, 118 Eng. Rep. at 755 (Erle, J.) ("the nature of the service contracted for is immaterial"). *See also* Walker v. Cronin, 107 Mass. 555, 567 (1871) (enticement doctrine "is founded upon the legal right derived from the contract").

of contractual property in which the procurement of a breach, and not the loss of service provided the basis of recovery.[64] According to *Lumley*, breach of a contractual promise is a violation of property rights.[65] Intangible property created by the promise of performance in a contract was apparently considered as worthy of protection as physical property already created by labor or transferred by inheritance.[66] The *Lumley* court did not, therefore, make the modern distinction between a contractual obligation enforceable against a particular person and a property right enforceable against the world.[67]

Although the theory of contractual property expounded in *Lumley* and *Walker* seemed to permit courts to guard nonemployment contracts, such as sales of goods, from interference by third-party persuasion, no court actually entertained such an action during Stage II.[68] As in Stage I, courts protected

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[64] The court could easily have determined, as Justice Coleridge argued, that under the appropriate theory of contract, plaintiffs were confined to remedies against the other party to the agreement. 2 El. & Bl. at 246, 118 Eng. Rep. at 760 (Coleridge, J., dissentiente). This was the approach taken in Burgess v. Carpenter, 2 S.C. 7 (1870), which held that a sharecropper was not a servant, but "a party to the same contract" with the plaintiff. *Id.* at 10. *See also* Huff v. Watkins, 15 S.C. 82, 86–87 (1880) (commenting on *Burgess*).

[65] 2 El. & Bl. at 243, 118 Eng. Rep. at 759 (Wightman, J.).

[66] "[T]he procurement of a violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property." *Id.* at 232, 118 Eng. Rep. at 755 (Erle, J.); *see* Bixby v. Dunlap, 56 N.H. 456, 461 (1876) (the plaintiff "was the owner of the beneficial interest in the contract").

[67] *See generally* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

[68] Walker v. Cronin, 107 Mass. 555 (1871), and Jones v. Stanly, 76 N.C. 355 (1877), are sometimes cited as supporting the proposition that after 1853 all contracting parties, not just employers, received protection against interlopers who induced a breach. *Walker* declared that the action of enticement "is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant; . . . it applies to all contracts of employment, if not to contracts of every description." 107 Mass. at 567 (dictum). As *Walker* involved workers enticed from their employ, this dictum does no more than indicate that this court would have considered extending the enticement action to nonemployment contracts. *Jones* involved a plaintiff who alleged that the defendant, president of a corporation, "induced" the corporation not to perform a contract. The court held the action maintainable. However, since the corporation and its president were principal and agent, *Jones* appears to be based more on agency law than upon interference with contractual relations.

Some commentators anticipated the extension of *Lumley* and Bowen v. Hall, 6 Q.B.D. 333 (1881), to all contracts. *See, e.g.*, T. COOLEY, A TREATISE ON THE LAW OF TORTS 280 (1879) (arguing there was "no peculiar sacredness to the right to service over any other right"); Schofield, *The Principle of* Lumley v. Gye *and Its Application*, 2 HARV. L. REV. 19, 23 (1888) ("consistency requires" that the tort "be extended"). In addition, many of the Stage I "exceptions" to the general rule against recovery for third-party interference continued to be recognized during Stage II. *See* cases cited notes 69, 71 *infra*.

nonemployment contracts from interference only when the third party induced termination of the contractual arrangement by such unlawful acts as fraud or defamation.[69] Thus, in *Rice v. Manley*,[70] the court permitted an action for fraud against a defendant who, by representing that the plaintiff-buyer was no longer interested in certain goods, caused the other party to withdraw from the contract. But in *Ashley v. Dixon*,[71] where the defendant induced a seller of land to breach his purchase agreement merely by offering him a higher price, the court denied the action, insisting the plaintiff's only remedy was to sue on the contract.

Despite the shift in legal theory from status to contract, retaining the enticement action meant that some of the incidents of status would remain. Because the enticement action shielded even agreements terminable at will, workers subject to the action were foreclosed from seeking or accepting other employment. Not surprisingly, post-Civil War southern states easily adjusted to the new contractual regime by defining black sharecroppers as servants, thus denying them employment mobility.[72] This legal servitude imposed upon newly freed slaves most clearly reflects the persistence of the nonreciprocal status paradigm. It was not until 1887, in *Chipley v. Atkin-*

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[69] *See, e.g.*, McNary v. Chamberlain, 34 Conn. 384 (1867) (rubbish dumped on road with intent to make plaintiff's performance of contract to keep highway in repair more burdensome); Marsh v. Billings, 61 Mass. (7 Cush.) 322 (1851) (false representation); Hughes v. McDonough, 43 N.J.L. 459 (1881) (loosening shoe on horse shod by plaintiff with intent to harm him actionable); State v. Stewart, 59 Vt. 273, 2 A. 559 (1887) (criminal conspiracy).

[70] 66 N.Y. 82 (1876).

[71] 48 N.Y. 430 (1872); *see* Bradley v. Fuller, 118 Mass. 239 (1875); Randall v. Hazelton, 94 Mass. (12 Allen) 412 (1866); Anthony v. Slaid, 52 Mass. (11 Met.) 290 (1846); *cf.* Connecticut Mut. Life Ins. Co. v. N.Y. & N.H.R.R., 25 Conn. 265 (1856) (negligent act causing death of insured by which plaintiff's contractual obligations are affected not actionable); Rockingham Mut. Fire Ins. Co. v. Bosher, 39 Me. 253 (1855) (negligence).

[72] Haskins v. Royster, 70 N.C. 601, 605 (1874) (enticement tort "is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons"). This, of course, was the theory of contract that had emerged by the 1870's. However, despite the claims of courts such as *Haskins*, many of the early American decisions involving interference with contracts concerned newly freed black sharecroppers who could be coerced by a regime of contract almost as effectively as by a regime of slavery. *See* cases cited note 61 *supra*. For example, the black "servant" in *Haskins* stipulated in his contract against his and his family's "insolence" towards the white landowner. For disrespectful behavior towards him, the plaintiff retained the power at any time to eject the sharecropper and his family from "their houses, and to take to himself the whole of their labor and crop." 70 N.C. at 616–17 (Reade, J., dissenting). And, as the dissent pointed out, even a slave had a right to be fed and clothed, whereas the cropper was responsible for meeting his own material needs. *Id.* at 618.

son,[73] that an employee successfully brought suit against a third party for procuring his discharge. Permitting an employee to sue dampened charges that the interference action was an incongruous holdover from eighteenth century status relations.

That the nature of the property interest in contract became the central focus of judicial analysis after *Lumley* signified a fundamental shift of the judicial spotlight. During Stage I, the writ system had focused the courts' attention on the nature of defendants' actions, such as violence, fraud, slander, and the like. Stage II marked the turn away from an examination of defendants' behavior to an examination of plaintiffs' interests.[74] In *Lumley*, for example, the means of enticement Gye employed — persuasion — was not inherently harmful. Unlike fraud or slander, not all persuasion injures. The theory of contractual property enabled the judges to determine that the persuasion in this instance was wrongful merely because the plaintiff lost his contractual expectations.

However, *Lumley* did not signify universal acceptance of the interference tort. Two intellectual hurdles had to be crossed. The first obstacle was the tort rule that an "intervening will" broke the causal connection between a third-party interferor and the breach of a contractual promise. The intervening will theory had never precluded actions in enticement, in which a servant, wife, or child was not considered to have a free will independent of the master's. Thus, courts had to treat all employees as servants lacking free will or abandon the "intervening will" rule of causation. At first courts chose to expand the definition of "servant."[75] But so long as employees were treated as "servants" who lacked free choice, coercive industrial conditions could not be legitimized by reference to a regime of "freedom" of contract.[76] Moreover, in order to prevent interference with nonemployment agreements, where the action of enticing a servant would be inappropriate,

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[73] 23 Fla. 206, 1 So. 934 (1887).

[74] *See* Chaffee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1302 (1940).

[75] *See* p. 1523 *supra*.

[76] *See, e.g.*, Johnston Harvester Co. v. Meinhardt, 60 How. Pr. 168, 175–76 (N.Y. Sup. Ct. 1880):

> [T]he origin of this kind of action[] was at a time of the substantial enslavement of domestic servants, and at the outset it proceeded upon the theory that such servant had not freedom of action which is conceded to that class at the present day . . . . [T]he person enticed is a free agent to come and go as he will, responsible only, like other persons, for the violation of his contract or his duty.

See also State v. Stewart, 59 Vt. 273, 289, 9 A. 559, 568 (1887) ("every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others"); Burgess v. Carpenter, 2 S.C. 7, 10 (1870).

the intervening will rule had to be rejected. Accordingly, by the end of Stage II, courts had abolished that theory of causation in the interference context. Second, the "property" rationale advanced in *Lumley* required further definition. If the plaintiff possessed a contractual right, *Lumley* appeared to establish strict liability for *any* intentional act by a third party that resulted in breach of the contract. Even advice given by a friend in good faith might be actionable.[77]

Both of these concerns were addressed in 1881 by the English Court of Appeals in *Bowen v. Hall*.[78] *Bowen* held that "malicious interference," not "enticement," provided the foundation for the tort. The court expressly limited the enticement action to relations with menial servants while holding the defendant liable for third-party interference on the general principle that a "malicious" act is actionable if it results in injury.[79] The plaintiff in *Bowen* had signed a five-year contract for exclusive service with a skilled brickmaker who possessed a secret process for manufacturing glazed bricks. The defendant successfully induced the brickmaker to breach his agreement and work for him. In finding the defendant liable, the court explained that "[m]erely to persuade a person to break his contract, may not be wrongful . . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefitting the defendant at the expense of the plaintiff, it is a malicious act . . . ."[80] Since virtually all interference works to the benefit of the third party and the detriment of the plaintiff, this definition of malice enabled courts to impose liability in almost any case of inducement. Any contract formerly shielded from interlopers by the master-servant doctrine of enticement would now be protected by the doctrine of malicious interference.[81] However, unlike the ac-

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[77] *See* Lumley v. Gye, 2 El. & Bl. 216, 252, 118 Eng. Rep. 749, 762 (Q.B. 1853) (Coleridge, J., dissentiente); Walker v. Cronin, 107 Mass. 555, 561 (1871) (argument of counsel for defendant).

[78] 6 Q.B.D. 333 (1881); *see* Walker v. Cronin, 107 Mass. 555 (1871) (a count alleging intentional and malicious interference with at will and prospective agreements held sufficient on demurrer). *See generally* Schofield, *supra* note 68.

[79] 6 Q.B.D. at 338. *See generally* W. ERLE, THE LAW RELATING TO TRADE UNIONS 13 (1869). In *Lumley*, "maliciously" was found in the declaration, and references to "malice" were found in the opinions, but it appears that this was an instance in which malice was required for pleading purposes, but did not have to be proved. *See* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 281–82 (1936); Crump, *Malice*, 106 LAW TIMES 9, 11 (1898).

[80] 6 Q.B.D. at 338.

[81] By 1890, the generally accepted interpretation of *Lumley* was that it made "malicious" interference with contracts actionable. That is, "*Lumley v. Gye* is only one example of a class of cases in the law of torts . . . where damage is made actionable because it is malicious." Schofield, *supra* note 68, at 27.

tion of enticement, "malicious" interference did not presuppose that the defendant had appropriated the fruits of the contract to himself. Thus, "interference" encompassed a broader range of forbidden behavior that conceivably included any intentional act that devalued the worth of a plaintiff's contractual interest regardless of whether the defendant personally obtained the benefits the plaintiff lost.

Introducing questions of malice into the interference context once again focused the attention of courts on elements of the defendant's behavior. While *Lumley* extended a master's right to sue an enticer of his servant, *Bowen* introduced inquiry into the defendant's motives for persuading a party to breach. But having made the nature of the defendant's motives for acting rather than the plaintiff's protected interest the relevant focus of inquiry, courts such as *Bowen* opened the door to giving complaining plaintiffs "contractual" protection, even where no contract had been breached. For example, *Walker v. Cronin*[82] safeguarded employment agreements terminable at will as well as merely prospective agreements from "malicious" acts of defendants that resulted in the loss of anticipated benefits to the plaintiffs. *Walker*, in effect, created a property right in at will or "prospective" contracts, enforceable against third-party interlopers but not against the other contracting party.[83]

Inquiring into defendants' motives increased the degree of judicial discretion necessary as jurists struggled to define malicious behavior. Not only did judges have to deal with difficult factual determinations as to whether the interferor was innocently advising a friend to breach an unfair contract or maliciously inducing a breach in order to injure the plaintiff or benefit himself, but some judges also began to question whether liability should be imposed when it would severely injure the societal interest in a competitive marketplace. Moreover, this proposed search into the defendant's subjective state of mind occurred in the very year Holmes articulated his objective test of tort liability in *The Common Law*.[84] A great deal of conflict was to arise in Stage III over the appropriate legal criteria to determine liability.

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[82] 107 Mass. 555 (1871).

[83] The court reasoned that "[e]very one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit." The defendant "malicious[ly]" caused the plaintiff to lose advantages "without the justification of competition or the service of any interest or lawful purpose." *Id.* at 564.

[84] O. HOLMES, THE COMMON LAW (1881).

III. PROPERTY VS. COMPETITION: THE INADEQUACY OF FORMALISTIC REASONING

In Stage III, between 1890 and 1920, the tort of interference with contractual relations became an intellectual battleground corresponding to the daily reality of struggle between labor unions and capitalist employers. The interference tort played an important role in this struggle by defining the limits of permissible employee behavior which tended to disrupt advantageous economic relations. During Stage II, the tort had been extended to protect at will contracts and even prospective relations from "malicious" interferors who persuaded employees and customers to stay away. However, during Stage III, a counterprinciple developed that undermined the very foundation of the tort. The counterprinciple maintained that protecting competition in the marketplace required that the acts of interference be privileged. Courts and commentators faced the dilemma of defining property rights in a way that did not eviscerate competition. For example, protecting a "right" to make a future contract with a customer left little room for competition.

Initially this conflict was not apparent to nineteenth century legal thinkers. The method of reasoning employed — formalism[85] — enabled jurists to rationalize the conflict between the ideals of property and competition. Formalist thinkers regarded this conflict as a matter of formulating bright line definitions.[86] The belief that a contract created an absolute property right deserving protection from third-party interference, and its antithesis — that competition entitled third parties to seek business without fear of liability — offered equally bright but clearly contradictory lines. The formalist mode of analysis maintained that contract and competition possessed separate legal "natures," and so no conflict was perceived between these two absolutes.

Courts in Stage II put forth doctrines of contractual property and malice that in theory permitted the extension of the tort of third-party interference to all contracts. But it was not until 1893, in *Temperton v. Russell*,[87] that a court actually

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[85] "Legal reasoning is formalistic when the mere invocation of rules and the deduction of conclusions from them is believed sufficient for every authoritative legal choice." R. UNGER, LAW IN MODERN SOCIETY 194 (1976).

[86] *See* D. Kennedy, *supra* note 2, at 1158–94, 1438–501.

[87] [1893] 1 Q.B. 715. That *Temperton* arose in the context of a labor dispute raises some question whether the court was not more concerned with protecting employers and their suppliers from labor strife than extending the interference action

protected a sale-of-goods contract from intentional outside interference. In *Temperton*, a union engaged in a labor dispute sought to strengthen its bargaining position by threatening to refuse to allow its members to work for any company that supplied the employer. One supplier, the plaintiff, continued to do business with the union's employer, so the union in turn threatened *his* suppliers with losing *their* workers unless they cut the plaintiff off. The union successfully induced some customers to breach existing contracts and persuaded others to refrain from future dealing with the supplier. The supplier sued the union. The court, declaring that a contract "imposes on all the world the duty of respecting that contractual obligation,"[88] held the union officials liable for intentionally procuring the breach of secured contracts. In addition, the court recognized a property right to *form* future contracts. There was no difference, the court contended, between the harm imposed by interference with existing contracts and the loss to prospective contractual relations.[89] Since in either case the value of the plaintiff's business was reduced, both constituted unlawful interference with the plaintiff's property.[90]

At the same time courts protected plaintiffs' contractual relations as absolute property rights, courts in business conspiracy cases shielded defendants from liability under principles of competition. For instance, in *Mogul Steamship Co. v. McGregor, Gow & Co.*,[91] an organization of shipowners sought to prevent nonmembers from carrying goods leaving certain ports. Members of the organization followed the plaintiff's ships in order to underbid the plaintiff and offered rebates to shippers who dealt exclusively with members. Although the combination's concerted action interfered with the nonmember

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beyond nonemployment contracts. Nonetheless, the court consciously extended the tort to include a sale of goods contract.

Although the general trend of the law in Stages II and III was to bring more and more factual situations under the purview of the tort, in Stage III, courts repudiated the tort in the marriage context. One who inveigled another to breach a contract to marry was held privileged to do so. *See, e.g.*, Homan v. Hall, 102 Neb. 70, 165 N.W. 881 (1917). *See generally* 25 COLUM. L. REV. 343 (1925).

[88] [1893] 1 Q.B. at 730 (Lopes, L.J.).

[89] *Id.* at 728–29 (Esher, M.R.).

[90] *Id.* at 728–32. *See also* Barr v. Essex Trade Council, 53 N.J. Eq. 101, 30 A. 881 (1894) (holding that a person's business is property); Jersey City Printing Co. v. Cassidy, 63 N.J. Eq. 759, 53 A. 230 (1902) (protecting employer's probable expectancies in having labor flow freely to him); Dowling, *Wanton Interference with Contract and Business Relations*, 54 CENT. L.J. 426 (1902).

[91] [1892] A.C. 25; *see* Allen v. Flood, [1898] A.C. 1; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119 (1893); Macauley Bros. v. Tierney, 19 R.I. 255, 33 A. 1 (1895); Bowen v. Matheson, 96 Mass. (14 Allen) 499 (1867) (businessmen's combination that resulted in destruction of plaintiff's business held lawful).

plaintiff's ability to enter into contracts, the British House of Lords upheld the lawfulness of the defendants' behavior. The Lords, in the words of the appellate court judge, insisted that the defendants had "done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade."[92] Apparently, the right to compete included the right to establish a cartel that eventually could eliminate competition.

The policy of competition articulated in *Mogul* could be used to excuse third-party interference not only with prospective contractual relations but also with secured sale of goods and employment term contracts. In *Chambers v. Baldwin*,[93] for instance, the Kentucky Supreme Court found no cause of action against a third party who persuaded a tobacco grower to breach his contract with the plaintiff and sell the tobacco to him.

> [C]ompetition in every branch of business being not only lawful, but necessary and proper, no person should or can, upon principle, be made liable in damages for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a pre-existing contract between the seller and a rival in business . . . .[94]

Thus, the defendant was entitled to compete in the marketplace for all goods and services, even those subject to a preexisting contract between the seller and a business rival. In *Bourlier Brothers v. Macauley*,[95] the same court, in a situation virtually identical to *Lumley v. Gye*,[96] rejected an action for interference against a theater owner who persuaded an actress to breach her term contract with a competitor and instead perform for him. The court restricted the tort to the traditional pre-*Lumley* limits — finding a third party liable for interference only if he enticed a menial servant or used coercion, fraud, or defamation to overcome the will of the breaching party.

Mogul Steamship, *Chambers*, and *Bourlier Brothers* con-

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[92] Mogul S.S. Co. v. McGregor, Gow & Co., 23 Q.B.D. 598, 614 (1889) (Bowen, L.J.), *aff'd*, [1892] A.C. 25, 51 (Morris, L.J.) ("I can see no limit to competition, except that you shall not invade the rights of another.").

[93] 91 Ky. 121, 15 S.W. 57 (1891). *See also* Glencoe Land & Gravel Co. v. Hudson Bros. Comm'n Co., 138 Mo. 439, 40 S.W. 93 (1897); Boyson v. Thorn, 98 Cal. 578, 33 P. 492 (1893).

[94] 91 Ky. at 129–30, 15 S.W. at 59.

[95] 91 Ky. 135, 15 S.W. 60 (1891).

[96] 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853).

tradicted the theory under which *Temperton* had been decided by holding that the "right to trade" excused harmful interference with prospective and term contracts. All three courts employed formalistic reasoning, but *Temperton* focused on the plaintiff's loss of a contractual "right" while *Mogul* and the two Kentucky cases emphasized the "right" of the defendant to engage in competitive, albeit predatory, behavior. None of the courts considered whether one party's "rights" were limited by the other's, or, for that matter, by social interests. As a result, during much of Stage III, the success of an interference tort action hinged on whether a court emphasized the plaintiff's right to have his contractual interest protected from outside interference or the defendant's right to compete.[97]

Ironically, the privilege of competition became relevant to employment contracts only after *Temperton* extended the tort to nonemployment contracts.[98] The "right" of competition traditionally excused interferences by persuasion with contracts for the sale of goods. But competition offered no defense in Stages I and II to the enticement action. Once the interference tort encompassed all contracts, though, it lost its roots in the enticement action, and the "right" of competition became a potential defense even in employment cases. The resulting conflict left the courts in a quandary; they had to reconcile their desire to protect contractual property from interference with their reluctance to immunize individuals from the rigors of competition.[99]

This conflict, however, was not as apparent to nineteenth century judges as it is today. Nineteenth century courts defined competition as a privilege to struggle against other persons who sought the same product within the same market; to compete was to fight with equals for the same end. Accordingly, merchants were considered to be in competition with one another for customers.[100] Employers could compete with

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[97] *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); Posner Co. v. Jackson, 223 N.Y. 325, 119 N.E. 573 (1918) (plaintiff has a *right* with which defendant interfered).

[98] Competition had been mentioned in Walker v. Cronin, 107 Mass. 555, 564 (1871), but the court clearly did not regard competition as a defense to interference. As a later Massachusetts case put it, "[*Walker*,] in defining the rights of competition has denied the existence of such a justification." Beekman v. Marsters, 195 Mass. 205, 210, 80 N.E. 817, 818 (1907).

[99] *See generally* Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894); Sayre, *supra* note 1, at 686–96.

[100] *See, e.g.*, Mogul S.S. Co. v. McGregor, Gow & Co., [1892] A.C. 25; Bowen v. Matheson, 96 Mass. (14 Allen) 499 (1867) (upholding a combination aimed at self-regulation but having a destructive competitive effect on nonmembers).

other employers for workers,[101] and laborers for jobs.[102] But employee strikes or boycotts that strengthened demands for higher wages and improved working conditions but harmed their employer's business were viewed as illegitimate competition.[103] While combinations of businessmen that destroyed the livelihood of nonmembers were tolerated,[104] unions that inflicted similar harm as a means to increase bargaining power rather than as an end were found to have engaged in intimidation and duress. Therefore, in *Vegelahn v. Guntner*,[105] union members were enjoined from establishing a peaceful two-person picket in front of their employer's business. No contracts were breached, but present and prospective employees were allegedly intimidated. Such behavior, said the court, was outside the realm of "allowable competition"; "[a]n employer has a right to engage all persons who are willing to work for him . . . . [and no] one can lawfully interfere by force or intimidation to prevent employers . . . from the exercise of these rights."[106] Although the interference tort had been extended to the nonemployment context, courts did not recognize that the continued disparate treatment of labor and goods contracts constituted a double standard because the formalist definition of competition perceived labor/capital struggle as a conflict over different ends.

This formalistic approach first came under attack in Justice Oliver Wendell Holmes' dissent in *Vegelahn*,[107] and in his 1894

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[101] *See, e.g.*, DeJong v. Behrman Co., 148 A.D. 37, 131 N.Y.S. 1083 (1911) (enticing away of employees actionable only if fraudulent or other unlawful means used); Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896).

[102] *See, e.g.*, A.R. Barnes & Co. v. Typographical Union, 232 Ill. 402, 83 N.E. 932 (1908); National Protective Ass'n v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902); Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906) (unions may strike to compete for the work done by nonunion members, even though the effect may be the dismissal of the nonmembers).

[103] *See* Holmes, *supra* note 99, at 7–8; Sherry v. Perkins, 147 Mass. 212 (1888); Walker v. Cronin, 107 Mass. 555, 564–65 (1871); Carew v. Rutherford, 106 Mass. 1 (1870); M. BIGELOW, THE LAW OF TORTS 250–51 (8th ed. 1907). This narrow view of competition also helps explain why English decisions at the turn of the century swung wildly from holding some "conspiracies" liable for interference to releasing other combinations from liability. *Compare* Allen v. Flood, [1898] A.C. 1 (employee's competition with other employees, causing the employer to discharge the latter, held lawful), *with* Quinn v. Leathem, [1901] A.C. 495. Many commentators assumed *Quinn* overruled *Allen*. *See, e.g.*, Ames, *How Far an Act May be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411 (1905).

[104] *See, e.g.*, Bowen v. Matheson, 96 Mass. (14 Allen) 499 (1867).

[105] 167 Mass. 92, 44 N.E. 1077 (1896). *See also* Sherry v. Perkins, 147 Mass. 212 (1888).

[106] 167 Mass. at 97–98, 44 N.E. at 1077.

[107] Vegelahn v. Guntner, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896) (Holmes, J., dissenting).

article entitled *Privilege, Malice, and Intent*.[108] Holmes challenged the notion that laborers cannot compete with employers over wages and working conditions. "Certainly the policy [of competition] is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests."[109] Holmes meant that laborers had a privilege to combine and seek higher wages, just like employers had a right to attempt to obtain their labor at the least possible cost.

But it was not just the restricted definition of competition that Holmes criticized. He also challenged the formalist mode by which courts of the period sought to deduce particular solutions from abstract general principles.[110] Holmes argued that the mechanical application of indisputable generalizations created only an illusion of scientific certainty. "[I]t is vain to suppose that solutions [to cases] can be attained merely by logic and general propositions of law which nobody disputes."[111] A court does not advance the issue when it proclaims that the intentional infliction of harm is actionable unless the defendant can prove his acts were justifiable. To resolve a particular controversy, a court must decide *when* an intentional injury is justified.[112] Since the price of the defendant's competition in the "free struggle for life"[113] is the abridgment of the plaintiff's interests in securing present and future contracts from third-party interference, liability must depend on whether the "free competition is worth more to society than it costs."[114] Having developed a model for judicial decisionmaking in interference cases, Holmes compared the competitive interests of the labor union in *Vegelahn* in preventing the hiring of nonmembers during a strike with the employer's interest in being able to make employment contracts with any willing worker without outside interference. In *Vegelahn*, Holmes contended, the defendant laborers' privilege of competition overcame objections to their interference.

The point that Holmes emphasized in *Vegelahn*, that laborers competed with employers, and that their competitive privilege conflicted with their employers' property interests in

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[108] Holmes, *supra* note 99.

[109] 167 Mass. at 107, 44 N.E. at 1080. *See also* Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 754 (1928).

[110] Criticism of formalism was more fully carried out by legal realists. *See, e.g.*, Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

[111] Vegelahn v. Guntner, 167 Mass. 92, 107, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting).

[112] *Id.* at 105, 44 N.E. at 1080.

[113] *Id.* at 106–07, 44 N.E. at 1080.

[114] Holmes, *supra* note 99, at 3.

contractual relations soon came to dominate discussions concerning the interference tort.[115] But while Holmes contended that only a legislative-type policy analysis could determine the appropriate line between these interests, most judges and scholars continued to employ a formalistic analysis predicated on the existence of absolute rights.[116] Part of the intractability of the conflict stemmed from a new element — collectivity — that had not appeared in many Stage II interference cases. Fears were expressed that the new aggregations — of labor, capital, or capitalists — would overwhelm society if left unregulated by the courts.[117] As a result, lawful acts undertaken by individuals, such as boycotts of a competitor or an employer, became unlawful when done in combination with others. The individual act was considered an "expression of individual liberty" (presumably because it was ineffective), but conducted by a group the same act became an "oppressive use of economic power."[118] However, few courts prohibited all worker collective action that tended to damage competitors.[119] The central question was how to distinguish lawful from unlawful collective behavior. Some, like the *Vegelahn* majority, continued to maintain that employee activity, but not business combination, was outside the bounds of "legitimate" competition when it reduced the value of employers' property rights to conduct business. Others, worried that such a standard appeared politically motivated, proposed inquiry into defendants' motivation for interference.[120]

The idea of a subjective inquiry had existed at least since *Bowen v. Hall* in 1881. *Bowen*, however, had defined malice in such a conclusory fashion that it was clear little emphasis

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[115] For instance, the April 1905 issue of the *Harvard Law Review* contains three articles on this issue. *See* 18 HARV. L. REV. 411–51 (1905).

[116] For example, see the discussion in the leading case of Allen v. Flood, [1898] A.C. 1.

[117] *See, e.g.*, Sherry v. Perkins, 147 Mass. 212 (1888) (approving the use of an injunction to curb the activities of a labor "conspiracy"); Carew v. Rutherford, 106 Mass. 1, 14–15 (1870) (protesting that a labor "conspiracy," if successful, would establish a "tyranny" of irresponsible persons over men and machines).

[118] Freund, *Malice and Unlawful Interference*, 11 HARV. L. REV. 449, 457 (1898).

[119] One case that prohibited picketing per se was Franklin Union No. 4 v. People, 121 Ill. App. 647 (1905), *aff'd*, 230 Ill. 355, 77 N.E. 176 (1906).

> There can be no such thing as peaceful, 'polite and gentlemanly' picketing, any more than there can be chaste 'polite and gentlemanly' vulgarity, or peaceful mobbing, or lawful lynching . . . . [T]he mere fact of a picket system being established by men known to be unfriendly constitutes and is a threat of physical violence and an intimidation to the peaceful man.

Id. at 665.

[120] *See, e.g.*, Holmes, *supra* note 99, at 8. Melville Bigelow reorganized the eighth edition of his torts treatise to reflect the prevailing importance of inquiry into state of mind. M. BIGELOW, *supra* note 103, at iii–iv, 237–66.

had been given to the legitimacy of the defendant's interests. Moreover, courts roundly denounced the idea of a subjective test: "malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful."[121] The circularity of this argument did not diminish its persuasiveness to persons convinced of absolute rights and who relied on formal logic to resolve cases.[122] These persons believed that objective characteristics best defined improper interference. Behind this rhetoric lay three essential premises. First, inquiring into motive would qualify previously absolute rights of property. Second, judges and juries would be given too much discretion to introduce policy considerations; the result would be nonscientific and hence uncertain. Finally, the inquiry into motive was not administrable because subjective proof was too hard to obtain.[123]

The objectivist position reached its zenith in *Allen v. Flood*.[124] In probably the most discussed case of its time in both England and America,[125] the English House of Lords held that regardless of the defendant's motive, an action would not lie against an individual for causing the discharge of the plaintiff by the latter's employer, if the defendant induced no breach of contract and did not commit an act of fraud or violence.[126] As a statement about labor law, *Allen* was not to reign for long. Within three years, the House of Lords determined that the element of conspiracy could alone determine legal liability.[127]

Those who called for inquiring into defendants' motives determined that some explicit qualification of absolute rights

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[121] Chambers v. Baldwin, 91 Ky. 121, 128, 15 S.W. 57, 59 (1891). *See also, e.g.*, Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119 (1893).

[122] *See, e.g.*, Pingrey, *supra* note 1, at 113–16 ("[a] contract does not impose a duty upon parties not in privity, yet it does impose a duty not to interfere with its operation").

[123] *See, e.g.*, Ormsby, *Malice in the Law of Torts*, 8 L.Q. REV. 140 (1892). "At first denoting hatred or personal ill-will, [malice] loses by degree its original meaning, till at last it reaches its vanishing point in its identification with 'intention' and 'knowledge'." *Id.* at 149.

[124] [1898] A.C. 1. The plaintiffs, Flood and Taylor, were shipwright woodworkers who were engaged by at will contracts to do both wood and iron work. The defendant Allen represented the boilermaker's union, which did exclusively iron work, and which objected to anyone's doing both iron and wood work. Allen asked Flood and Taylor's employer to discharge them, warning him that otherwise all the boilermakers would strike. The manager complied.

[125] *See, e.g.*, Ames, *supra* note 103.

[126] *See* 11 HARV. L. REV. 405 (1898).

[127] Quinn v. Leathem, [1901] A.C. 495; *see* Ames, *supra* note 103; Note, *"Boycotts,"* 15 HARV. L. REV. 223 (1901).

had to be made[128] in order to resolve what appeared to them to be contradictory holdings in the case law. Their goal was to use "malice" to distinguish lawful from unlawful competition, and permissible from impermissible combination. Thus, an act that normally would be privileged competition would be held actionable if done with malicious motives.[129] Using malice to resolve the dilemma at first seemed to be a satisfactory solution to those who adopted that approach. However, the fears of the objectivists proved correct, as malice, like the absolute rights analysis, became a manipulable, conclusory concept.[130] Almost from its inception as a mediating doctrine, malice undermined the method of legal analysis of the nineteenth century interference cases.

IV. The Emergence of Balancing

By the end of the nineteenth century many courts and commentators recognized the impossibility of simultaneously protecting both competitive and property interests. As Holmes noted, "[t]he two advantages run against one another, and a line has to be drawn."[131] Formal reasoning could not resolve the dilemma, nor could blind appeal to conclusory doctrines such as malice. Finally, in the twentieth century, external and internal changes were made in an effort to resolve the conflict. Externally, the source of much conflict, labor relations, was removed from the purview of the tort. Instead, an administrative agency, the National Labor Relations Board, was created to oversee labor-management struggles and a body of statutory law is used to resolve conflicts.[132]

The internal response to the conflict between plaintiffs' property and defendants' competitive interests took two forms. First, various rules were developed that qualified both

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[128] Holmes, *supra* note 99; *see* Plant v. Woods, 176 Mass. 492, 499, 57 N.E. 1011, 1014 (1900). *Compare* Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119 (1893) (holding that malice is not actionable), *with* Steffes v. Motion Picture Mach. Operators Union, 136 Minn. 200, 161 N.W. 524 (1915) (holding malice is actionable).

[129] *See, e.g.*, Doremus v. Hennesy, 176 Ill. 608, 52 N.E. 924 (1898).

[130] *See* Henderson, *Malicious Motive as a Ground of Action*, 13 Jur. Rev. 452, 461 (1901) (the result of the English interference decisions between 1881 and 1901 demonstrates that "[t]he conception of legal malice . . . mean[s] little more than mere intention").

[131] Holmes, *supra* note 99, at 6.

[132] *See* National Labor Relations (Wagner) Act of 1935, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169 (1976)); Norris-LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115 (1976)). *But cf.* Klare, *Judicial Deradicalization of the Wagner Act*, 62 Minn. L. Rev. 265 (1978) (arguing that Supreme Court has interpreted Wagner Act with reference to common law contract principles).

parties' rights and privileges. For example, term, at will, and mere prospective contracts no longer received equivalent protection.[133] By the 1920's, some courts urged that a plaintiff's contractual interests deserved greater protection from interference when he had secured his expectation against the other party through an explicit agreement for a fixed term than when either party could terminate the contract at will.[134] And even less protection seemed appropriate when the plaintiff had never signed a contract but had merely hoped to reach some agreement in the future. Similarly, the defendant's ability to invoke a privilege to compete for business was qualified. The defendant's motive for acting became relevant in determining whether a privilege exists, but the mere classification of him as a competitor of the plaintiff's, or a friend of the breaching party, would not automatically serve as a defense. The right to compete was unlikely to privilege acts such as that encountered in *Mogul Steamship*.[135]

The second internal response to the demise of formalistic reasoning was an attempt to "balance" the conflicting interests. Beginning with Holmes, a new view of legal analysis emerged that maintained that intelligent lawmaking, like intelligent policymaking, must consider the social consequences of legal rules; courts must attempt to weigh the interests of the plaintiff, the defendant, and the society to find an appropriate solution to a legal controversy. In the interference context, a leading scholar, Professor Carpenter, wrote in 1928,

> [W]hether a privilege of invasion exists depends upon whether it is of greater moment to society to protect the defendant in the invading activities than it is to protect and guard the plaintiff's interest from such invasions. An evaluation and balancing of the social import of the conflicting interests of the respective parties and of the social interests *per se* are involved.[136]

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[133] W. PROSSER, LAW OF TORTS 933 (4th ed. 1971).

[134] *See, e.g.*, Beekman v. Marsters, 195 Mass. 205, 80 N.E. 817 (1907) (competition excuses interference with either at will or prospective agreements); Posner Co. v. Jackson, 223 N.Y. 325, 119 N.E. 573 (1918) (recovery for interference subject to existence of express contract for definite period of time); DeJong v. Behrman Co., 148 A.D. 37, 131 N.Y.S. 1083 (1911) (interference tort limited to use of fraudulent means to break existing contracts); RESTATEMENT OF TORTS § 766, Comment b, at 52 (1939) ("[t]he added element of a definite contract may be a basis for greater protection"). It should be noted that the same privilege to compete did not yet extend to labor unions. *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).

[135] [1892] A.C. 25; *see* pp. 1530–31 *supra*.

[136] Carpenter, *supra* note 109, at 745.

No interest of either party is so absolute that the other party will not at times succeed in the litigation. Each case rests on its own facts, and the process of "weighing" the various interests involved admits of sufficient discretion to permit courts to override a party's claim or defense if social policy so requires.

V. Conclusion

The nineteenth century transformation of the tort of interference with contractual relations is not only a history of the evolution of particular tort rules, but also an illustration of the changing juristic conception of property, tort, and contract. This Note has attempted to shed light on the relationship between the development of the rules of the tort and their legal justifications. The conflict posed by the tort in the nineteenth century — which forms of interference to permit and which to forbid — remains the central question today. The ultimate abandonment of formalistic reasoning implies that judicial decisions cannot be deduced from abstract doctrines such as property and competition. Nevertheless, the study of such reasoning may give us a sense of the contingency of our own approach to the conflict.