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THE JOURNAL takes pleasure in announcing the following appointments to the Editorial Board from the Class of 1910: James Dugdale Baird, of Carthage, Ill.; Arthur Milton Comley, of Bridgeport, Conn.; Eldon Lewis Hilditch, of Thompsonville, Conn.; Thomas Connelly Malley, of Springfield, Mass.

CRIMINAL LIABILITY OF CORPORATIONS.

In the case of *The People v. The Rochester Railway and Light Company,* 41 N. Y. Law J. No. 6, it was *held,* that a corporation is not, under the Penal Code, indictable for manslaughter in the second degree. The provisions of the Code defining homicide and manslaughter as the killing of one human being by another, do not include corporations. Sects. 179, 180, etc. The Rochester Railway and Light Company had been indicted for the crime of manslaughter in the second degree, because it, per allegations, installed in a residence certain apparatus so negligently that gases escaping therefrom caused the death of an inmate. Upon a demurrer to the indictment the question of whether a corporation may be indicted under Section 193 of the Penal Code arose. The court could not discover any evidence of an intent upon the part of the legislature to abandon the limitations of its enactments to human beings or to include a corporation as a criminal. In reach-

ing this conclusion, however, interpreting a specific provision of the Code, the court briefly considered the general question, whether a corporation is capable of committing in any form such a crime as that of manslaughter.

And in the first place, were it not for the fact that it appears to have partaken of Phoenix-like qualities, it would doubtless be wearisome to the reader to again state that although Lord Chief Justice Holt is said to have held that, "A corporation is not indictable, although the particular members of it are." *Anon.*, 12 Mod. 559, that in modern times this doctrine, if it were ever promulgated,* has absolutely no stand in courts or among text writers. Since a corporation, "is an artificial being, invisible, intangible and existing only in contemplation of law, it must act by its officers and agents, and their purposes, motives and intent are just as much those of the corporation as are the things done. Although, from the very nature of its existence, a corporation cannot be imprisoned bodily, yet it may be fined, and the fine may be enforced against its property, or its charter may be forfeited because of some nonfeasance or malfeasance or misfeasance, the fear of which forfeiture could certainly be made as strong a deterrent force with a corporation, as is imprisonment with the average individual.

There is, doubtless, no principle of corporation law better settled to-day than the one that a corporation may be indicted and fined for offenses consisting merely of nonfeasance. In quite a number of the early cases a distinction was made between the criminal responsibility for a nonfeasance and for responsibilities for a misfeasance. While it was conceded that an indictment would lie for the one, it was held that it would not lie for the other. *Com. v. Swift Run Gap Turnpike Co.*, 2 Va. Cas. 363. Such holdings, however, have not been approved, and the principle is now well established that a corporation may be indicted for a misfeasance or malfeasance as well as for a nonfeasance. *Reg. v. Great North of England Ry. Co.*,. 9 Q. B., A. & C., 315.

Lord Denman, C. J., when it was urged in behalf of corporations that it was unnecessary to hold them criminally liable for acts of misfeasance, since their officers who do the act may be indicted, said: "Of this there is no doubt. But the public know nothing of the former, and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury." *Reg. v. Railway, supra.*

In the same case appears a *dictum* to the effect that a corporation cannot be guilty of an offense which involves the element of malice or evil intent; but this broad statement may well be questioned. It is a settled principle that a corporation may be held liable in a civil action for wrongs of its officers and agents involving the element of malice, and that it may be subjected to exemplary or punitive damages, and the assertion that an indictment for offenses which derive their criminality from evil intent is open to question. *State v. Passaic County Agricultural Soc.*, 54 N. J. L. 260. Malice is an element of criminal libel, and an indictment against a corporation for the same has been sustained. *State v. Atchison*, 3 Lea. Tenn., 729. It has also been held that a corporation is indictable for a criminal contempt of court, although a criminal contempt involves a specific intent as a necessary element. The contempt in question was publishing an article in a newspaper, concerning a pending trial, which was deemed to prejudice the jury, and thus tend to prevent a fair trial. *Telegram Newspaper Co. v. Com.*, 172 Mass., 294. There are many *dicta* to the effect that a corporation cannot be guilty of an offense involving the element of personal violence, as assault and battery, riots, etc., *Reg. v. Railway, supra,* and there appears to be no reported case to the effect that an indictment has ever been maintained for such crimes.

In the recent case of *The New York Central and Hudson River Railroad Company v. United States,* Vol. 212, No. 5 U. S. Rep., April 5, 1909, wherein an indictment against the railway company and one of its agents for giving rebates was sustained, it was held that "due process of law is not denied by the provisions of the Elkins Act of February 19, 1903, 32 Stat. at L. 847, under which the commission, by corporate officers, acting within the scope of their employment, of criminal violations of the prohibitions of that act against giving rebates, is imputed to the corporation, and the corporation is subject to criminal prosecution therefor." Furthermore, a joinder of both, the agents and the corporation in the indictment, was allowed. At the same time the court held that there are some crimes which, from their very nature, cannot be committed by corporations.

The New York Court of Appeals in *People v. Rochester Railway and Light Company, supra,* in a *dictum,* hold: "We have no doubt that a definition of certain forms of manslaughter might have been formulated, which would be applicable to a

corporation, and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in homicide, and among which, very probably, might be included conduct in its substance similar to that here, *vide supra,* charged against the respondent." The court then goes on to plainly show under the existing law that the defendant cannot be held. However, this *dictum* shows the state of sentiment today in regard to holding corporations criminally responsible for a set of crimes for which, thus far in the development of the law, they have not been held, although Massachusetts and some of the other New England states at one time, by statute, allowed an indictment to hold in cases of manslaughter, the fine being given to the widow or next of kin. These laws were in effect merely an effective civil aid, rather than a criminal indictment. The civil liability of corporations has had a steady growth, analagous, though limited, to the criminal, and especially is this true in connection with the growth of tort liability.

The Supreme Court of the United States in the case of *U. S. v. Railway Co., supra,* says: "It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuls only were subject to punishment for violations of the law, when the giving of rebates as concessions inured to the benefit of the corporations, of which the individuals were but the instruments.. . . . . We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act."

That the law in connection with the subject of the indictability of corporations is a live, healthy, growing organism, there can be little doubt. Not so very long ago, corporations, from the very fact that they were so few in number, held certain immunities, not held today. These immunities existed not so much from the nature of the corporation as "a soulless creature," and similar attributes more tritely than truly put, as from the fact that it was not so vital a question, while corporations were so few in numbers and small in power, to thresh out each minute doctrine re-

sulting from a *reductio ad absurdum* of the intangible entity theory. The whole growth of the modern law is to take away as much as is possible of fiction, and the doctrine of criminal liability of corporations does not appear to be forming any privileged exception. Our Supreme Court well moulded into words both the spirit of the modern law and the spirit of the times when it said: "There can be no question of the power of Congress to regulate interstate commerce to prevent favoritism, and to secure equal rights to all engaged in interstate trade. It would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises." *N. Y. C. & H. Ry Co. v. U. S., supra.*

REGULATION OF CONTRACTS UNDER THE POLICE POWER.

With the formal entrance of the American Federation of Labor into the field of national politics last summer, it became evident that we are destined to have in this country a large body of voters clamoring for laws to advance their own class interests. To what extent our legislators will yield to the persistent demands of labor leaders, it is impossible to determine; but it is almost certain that from time to time waves of radicalism will sweep over the country and carry with them statutes which, if undisturbed, will work much harm and little good to our nation. When, in addition to this, we consider the present optimism of a large number of our lawmakers, who by legislative fiat hope to cure many almost inherent human vices, we realize that the Constitution of the United States grows constantly more important as a protection of individual rights and liberties against unjust and arbitrary enactments.

The protection of the public against encroachment on their privileges by legislation is secured by that part of the fourteenth amendment which declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law." This restriction on the power of the states is, however, limited by the fact that both property and liberty are held on such reasonable conditions as may be imposed by the State in the exercise of the

police power. *Mugler v. Kan.,* 123 U. S. 623. Thus, in every case where the protection of the Federal Constitution is sought against harsh legislation, the question arises: Is this a fair, reasonable, and appropriate exercise of the police power or is it an unreasonable, unnecessary, and arbitrary interference with the rights of the individual? *In re Converse,* 137 U. S. 624.

A few attempts have been made to define police power, but most courts have declared it incapable of exact definition, and have held with Mr. Chief Justice Shaw that, "It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." *Commonwealth v. Alger,* 7 Cushing 84. As a result it has come about that the extent of police power rests largely with the courts, and what is thought without the power at one time may be permanently included within it at another. On almost no subject are the courts of this country in greater conflict than as to the scope of this power, and there is little likelihood of any uniform legislation. To what degree and over what subjects the Supreme Court of the United States extends the police power is, therefore, of vital importance to the community, as such interpretation greatly limits the protection of the individual against oppressive State legislation.

In the recent case of *McClean v. Arkansas,* 211 U. S. 539, the United States Supreme Court has rendered an opinion which is important as showing the length to which states may go under the police power in the regulation of the contracts of private parties. That the general right to make contracts is protected by the fourteenth amendment, has been thoroughly established in the courts. *Allgeyer v. Louisiana,* 165 U. S. 578. The Supreme Court, in the case under consideration, upheld the power of the Arkansas legislature to pass an act which, in substance, declared that every mine operator or mining company employing more than twelve men, and paying his employees at a ton or bushel weight, should weigh or measure all the coal coming out of the mine before it has been screened, and base the wages paid on the amount of unscreened coal. For any mine owner to contract to pay his men for screened coal was declared a serious offence, involving fines or imprisonment or both.

This law constituted, as may be seen, a serious curtailment of the right to contract and could, therefore, only be supported in case it came within the police power of the state. In sustaining

the act the Supreme Court took the ground that, as it was unable to say that the law had no reasonable relation to the protection of a large class of laborers and did not promote harmonious relations between capital and labor, the law was within the power of the state. A different course was taken from that adopted in the cases deciding on the validity of laws limiting the hours of certain employments and the reasonableness of the statute was hardly considered. Instead, after briefly touching upon the claims of the advocates of such a law, the court declared: "It is not for us to say whether these are the actual conditions. It is sufficient to say that it was a situation brought to the attention of the legislature, concerning which it was entitled to act and judge for itself in the exercise of its lawful power to pass remedial legislation."

The advisability of such a method of payment has been, indeed, seriously questioned by both laborers as well as capitalists. In bituminous mining the miners have generally urged such a law and it was undoubtedly their political influence which was responsible for this Arkansas statute. At the same time it has been urged by many students of the problem that such legislation militates against the best interests of the industry. Thus Judge English, of the West Virginia Court, said in a dissenting opinion: "What then are the inevitable results of the law under consideration? It depresses the wages of the miners; it takes bread from the family of the skilled miners and gives it to the family of the unskilled and careless one. When this act is enforced there is no longer any incentive to the skilled miner to send out as the product of his labor the highest percentage of merchantable coal." *State v. Coal Co.*, 36 W. Va., 802. In the anthracite the demand for such a method of payment was once popular, but the present, more competent organization of the United Mine Workers holds such a change as undesirable for labor. Both mine owners and mine workers dispute to a great extent the advantage of such a law, both in its effect on themselves and on the industry. In this lies the distinction between the present decision and the ordinary opinions as to police power since the beneficiality to at least a large class by the enactment of laws compelling vaccination, or ordering the destruction of spoiled food, or limiting the hours for women's work, or similar statutes cannot be denied.

In four states coal screening laws of the same general nature

as this Arkansas statute have been passed on by the courts. West Virginia and Arkansas have upheld the laws, while Illinois and Colorado have condemned them as unconstitutional. The case of the *State v. Peel Splint Coal Company,* 36 W. Va. 802, is the most important decision upholding such an act. The West Virginia court based its opinion first upon the ground that the coal mining company was a corporation in the enjoyment of extraordinary privileges, and, second, that such companies in that State are required to take out a license, and, therefore, become licensees. In its decision the court followed *Munn v. Illinois,* 94 U. S. 113, where the validity of legislation fixing grain elevator charges was sustained. It is very difficult to see upon what theory such an extension of the doctrine of that case was made. The principle of *Munn v. Illinois* was based upon the statement of Lord Chief Justice Hale, made more than 200 years before, in which he said, when property is "affected with public interest it ceases to be *juri privati* only." *De Juri Maris,* 1 Harg. Law Tracts 6. This ground of the decision as the only one in which it could be sustained was later affirmed by the Supreme Court in *Budd v. New York,* 143 U. S. 53. That the principle applied to carriers, hack drivers, and similar occupations has not been questioned, because of the nature of their pursuits, but its extension to coal mines has rarely been ever suggested. It was not raised in *Holden v. Hardy,* 169 U. S. 366, where the constitutionality of an eight-hour law for miners was sustained, and it seems incredible to believe that the United States Supreme Court would even consider a law fixing the selling price for coal, which statute might well be constitutional if the words, "affected with public interest," are to be so broadly construed. Such a claim was decisively repudiated in *Millet v. Illinois,* 117 Ill., 294.

In *State v. Wilson,* 61 Kans. 35, the Kansas statute sustaining such a coal screening law was sustained, but here the court said: "In our judgment the law in no wise affects the right of contract, and does not hinder or prevent the mine operator or miners from making such agreements as they may choose concerning the amount of compensation to be paid for labor in mining coal. Nor does the act prohibit the employment of miners at day wages or make void contracts for the payment of wages based on the quantity of screened coal produced." The effect of this Kansas law was not the same as that of the Arkansas law, where payment by screening was made illegal.

The Colorado and Illinois courts are most emphatic in holding such screening acts repugnant to the provisions of the fourteenth amendment. In *Ramsey v. People,* 142 Ill., 380, the Illinois court says: "In all other kinds of business involving the employment of labor, the employer and employee are left free to fix by contract the amount of wages to be paid, and the mode in which such wages shall be ascertained and computed. This is justly regarded as a very important right, vitally affecting the interests of both parties. To the extent to which it is abridged, a property right is taken away. There is nothing in the business of coal mining which renders either the employer or employee less capable of contracting in respect to wages than in any of the branches of business in which laborers are employed under analogous circumstances." The Colorado Court charcaterized such an act as an "infringement of personal guarantees." *Re House Bill No.* 203, 21 Col. 27.

Five cases stand out prominently among the Supreme Court decisions as passing upon the constitutionality of laws restricting the right of contract. Two of these opinions are concerned with laws regulating the payment of wages, and the other three deal with statutes fixing the maximum number of hours in certain occupations. In *Patterson v. The Eudora,* 190 U. S., 169, the court sustained an act of Congress making it a misdemeanor for a shipmaster to pay a sailor any part of his wages in advance. The court took notice of the conditions of the sailors' livelihood, and largely based its decision on the necessity of such a law to protect seafaring men against unscrupulous masters. During the year before this case was decided the Supreme Court in *Knoxville Iron Co. v. Harbison,* 183 U. S. 13, upheld the constitutionality of a statute requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages upon the ground that the employee was at a disadvantage in dealing with the employer about such matters.

Of the other class of cases was *Holden v. Hardy,* 169 U. S., 366, where the Supreme Court held an eight-hour law affecting mine workers constitutional because of the nature of the employment. This ruling was not followed in *Lochner v. New York,* 198 U. S., 45, where a statute limiting the working hours of bakers was held unconstitutional, the conditions of the trade being carefully distinguished from mining. Following out this principle, the Supreme Court in *Muller v. Oregon,* 208 U. S. 412,

upheld an Oregon statute prohibiting the working of females in laundries more than ten hours each day. This case, like each of the other four, was decided after considering the class of persons protected, the nature of their occupations, the effect of such a law, and making these facts the underlying reason for their decisions. In none of them was so much left to the discretion of the State legislature as was left in *McClean v. Arkansas.*

The importance of the decision under consideration is, therefore, patent. In its decision the court acted on a law, the validity and the results of which have been much questioned. It did not adopt the reasoning by which like statutes in the State courts were declared constitutional. The decision indicates that the states are to be given a broader field to legislate in under the police power than they have had up to the present time.

It is undeniably true that the legal tendency of the last three hundred years has been away from police power, and the statutes of Elizabeth regulating the wages of laborers seem as foreign to us as the acts of Richard II. declaring that no servant should play tennis or football. 5 *Elizabeth ch.* 4 *St.* 12 *Rich.* 11. *C.* 6. Equally true, however, is the fact that the movement of judicial decisions during the last quarter century has been toward the extension of this power. We may, therefore, reiterate with confidence in its truth the opinion voiced twenty years ago by Ambassador Bryce in a comment on the Granger cases: "I do not presume to doubt the correctness of these decisions, but they evidently present a different view of the sacredness of private rights, and of the powers of the legislature from that entered into by Chief Justice Marshall and his contemporaries." *American Commonwealth,* Vol. 2, p. 167.

THIRD PARTY SUING ON CONTRACT MADE BY ANOTHER.

In the case of *Charles Eades v. Atlantic, Gulf and Pacific Co.,* No. 6262, the Court of the First Instance for the District of Manila was called upon to determine whether a third party could sue a promisee on a contract made with the promisor (primarily at least) for the promisor's benefit alone. The defendant company was under contract with the City of Manila to install a sewerage system. The plaintiff was a fireman employed in the fire department of the city as a driver. While responding to an alarm he was thrown from his wagon. He alleges that owing

to the condition in which the street was left by the contracting company, he was injured and sued it, with an averment of liability only such "as arises under and by virtue of such contract."

Decision was rendered for the defendant company based principally on Art. 1257 of the Civil Code, which reads as follows: "Contracts shall only be valid between the parties who execute them and their heirs.* * * Should the contract contain any stipulation in favor of a third party, he may demand its fulfilment, provided he has given notice of its acceptance to the person bound, before it may be revoked;" following Art. 1165 of the French (Napoleonic) Code, "Contracts only produce effects between the contracting parties. They do not affect third parties, and do not benefit them, except in the case provided by Art. 1121."

This, continues the court, is the law in Germany, Austria, Italy, Portugal, Holland, Switzerland, and Spanish American countries, following corresponding provisions in their respective codes.

Then, perhaps erroneously, the court says that this, too, is the prevailing doctrine of the American Law. The law on this subject both in England and in the United States is and has been somewhat anomalous.

In England, originally, a third party could enforce a contract against a promisor, if it was supported by a valuable consideration, if it was a promise not under seal, and if it was intended for the benefit of the third person, at least if the third person was a near relative. *Dutton v. Poole,* 2 Levin 216; 1 Vent. 318. (Why relationship was such an important fact seems at first blush difficult to understand). Later English cases held that under no circumstances could the third party enforce a contract to which he was not a party. *Price v. Easton,* 4 B. & Adolph. 433.

The weight of modern authority seems to hold that the third party may recover from the promisor if the promise is upon consideration, not under seal made primarily for the benefit of the third party. *Hendrick v. Lindsay,* 93 U. S. 143; *Buckley v. Gray,* 110 Cal. 339; *Lawrence v. Oglesby,* 178 Ill., 122. And it has been so held in at least nineteen states. On this subject the leading case is *Lawrence v. Fox,* 20 N. Y. 268. The courts have, however, shown a tendency not to extend the rule. *Montgomery v. Rief,* 15 Utah 495.

The courts which allow the third party to enforce the contract

against the promisor, do so only when the promise was intended primarily to benefit him. If the promise was intended for the promisee's benefit, and the benefit to the third party is merely incidental, in such case the third party cannot maintain an action against the promisor. *Treat v. Stanton,* 14 Conn., 445; *Crandall v. Page,* 154 Ill., 627. Some courts even go so far as to hold that the third party can only sue when he is the sole beneficiary. *German S. Bk. v. N. W. Water and L. Co.,* 104 Ia. 717.

A minority of our courts have held that a contract between two persons for the benefit of a third person confers no right of action upon such third person as against the promisor. *Morgan v. The Randolph and Clowes Co.,* 73 Conn., 396; *Williamson v. McGrath,* 180 Mass. 55; *Linneman* v. *Moross Estate,* 98 Mich. 178; *Coffee v. Shuler,* 112 N. C., 622.

The right is one, however, usually recognized in equity. *Palmer v. Bray,* 136 Mich. 85; *Zell's Appeal,* 111 Pa. St. 532; *O'Connor Adm'r v. O'Connor,* 88 Tenn., 76.

We frankly confess that we see no reason why, in these days of enlightenment, when such a pronounced tendency exists to look no longer to the form, but to the substance, we confess we see no reason why, in any contingency, the third party should not be entitled to sue on a contract made for his benefit whether primarily or incidentally; giving a bond against further liability to the promisor. In the case at bar, however, a strange feature was present, to wit: A municipal employee suing a third party for injuries received while he was acting for the municipality on its governmental side. The circumstances of the suit, however, were such that it was not necessary for the court to consider this question, and it went by entirely unmentioned. *H. F.*

MOTIVE AS AN ELEMENT OF TORT.

In 1905 Mr. James Barr Ames, writing on the increasing importance of motive as an element in torts, suggested a case in which a man should start a shop, not for the sake of profit, but regardless of loss for the sole purpose of driving another shopkeeper out of business and with the intention of retiring upon the accomplishment of his malevolent purpose. Such a case, he declared, was not likely to arise, but he pointed out that, according to the trend of many modern decisions, such a defendant would be held liable. 18 *Harvard Law Review,* 420.

On February 19th of this year the Supreme Court of Minnesota, acting upon a state of facts almost identical with those suggested by Mr. Ames, held the malicious competitor liable in damages. *Tuttle v. Buck,* 199 N. W. Rep. 946. The defendant in the case was a wealthy banker with much influence in the town of Howard Lake, Minn. Angered by the plaintiff, who was a barber, he maliciously established a barber shop, employed a man to carry on the business and did what he could to draw away his rival's customers. This was not done for the purpose of serving any legitimate end of his own, but merely with the idea of injuring the plaintiff. The business of the plaintiff was finally ruined as a result.

A perfectly clear question was presented in the case as to whether underbidding in business done with the sole purpose of damaging another gives rise to liability. None of the usual incidents of many of the cases involving motive appear. There was no conspiracy, no inducement to break contracts, and not a suggestion of restraint of trade.

In its decision the court justified itself upon general grounds. Judge Elliot, rendering the majority opinion, said: "To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest and justifiable as fair competition, but when a man starts an opposition place of business for the sole purpose of driving his competitor out of business, he is guilty of a wanton wrong and an actionable tort. . . . To call such conduct competition is a mere perversion of terms."

On the question of motive as an element in torts the decisions of the courts differ considerably. It is universally acknowledged that "where one exercises a legal right only, the motive which actuates him is immaterial." *Roycroft v. Taintor,* 68 Vt. 219. Certain courts seem to follow this principle almost blindly in the questions of tort which came before them. *Road Co. v. Douglas,* 9 N. Y. 444. *National Protective Association v. Cumming,* 170 N. Y. 314-326. The tendency of the modern cases is, however, to draw a distinction well stated by Mr. Justice Hammond in *Plant v. Woods,* 176 Mass. 492: "If the meaning of this and other similar expressions is that where a person has a lawful right to do a thing irrespective of motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of motive, has

a right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate."

This reasoning that certain actions are lawful when done with one set of motives, but are unlawful when done with another set, is of ancient origin in the law. The same considerations are the basis of the decision in *Keeble v. Hickeringill,* 11 East 574 n., where the defendant, with the object of urging the plaintiff in the use of his duck decoy, wilfully fired off guns upon his own land and made loud noises in order to frighten the ducks away from the plaintiff's land. These were held to be wrongful acts as they were done with a sinister motive; and yet the defendant had undoubtedly the privilege of shooting over his own ground, and if in the *bona fide* exercise of this right he had made the same noises at the same time and with the same results in shooting his own game, he would have been acting within his right to use as he pleased his own land for his own legitimate purposes.

In the modern case of *Harrison v. The Duke of Rutland* [1893], 1 Q. B. D. 142, the same principle was laid down. It was here held that to pretend to use a legal privilege as a mere cloak for doing a wrongful act to the prejudice of another affords the wrongdoer no greater protection than if that privilege had no existence. A charge of assault was made against the game-keepers of the Duke of Rutland, who was the owner of a grouse moor, crossed by a public highway, the soil of which also belonged to him. The Duke and a party of friends were shooting when the defendant, for the sole purpose of interfering with the enjoyment of the sport, went out upon the highway. In its decision, the court held the game-keepers justified in preventing the plaintiff from carrying out his unlawful object upon the ground that since the plaintiff was on the highway for other purposes than the use of it as a highway, he was a trespasser.

Two cases, one decided in France, the other in Belgium, well illustrate the point. In each case an employer threatened to discharge his working men if they traded with the plaintiff. In the French case the order was held a reasonable regulation, as the plaintiff, a saloon keeper, had exercised a demoralizing influence over the employees. *Reding v. Kroll,* Trib. de Luxembourg (Oct. 2, 1896) Sirey 1898, 416. Damages were awarded the

plaintiff in the Belgian case, as the only ground for the order was that the plaintiff was a political rival of the defendant. *Dapsens v. Lambret Cour d'Appel de Siege* (Feb. 9, 1888).

The right under which the defendant in the present case claims is the privilege of competition. That every man has legally cut prices in order to drive his competitor out of business has become a fixed principle in the law so long ago as the Schoolmaster Cases, 11 Henry IV 47, where one schoolmaster sued another for injury done by the latter in setting up a rival school, the court firmly upheld this right of competition. In the *Mogul Steamship Co. v. McGregor,* 23 Q. B. D. 593, the House of Lords presented the doctrine in its modern form and refused to give damages to the plaintiff for injuries to his business received while in competition with the defendant.

The competition to be privileged must, however, be real. This distinction was clearly recognized in the Mogul Steamship case. Lord Esher declared, in his opinion: "An act of competition otherwise unobjectionable done not for the purpose of competition, but with intent to injure a rival tradesman or his trade is not an act done in an ordinary course of trade and, therefore, is actionable if injury results." Bowers, L. J., also clearly pointed out the difference between the case under consideration and one where, under the guise of competition, a purely malicious act is done which has for its purpose injury to another.

In the United States the courts have laid down no such broad statement in regard to competition as that of Lord Esher. Where the few cases involving the subject have arisen the courts have been conservative in their limitation of competition.

The United States Circuit Court recently decided that one may advertise and sell the goods of a manufacturer at less than wholesale price, though the purpose be to inflict a loss on the manufacturer. The court held that the plaintiff had no remedy since a person may sell or offer his property at any price he pleases. Judge Thayer gave the basis of the opinion when he said: "It is wiser to exclude any inquiry into the motives of men when their actions are lawful, except in those cases where it is well established that malice is an essential ingredient of the cause of action, or in those cases where, the act done being wrongful, proof of a bad motive will exaggerate damages." *Passaic Print Works v. Ely & Walker Dry Goods Co.,* 105 Fed. 163.

The New York courts favored the same reasoning in *National*

Protective Association v. Cumming, 170 N. Y. 314-326. On the other hand, Massachusetts, in a line of decisions involving the rights of trades unions, have leaned toward the other point of view. 18 *Harvard Law Review* 420. In Wisconsin the legality of such acts depends on the number of persons concerned. *State v. Huegin,* 110 Wis. 189. For a full discussion of the holdings of the states, see 62 L. R. A. 673.

The attitude taken by the Minnesota Court in *Tuttle v. Buck* is therefore a rather radical development of the theory of motive in competition. In drawing the somewhat fine distinction that this decision does in making the right of competition depend upon the motive with which it was done, the court assumes the heavy burden of ascertaining that fact. As was suggested in the argument of *Aikins v. Wisconsin,* 195 U. S. 194, such an interpretation will probably leave much to the whim of the jury. Men do not, as a rule, make known their intention under such circumstances and the court may do well to remember the comment of Bryan, C. J., made many centuries ago: "For it is trite learning that the thought of a man is not triable, for the devil himself knows not the thought of a man." *Year Book,* 17 Ed. IV 1.