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Validity of Contract Based Upon Breach of Prior Existing Contract

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Conclusion

Professor Mechem in his treatise on the law of agency recognized the application of apparent agency to all cases, whether founded in tort or contract. He observes that "Reliance upon the appearances, however, does not ordinarily induce the assault, slander, trespass, or negligent injury, and the cases must be very rare, if any, in which it could be an element".[31] With this the writer is inclined to agree. A diligent search of the case books has failed to reveal any other cases or torts but those founded on the theory of negligence.[32] However, the author is confident that, in the future, actions will arise holding apparent principals liable on other torts as well. They will fill in the last gaps in the apparent agency-tort liability scheme.

ARTHUR BENNETT.

VALIDITY OF CONTRACT BASED UPON BREACH OF PRIOR EXISTING CONTRACT

I

A contract represents the legal obligations of all parties thereto and defines their legal rights.[1] Any interference with the legal rights is remediable at law or in equity.[2] And the law goes further. It protects the contracting parties against interference by third parties not in privity with the contract.[3] This protection is of comparatively modern origin although it sprang from the early master and servant relationship,[4] spread to specialty contracts of a personal nature [5] and, at present, is applied to all types of contracts.[6] The courts have definitely classified interference with and procurance of a breach of con-

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[31] 1 MECHEM, AGENCY § 724.
[32] (1931) 29 MICH. L. REV. 640.

[1] WHITNEY, LAW OF CONTRACTS (3d ed. 1937) § 1.
[2] *Id.* § 12.
[3] Blumenthal v. United States, 30 F. (2d) 247 (C. C. A. 2d, 1929), *cert. denied*, 279 U. S. 847, 49 Sup. Ct. 345 (1929); Walker v. Cronin, 107 Mass. 555 (1871); Union Car Advertising Co. v. Collier, 263 N. Y. 386, 189 N. E. 463 (1934); Fradus Contracting Co. v. Taylor, 201 App. Div. 298, 194 N. Y. Supp. 386 (1st Dept. 1922); Axelrod v. 77 Park Ave. Corp., 225 App. Div. 557, 234 N. Y. Supp. 27 (1st Dept. 1929).
[4] Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663, 665.
[5] Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853); Bowen v. Hall, 6 Q. B. D. 333 (1881).
[6] Employing Printers Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353 (1905); Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924 (1898); Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907); Lamb v. Cheney, 227 N. Y. 418, 125 N. E. 817 (1920); Temperton v. Russell (1893) 1 Q. B. 715; Note (1923) 36 HARV. L. REV. 663, 671.

tract by a third party as a tort.[7] The latest problem relevant to this subject is the legality of a bargain requiring the breach of contract with a third person. When the New York Court of Appeals was faced with that question in *Budd* v. *Morning Telegraph,*[8] it rendered a decision that has created considerable confusion as to the status of the law in New York on that issue. In this case, the plaintiff, Budd, sued for a breach of contract. Budd had been under a three-year contract with the *Daily Racing Form Publishing Co.* which defendant knew. However, defendant, a competitor of *Racing Form,* offered him a contract on better terms, and assured him that the agreement with *Racing Form* was not binding, and that the defendant would assume all liability if any occurred from the breach. Budd then breached his contract and entered into one with the defendant. Subsequently, he was discharged by the defendant, and brought an action for the breach. The Appellate Division held that it was error to dismiss the complaint for fraud as plaintiff presented a *prima facie* case. There was no wrong on the part of the plaintiff in breaching the first contract, and no fraud was established. Therefore the parties were not in *pari delicto,* and the contract was enforceable. The Appellate Division did not attempt to support its findings by any law, although the dissenting opinion clearly showed that the law in New York was to the contrary. The Court of Appeals upheld the decision without rendering an opinion.

II

However, before judgment is passed on the wisdom of this recent decision on the question, it is necessary to search into the background of the law upon which it is based. As previously stated, a

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[7] Angle v. Chicago, St. P., M. & O. R. R., 151 U. S. 1, 14 Sup. Ct. 240 (1894); Truax v. Raich, 239 U. S. 33, 38, 36 Sup. Ct. 7 (1915); Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 252, 38 Sup. Ct. 65 (1917); Sklaisky v. A. & P. Tea Co., 47 F. (2d) 662 (1931); Employing Printing Club v. Dr. Blosser Co., 122 Ga. 509, 50 S. E. 353 (1905); Kock v. Burgess, 167 Iowa 727, 733 (1914); Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 381, 392, 87 Atl. 927 (1913); Walker v. Cronin, 107 Mass. 555, 567 (1871); Berry v. Donavan, 188 Mass. 353, 74 N. E. 603 (1905); Bixby v. Dunlop, 56 N. H. 456 (1876); Brennan v. United Hatters, 73 N. J. L. 729, 65 Atl. 165 (1905); Caughey v. Smith, 47 N. Y. 244 (1872); Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. 267 (1891); Lamb v. Cheney & Son, 227 N. Y. 418, 125 N. E. 817 (1920); Weinberg v. Irwinessie, 225 App. Div. 241, 232 N. Y. Supp. 443 (2d Dept. 1929); Stewart v. Simpson, 1 Wend. 376 (N. Y. 1828); Haight v. Badgeley, 15 Barb. 499 (N. Y. 1853); Covert v. Gray, 34 How. Pr. 450 (N. Y. 1865). *Contra:* Only where the act of invasion is itself a legal tort, *i.e.,* fraud, libel, slander, violence or actionable threats, then there is an action for damages, Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492 (1893); Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57 (1891); Marsh v. Billings, 7 Cush. 322 (Mass. 1851); Tally v. Cantwell, 30 Mo. App. 524 (1888); Rice v. Manley, 66 N. Y. 82 (1876); Benton v. Pratt, 2 Wend. 385 (N. Y. 1829).

[8] 241 App. Div. 142, 271 N. Y. Supp. 538 (1st Dept. 1938), *aff'd,* 265 N. Y. 639, 193 N. E. 423 (1938).

contract represents certain property rights, and the invasion of them is a legal wrong.[9] The majority of the states have agreed that such an invasion is a tort.[10] Basically, the question involved in the *Budd* case resolves itself around the point as to whether a tort exists where a prior contract is breached, in order to fashion the contract in the action. If the inducement is proven to be a tort, can the courts condone it by enforcing the later contract? That is the question answered by the New York Court of Appeals. In order to establish a tort arising from the breach of one contract by a second one, certain factors must necessarily be present. Primarily, the original contract must be valid and enforceable.[11] There must be an intent by the tort-feasor to prevent performance [12] of the first obligation. This intent is presumed by proof of the most essential element of the tort, knowledge of the existence of the contract which is breached.[13] Combined with these factors is the fourth element of malice which is generally implied from the act of interference.[14] The malice required is the intentional doing of a harmful act without justification. It does not consist of spite or ill will.[15] It is not necessary to prove actual

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[9] Second National Bank v. Samuel & Sons, 273 U. S. 720, 47 Sup. Ct. 110 (1926); Central Metal Products Corp. v. O'Brien, 284 Fed. 850 (C. C. A. 6th, 1922); Cook v. Wilson, 108 Misc. 438, 178 N. Y. Supp. 463 (1919); Vail-Ballou Press v. Casey, 125 Misc. 689, 212 N. Y. Supp. 113 (1925); Meltzer v. Kaminer, 131 Misc. 813, 227 N. Y. Supp. 459 (1927); Exchange Teleg. Co. v. Gregory (1896) 1 Q. B. 147.

Right in an existing employment is a property right. Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 214 N. W. 754 (1930); Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97 (1919). *Contra:* Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327 (1905).

[10] See note 7, *supra.*

[11] Ford Motor Co. v. Union Motor Sales Co., 244 Fed. 156 (C. C. A. 6th, 1917); Campbell v. Cooper, 34 N. H. 49 (1856); Rich v. N. Y. C. & H. R. R., 87 N. Y. 382 (1882); Sykes v. Dixon, 9 Ad. & El. 693, 112 Eng. Rep. 1374 (1839).

[12] Sweeney v. Smith, 171 Fed. 645 (C. C. A. 3d, 1909), *cert. denied,* 215 U. S. 600, 30 Sup. Ct. 400 (1909); N. Y. Trust Co. v. Island Oil & Transport Corp., 34 F. (2d) 639 (C. C. A. 2d, 1929). See also Wissmath Packing Co. v. Miss. River Power Co., 179 Iowa 1309, 162 N. W. 846 (1917); L. R. A. 1917F, 790.

[13] Rice-Brown Lumber Co. v. Fleetwood, 134 Ark. 340, 203 S. W. 692 (1918); Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 214 N. W. 754 (1930); Denver v. Smith, 89 N. J. Eq. 339, 104 Atl. 717 (1918); Lamb v. Cheney & Son, 227 N. Y. 418, 125 N. E. 817 (1920); Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 674 (1930); Goodman Bros., Inc. v. Ashton, 211 App. Div. 769, 208 N. Y. Supp. 83 (1st Dept. 1925); Bolivar v. Monnat, 232 App. Div. 33, 248 N. Y. Supp. 722 (4th Dept. 1931); Thompson Co. v. Winchell, *et al.,* 244 App. Div. 195, 278 N. Y. Supp. 781 (1st Dept. 1935).

[14] Brennan v. United Hatters, 73 N. J. L. 729, 65 Atl. 165 (1906); Lamb v. Cheney & Son, 227 N. Y. 418, 125 N. E. 817 (1920); Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 674 (1930); E. L. Husting Co. v. Coca Cola Co., 205 Wis. 356, 237 N. W. 85 (1931).

[15] Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 381, 392, 87 Atl. 927 (1913); Commonwealth v. Goodwin, 122 Mass. 19 (1877); Quinn v. Leathem (1901) A. C. 495.

malice in order to establish a cause of action.[16] Lastly, the breach must be proven together with the actual damages suffered by the injured party.[17] Proof of these elements establishes the tort.

But does that mean that a contract drawn upon these elements is not valid? Certain factual situations serve to illustrate the problems involved and give a better understanding of the questions to be answered. Where *A* and *B* have a valid contract between them and *X*, with knowledge of the contract, maliciously induces *B* to contract with him for the same purpose with intent to harm *A*, can such a bargain be enforced at the expense of the previous agreement? The primary obligation between *A* and *B* is valid. *X* intends deliberately to harm *A* by preventing performance. He has knowledge of the existing contract, and his malice need not be implied from the facts, but is express. Execution of the second contract is sufficient breach of the first obligation from which *A* can prove his damages. *X's* conduct in every respect shows him to be a tort-feasor. His contract is the element creating the harm, yet the Court of Appeals would have such a contract enforced.

Assume a second set of facts similar in every respect, except that *X* only desires to acquire the object of the prior contract for his own use and benefit. This situation does not give as clear a picture of the perpetration of a tort. In fact, many decisions seek to justify such an act of interference under the heading of "competition". Such exponents of this theory state that to prevent a man from driving a good bargain at the expense of his competitor would be to stifle competition and freedom of trade.[18] It is true that competition should not be stifled, but does that justify an invasion of another person's rights? This theory fails when one important fact is recognized, that is, knowledge of the first contract. Accidental injury is seldom actionable. But an incidental breach cannot be claimed by the party interfering when the inducer *knows* that he will breach a contract to effectuate his own ends.[19] It is the *knowledge* that one is doing a

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[16] Said v. Butt (1920) 3 K. B. 497.

[17] Hodge v. Meyer, 248 U. S. 565, 39 Sup. Ct. 9 (1918); Chysley v. Atkinson, 23 Fla. 206, 1 So. 934 (1877); Butterfield v. Ashley, 6 Cush. 249 (Mass. 1850); Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907).

[18] Citizens Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 Fed. 553, 560, 561 (1909); Peters v. Lord, 18 Conn. 337 (1847); Jones v. Blocher, 43 Ga. 331 (1871); Kerr v. Du Pree, 35 Ga. App. 122, 132 S. E. 393 (1926); Butterfield v. Ashley, 6 Cush. 249 (Mass. 1850); Walker v. Cronin, 107 Mass. 555 (1871); McGurk v. Conenwitt, 199 Mass. 457, 85 N. E. 571 (1908); Woody v. Brush, 178 App. Div. 698, 165 N. Y. Supp. 867 (2d Dept. 1917); Knapp v. Penfield, 143 Misc. 132, 256 N. Y. Supp. 41 (1932); Biber Bros. News Co. v. N. Y. Evening Post, 144 Misc. 405, 258 N. Y. Supp. 31 (1932); Johnson v. Hitchcock, 15 Johns. 185 (N. Y. 1818); Garcia Sugar v. N. Y. Coffee & Sugar Co., — Misc. —, 7 N. Y. S. (2d) 532 (1938); *In re* Curtiss' Will, 140 Misc. 185, 250 N. Y. Supp. 146 (1931).

[19] Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907); Campbell v. Gates, 236 N. Y. 457, 141 N. E. 914 (1923); Affiliated Ladies Apparel v. National Dress Mfrs. Ass'n, 164 Misc. 785, 299 N. Y. Supp. 914, 916 (1937);

wrongful act without justification that infers the *malice* and creates the tort.

In a third situation, similar in all respects to the first except that *X* has no knowledge nor intent to harm *A*, it cannot be said that a tort exists. Testing the facts with the elements of the tort, no wrong can be shown. It is true that the rights of *A* have been invaded, but there is no intent to interfere, no knowledge of any rights being invaded, and, consequently, malice is lacking. It is *damnum absque injuria*.[20]

What is the distinction between the three cases? It is in considering the elements of knowledge and malice which are basic in establishing the tort. They are dependent factors. Formerly, English courts insisted on establishing malice as an independent fact in order to prove the tort,[21] but the later decisions acknowledged that the tort was not based on malicious intention, but on the grounds that a violation of a legal right committed knowingly is a cause of action.[22] Subsequently, this was followed in the United States,[23] and today knowledge is the important element.[24] It is from knowledge of the prior contract that malice is now inferred. The word, "malicious", required in the complaint for a tort action for procuring a breach of contract, means an intentional doing of a wrongful act without justification. It does not consist of spite or ill-will.[25] It is malice in the strictly legal sense. Thus a conscious intention to appropriate that which belongs to another would be a correct definition of the malice involved herein.[26] Knowledge creates the malice. In the first example, both knowledge and malice were present and no discussion is needed to further the tort. In the second example no malice can be proven except that knowledge is admitted. This knowledge forms the malice, as the act of interference in another's rights is done intentionally without just cause or excuse.[27] The third example is devoid of knowledge and malice although there is a right invaded. The tort requires knowledge and malice, which must arise out of the knowledge or be expressed. Invasion of a legal right alone is not sufficient to give rise to a cause of action.[28]

Jones v. Stanley, 76 N. C. 355 (1877); Skinner & Co. v. Shew & Co. (1893) 1 Ch. 413; Quinn v. Leathem (1901) A. C. 495, 510. See note 13, *supra*.

[20] Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492 (1893); Baulier v. MacCauley, 91 Ky. 135, 15 S. W. 60 (1891); McCann v. Wolff, 28 Mo. App. 447 (1888); Ashley v. Dixon, 48 N. Y. 430 (1872).

[21] Quinn v. Leathem (1901) A. C. 495.

[22] Said v. Butt (1920) 3 K. B. 497. See note 21, *supra*.

[23] See note 13, *supra*.

[24] Rice-Brown Lumber Co. v. Fleetwood, 134 Ark. 340, 203 S. W. 692 (1918).

[25] Brennan v. United Hatters, 73 N. J. L. 729, 65 Atl. 165 (1905); Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 674 (1930). See note 15, *supra*.

[26] Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663.

[27] Commonwealth v. Goodwin, 122 Mass. 19 (1877).

[28] Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 674 (1930); Van Wyck v. Manning, 256 App. Div. 256, 9 N. Y. S. (2d) 684, 687 (2d Dept. 1939).

III

Only one step further need be taken to show that a bargain, or agreement, which requires for its execution the breach of an existing contract, is illegal. The act of procuring a breach is a tort.[29] A contract based on that act cannot be legal as the consideration is illegal,[30] and the acts called for are illegal. The parties to the second contract are both guilty of wrongful acts. One has by the contract procured the breach of an existing contract, which act has been shown to be a tort. The other party has breached a contract and broken faith with his promisee which, while not a tort, is still a wrong. The injured party has a cause of action against both or either.[31]

If either of the parties to the second contract so formed breach it, their only hope for remedy is at law as equity will not take jurisdiction.[32] The *Budd* case gave recognition of a remedy at law, but the weight of opinion is to the contrary.[33] A breach of contract is a legal wrong and the courts will not aid one who bases his cause of action on such an illegal act.[34] Nor will they aid a tort-feasor to perpetrate his misdoings. It has been the policy of the courts to leave parties equally at fault where they stand as the law will not aid either party to an illegal contract to enforce it against the other.[35] Also,

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[29] See note 7, *supra*. EDGAR & EDGAR, LAW OF TORTS (3d ed. 1936) § 141.

[30] Roberts v. Criss, 266 Fed. 296 (C. C. A. 2d, 1920); Hocking Valley Ry. v. Barbour, 190 App. Div. 341, 179 N. Y. Supp. 810 (1st Dept. 1920); 83 A. L. R. 32, 44; 9 CYC. 468.

[31] Second National Bank of Toledo v. Samuel & Sons, Inc., 12 F. (2d) 963 (C. C. A. 2d, 1926), *cert. denied*, 273 U. S. 720, 47 Sup. Ct. 110 (1926); Motley Green & Co. v. Detroit Steel & Spring Co., 161 Fed. 389 (C. C. A. 2d, 1908); Posner Co. v. Jackson, 223 N. Y. 325, 331, 119 N. E. 573, 574 (1918); Gonzales v. Kentucky Derby Co., 197 App. Div. 277, 189 N. Y. Supp. 783 (2d Dept. 1921), *aff'd*, 233 N. Y. 607, 135 N. E. 938 (1922); Hornstein v. Podwitz, 254 N. Y. 443, 449, 173 N. E. 674 (1930); Note (1930) 30 COL. L. REV. 232. *Contra:* Weinberg v. Irwinessie Holding Corp., 225 App. Div. 241, 232 N. Y. Supp. 443 (2d Dept. 1928).

[32] He who comes into equity must do so with clean hands. Harms & Francis, Day & Hunter v. Stein, 229 Fed. 42, 49 (C. C. A. 2d, 1916), *rev'g*, 222 Fed. 581 (1915); Sharpless-Hendler Ice Cream Co. v. Davis, 17 Del. Ch. 161, 151 Atl. 261 (1930).

[33] Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 643, 8 Sup. Ct. 402 (1889); Foley Mfg. Co. v. Sierra-Nevada Lumber Co., 172 Fed. 197 (C. C. A. 7th, 1909); Wegham v. Kellifer, 215 Fed. 289 (C. C. A. 6th, 1914); Moody v. Newmark, 121 Cal. 446, 53 Pac. 944 (1898); Ely v. Kings-Richardson Co., 265 Ill. 148, 106 N. E. 619 (1914); Morgan v. Ballard, 1 A. K. March 558 (Ky. 1819); Weld v. Lancaster, 56 Me. 456 (1868); New Haven Road Constr. Co. v. Long, 269 Mass. 16, 168 N. E. 161 (1921); Driver v. Smith, 89 N. J. Eq. 339, 104 Atl. 717 (1918); Cobb v. Wm. Kinefick Co., 23 Okla. 440, 100 Pac. 545 (1909); Jackson v. Duchaire, 3 T. R. 551, 100 Eng. Rep. 727 (1790). *Contra:* Biggers v. Matthews, 147 N. C. 299, 61 S. E. 55 (1908); Benford v. Sanner, 40 Pa. 9 (1861); No. Wisconsin Coop. Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N. W. 936 (1924).

[34] Hocking Valley Ry. v. Barbour, 190 App. Div. 341, 179 N. Y. Supp. 810 (1st Dept. 1920); WHITNEY, LAW OF CONTRACTS (3d ed. 1937) 167, § 62.

[35] Woodstock Iron Co. v. Richmond & Danville Extension Co., 129 U. S. 643, 9 Sup. Ct. 402 (1888); Coverly v. Terminal Warehouse, 85 App. Div. 488,

contracting to commit a breach of an existing contract is an agreement to commit a tort and the courts cannot enforce such an agreement.[36] Another strong reason against enforcement is public policy.[37] To permit enforcement would be to encourage persons to breach their contracts to accomplish similar unconscionable and unbusinesslike acts even though they originally made the contract freely and honestly. To thus support a contract based on acts that are morally unsound, against common honesty, and are proven torts would be to encourage such wrongdoing. The mere fact that the contract is partially executed will not take it out of the general rule.[38] Neither party can enforce against the other a contract made between themselves to injure a third person in fraud of the law.[39] Such an agreement has always been held illegal and fraudulent as against public policy.[40] A contract is protected and enforced at law, not because it is a moral obligation but because it is a civil obligation, and, to entitle it to be enforced, the contract must be legal, as an illegal contract creates no obligation.[41]

How does the Court of Appeals rationalize the *Budd* case with this evident weight of authority? The decision is utterly lacking in support by any authority and is based on two theories, one of justification in that the original contract did not intend Budd to go to California to perform it. The other was that Budd was not committing a legal wrong in breaking his contract. In support of justification, the evidence is all too weak and the point is not stressed. But if Budd did not believe that his contract called for services wherever desired, his letters and the fact he performed about sixteen months of the three-year contract, are to the contrary. It was only when he had assur-

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83 N. Y. Supp. 369 (1st Dept. 1903), *aff'd*, 178 N. Y. 602, 70 N. E. 1097 (1904); Hart v. City Theatres Co., 215 N. Y. 322, 109 N. E. 497 (1915); Municipal Metallic Bed Mfg. Corp. v. Dobbs, 253 N. Y. 313, 171 N. E. 75 (1930); Kountze v. Flanagan, 64 Hun 635, 19 N. Y. Supp. 33 (1892); Hocking Valley Ry. v. Barbour, 190 App. Div. 341, 179 N. Y. Supp. 810 (1st Dept. 1920); DiTomasso v. Loverro, 250 App. Div. 206, 293 N. Y. Supp. 912 (2d Dept. 1937); Central N. Y. Tel. & Tel. Co. v. Averill, 58 Misc. 59, 110 N. Y. Supp. 273 (1908); Karpel v. Sands, 144 Misc. 392, 258 N. Y. Supp. 746 (1932).

[36] Reiner v. North-American Newspaper Alliance, 259 N. Y. 250, 181 N. E. 561 (1932); RESTATEMENT, LAW OF CONTRACTS § 576.

[37] Armstrong v. Toler, 11 Wheat. 258 (U. S. 1826); Moody v. Newmark, 121 Cal. 446, 53 Pac. 944 (1898); Rhoades v. Malta Vita, 149 Mich. 235, 112 N. W. 940 (1907); Baird v. Sheehan, 38 App. Div. 7, 56 N. Y. Supp. 228 (1st Dept. 1899), *aff'd*, 166 N. Y. 631, 60 N. E. 1107 (1901); Posner v. Jackson, 223 N. Y. 325, 119 N. E. 573 (1918); Reiner v. North American Newspaper Alliance, 259 N. Y. 250, 181 N. E. 561 (1932); Barry v. Mulhall, 162 App. Div. 749, 147 N. Y. Supp. 996 (1st Dept. 1914); Sprague v. Webb, 168 App. Div. 292, 153 N. Y. Supp. 1020 (1st Dept. 1915); Cahill v. Gilman, 84 Misc. 372, 146 N. Y. Supp. 224 (1914). See dissenting opinion Budd v. Morning Telegraph, 241 App. Div. 142, 271 N. Y. Supp. 538 (1st Dept. 1938), *aff'd*, 265 N. Y. 639, 193 N. E. 423 (1938).

[38] Kountze v. Flanagan, 64 Hun 635, 19 N. Y. Supp. 33 (1892).

[39] Randall v. Howard, 2 Black 585 (U. S. 1862); 13 C. J. 343.

[40] See note 37, *supra*.

[41] Greenwald v. Barrett, 199 N. Y. 170, 92 N. E. 218 (1910).

ance that he could breach it and still incur no liability, that he dared to enter into the second contract. On the second theory, that such breach is a private wrong between the injured party and the one who breached the contract and not a matter involving public policy or interests, it has been shown that breaching a contract is a matter of public interest when all the facts are shown. In *Reiner* v. *North American Newspaper Alliance,*[42] Judge Pound holds that to breach a contract is not of itself a tort; it is not a matter involving public policy, but only private rights, and a person has a right to breach a contract and subject himself to damages. It is to be conceded that to breach a contract is not a tort,[43] and, on the surface, the *Budd* case is strictly an action for such a breach. On the facts pleaded in the *Budd* case, a cause of action is shown which must be brought to trial in order to bring out all the additional facts involved. And in order to render a true decision on the motion to dismiss the complaint, the court must go beneath the surface and look at the facts. The contract therein involved is basically one to commit a tort,[44] and there is little doubt that such a contract is illegal and does concern a question of public policy.[45] Judge Lehman, while partially agreeing with Judge Pound, seeks to show the error in limiting the eyes of the court to the facts at hand. He states:

> "That problem should not be complicated by questions of the form of action for breach of such duty or of whether the narrow contractual duty supersedes the more general duty, if it exists. Determination of public policy must rest upon broad principles. If the plaintiff is seeking to recover compensation for an act which constitutes a breach of a general duty to refrain from willful, intentional injury to another without just cause or excuse, then public policy must deny him recovery."

Therefore a cause of action predicated on an illegal contract against public policy cannot be enforced in the courts.[46]

IV

Considering the *Budd* case, it is difficult to say what attitude the New York courts will assume in the future. Other jurisdictions have taken cognizance of the problem, and the majority opinion is that a bargain requiring the breach of an existing contract with harm to a third party is unenforceable as against public policy.[47] If the

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[42] 259 N. Y. 250, 181 N. E. 561 (1932).
[43] Rich v. N. Y. Central & Hudson R. R., 87 N. Y. 382 (1882).
[44] Reiner v. North-American Newspaper Alliance Co., 259 N. Y. 250, 181 N. E. 561 (1932).
[45] WHITNEY, LAW OF CONTRACTS (3d ed. 1937) 167, § 62.
[46] See note 35, *supra.*
[47] Roberts v. Criss, 266 Fed. 296 (C. C. A. 2d, 1920); Moody v. Newmark,

Budd case is followed in New York, then it must be said that New York will follow a minority rule. The law in New York involving the principles herein discussed placed this state among the majority of those adopting the rule that a party inducing a breach of contract is guilty of committing an illegal act [48] and that contracts based on a tort may not be enforced.[49] A further point to be added which has not been discussed yet, is that the subsequent contract is a fraud against the third party [50] and is a tort, independent of the inducement to breach the contract.

In *Reiner* v. *North American Newspaper Alliance* [51] the issues are almost identical to the problem herein, but the court based its opinion on the question of fraud and avoided answering this question. Judge Hubbs and two other judges decided that the contract was one to commit a tort and as such unenforceable. Judge Pound specifically denies that it is a tort and that public policy is involved, but states that it is a fraud on a third party and as such unenforceable. He does not base his opinion on the breach at all. Judge Crane similarly refused to recognize the tort but upheld the decision, stating that the courts will not aid a fraudulent scheme that is inherently against public policy in that it is based on immoral and unconscionable acts. It was only Judge Lehman who approached the question that public policy forbids the enforcement of a contract calling for a breach of an already existing agreement. Recognizing the basic question present as to whether enforcement of the second contract is against public policy, he states:

> "Even now the law has evolved at least to the point where on ground of public policy it should refuse to a suitor all remedy upon a contract which could be performed only by the suitor's using a contract made with a third party as an instrument of injury to the third party. * * * Any broader rule indicated in this opinion is intended only as a warning that other contracts or acts, in breach of contracts made with third parties, may similarly outrage public policy."

Although various opinions are to be found in the *Reiner* case, they all ultimately conclude that the second contract is unenforceable.

Yet when five of those same six judges are faced with almost the self-same facts as they are in the *Budd* case, they abandon their

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121 Cal. 446, 53 Pac. 944 (1898); Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235, 112 N. W. 940 (1907); Hocking Valley Ry. v. Barbour, 190 App. Div. 341, 179 N. Y. Supp. 810 (1st Dept. 1920); Attridge v. Pembroke, 235 App. Div. 101, 256 N. Y. Supp. 257 (4th Dept. 1932); Wanderess Hockey Club v. Johnson (1913) 18 B. C. 367. See also Sharpless-Hendler Ice Cream Co. v. Davis, 17 Del. Ch. 161, 151 Atl. 261 (1930); Driver v. Smith, 89 N. J. Eq. 339, 104 Atl. 717 (1918); Cobb v. Kenefick, 23 Okla. 440, 100 Pac. 545 (1909).

[48] See note 7, *supra*.

[49] See note 36, *supra*.

[50] RESTATEMENT, LAW OF CONTRACTS § 576.

[51] 259 N. Y. 250, 181 N. E. 561 (1932).

ideas and can see no wrong in a contract which is intended to harm a third party. The only illegal act being that defendant by his inducement committed a tort, as plaintiff's acts can only have harmed the third party and no one else. The contract is not one to commit a tort; it is not a fraud on the third party; it is not an immoral and fraudulent agreement against public policy, it is a valid and enforceable contract. Perhaps the reason for this obvious reversal of opinion, contrary to the weight of decision, is that the question reached the court on a motion to dismiss the complaint. The complaint does state a cause of action and it would only be on the trial that all the pertinent facts would be brought out.

These two recent cases represent the law in New York. Which one will be followed, it is difficult to say. The *Budd* case is distinguished from the *Reiner* case by showing that fraud alone defeats the plaintiff in the latter case whereas no fraud is present to prevent Budd from suing. Even to concede that a breach of a contract standing alone is only a private wrong, does not give the proper answer. When that breach is interwoven into a tort, it cannot be separated. The defendant was guilty of a wrong unquestionably, yet his illegal act cannot be separated from plaintiff's act in breaching his contract with a third party. They are not two separate acts but are one, having one result, *i.e.,* harm to a third party. The acts of the plaintiff were as unconscionable as those of the defendant inducer. Any acts intended to harm a third party are illegal,[52] and it is this combination of acts that creates the injury. Defendant's inducement would not be the basis of any tort, if plaintiff had not acted with him in order that they together could form a second contract.

It is apparent that the better law should follow Judge Lehman's opinion in the *Reiner* case, and undoubtedly future decisions involving the validity of a contract which requires in its performance the breach of a contract already existing between one of the parties with a third person will limit the rule of the *Budd* case.

In *Roberts* v. *Criss,* the federal courts have properly adjudicated the question involved herein.[53] In that case the courts refused to enforce a second contract on the grounds that it was against public policy and that the consideration given for it was illegal. This is apparently the line of reasoning that should be followed in future decisions as it properly states what the law should be.

Where a contract has for an integral part of its consideration the breach of a prior inconsistent contract between one of the contracting parties and a stranger, it is based upon an illegal consideration, and is void and unenforceable by either party thereto. Moreover, when the breach of the prior contract is accompanied by a

[52] 13 C. J. 343.

[53] Roberts v. Criss, 266 Fed. 296 (C. C. A. 2d, 1920) (action to enforce a business contract which involved the breach of an existing contract between the promisee and the stock exchange. *Held,* the second contract being illegal and tortious was unenforceable).

tortious act or "wrong" to the other contracting party, the wrongdoer will be precluded from profiting by an enforcement of his second contract.[54]

ROBERT M. POST.

PICKETING—SCOPE OF RELIEF UNDER THE NEW YORK ANTI-INJUNCTION ACT

I

It is most interesting to note the first judicial dispositions of cases involving organization to secure wage increases and picketing. In 1835 a combination of bootmakers, to raise their wages, was indicted for peaceable co-operation for the purpose of maintaining the rate of wages. The court held that such combinations and confederacies to enhance or reduce the price of labor were injurious to trade, and monopolistic in aspect.[1] Business was upheld as a property right which equity would enjoin from injury.[2] In another action involving the right to picket, the court similarly enjoined the defendant on the ground that it was a public obstruction and a private nuisance in violation of the right to do business freely.[3] Judicial attitude was rapidly changing, and, towards the end of the century, we find the first assertions that combination, appeal, persuasion,[4] and picketing[5] are legal means of obtaining larger wages. Legislative recognition fostered this change, and in 1870 it was enacted that the "orderly and peaceable assembling or co-operation of persons employed in any profession, trade or handicraft, for the purpose of securing an advance in the rate of wages or compensation" is now permitted.[6] Thus the common law actions of conspiracy[7] and enticing away of workmen[8]

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[54] 11 A. L. R. 698; RESTATEMENT, LAW OF CONTRACTS § 576.

[1] People v. Fisher, 14 Wend. 2, 18 (N. Y. 1835) ("He may say that he will not make coarse boots for less than one dollar but he has no right to say that no other mechanic shall make them for less").

[2] People v. Barondess, 61 Hun 571, 16 N. Y. Supp. 436 (1st Dept. 1891); Davis v. Zimmerman, 91 Hun 481, 36 N. Y. Supp. 303 (1895); Kerbs v. Rosenstien, 56 App. Div. 619, 67 N. Y. Supp. 385 (1st Dept. 1900); Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185 (2d Dept. 1904); Rogers v. Evarts, — Misc. —, 17 N. Y. Supp. 264 (1891).

[3] Gilbert v. Mickle, 4 Sandf. Ch. 357 (N. Y. 1846) (defendant picketed the plaintiff's auction rooms to warn strangers of mock auctions).

[4] People v. Wilzig, 4 N. Y. Cr. Rep. 403 (1886); People v. Kostka, 4 N. Y. Cr. Rep. 429 (1886).

[5] Levy v. Rosenstein, 66 N. Y. Supp. 101 (Sup. Ct. 1900).

[6] N. Y. Laws 1870, c. 19.

[7] Two or more persons who conspire to prevent another from exercising a lawful trade or calling, or by interfering or threatening to interfere with property belonging to or used by another, or with the use or employment thereof, are guilty of a misdemeanor.

[8] Johnston Harvester Co. v. Meinhardt, 9 Abb. (N. C.) 393 (N. Y. 1880)