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NEGLIGENCE IN RELATION TO PRIVITY OF CONTRACT

It is a paradox of the legal science that its fundamental principles need restriction; we are loath to see many of them carried to their logical conclusion. With fettered truths a lawless science is created. In no branch of the law is this better illustrated than in an attempt to define the limits of responsibility for negligence. *Sic utere tuo, ut alienum non laedas,* is a basic rule of conduct which none will question; to what extent is it a duty?

Although the broader principles of such a question are covered in a discussion of proximate cause, an examination of liability for negligence in relation to privity of contract, apart from the larger field, offers a specimen perhaps unequalled elsewhere of the truth of the paradox.

As a general rule, it is laid down that an action for injuries resulting from negligence in respect to a subject-matter which is covered by a

contract cannot be maintained by a stranger to that contract.[1] This arbitrary doctrine may be an unfortunate legacy bequeathed to us by the old technicalities as to the forms of action.[2] That it is unfortunate is indicated by the struggle which the courts have made to escape from it; they have thrust so many exceptions through it that a recent attempt to annihilate it altogether may prove successful.

The defendants had been engaged by a vendor of beans to weigh a quantity which they knew the plaintiff had bought and had contracted to pay for according to their certificate of weight. The defendants negligently certified the weight to be more than it actually was, and the plaintiff, in consequence, overpaid the vendor. He then brought an action of tort for negligence, and was allowed to recover, on the ground that he had suffered an injury caused by the defendants' negligence. *Glanzer v. Shepard* (1920, App. Div.) 186 N. Y. Supp. 88.

The court boldly took the analogy of a dangerous instrumentality and arrived at an extreme result.[3] But is there anything anomalous in a rule which imposes upon A, who has contracted with B, a duty to C when he knows the subject-matter is intended for C's use?[4] When anyone of reasonable foresight is so placed with regard to another that he recognizes that his negligence in the matter is not unlikely to cause injury to the other party, should not a duty exist for him to use ordinary care to avoid such a danger?[5] The instant case is practically unique in so holding,[6] and no other form of action against the present defen-

[1] Labatt, *Negligence in Relation to Privity of Contract* (1900) 16 LAW QUAR. REV. 168; 2 Cooley, *Torts* (3d ed. 1906) 1486; 38 Cyc. 433; see discussion of general rule in NOTES (1902) 15 HARV. L. REV. 666.

[2] See Bohlen, *Affirmative Obligations in the Law of Torts* (1905) 53 AM. L. REG. 214-220. *Winterbottom v. Wright* (1842, Exch.) 10 M. & W. 109, is the traditional leading case on this phase of the law and started the tendency which grew into a rule. Lord Abinger remarked, "There is . . . a class of cases in which the law permits a contract to be turned into a tort; but . . . they are all cases in which an action might have been maintained on the contract." The case does not really stand for the proposition supposed, as it turned on a question of pleading.

[3] *MacPherson v. Buick Co.* (1916) 217 N Y. 382, 111 N. E. 1050, is the only case cited by the court and its entire reliance is upon its reasoning. Cardozo, J., in his decision there said, "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger." The article in question was an automobile wheel. "If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for a decision of this case." See discussion in NOTES (1916) 29 HARV. L. REV. 866; (1916) 25 YALE LAW JOURNAL, 679.

[4] See *MacPherson v. Buick Co., supra* note 3: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

[5] See *Heaven v. Pender* (1833) 11 Q. B. 503, 509. This dictum by Brett, M. R., was not concurred in by the rest of the court.

[6] *Le Lièvre v. Gould* [1893] 1 Q. B. 491, is directly *contra* to the instant

dant can be suggested.[7] The English courts had struggled with a nearly identical state of facts, the lower court allowing a recovery, but the principle was apparently repudiated before an appeal was brought.[8]

If a presumption of validity is granted to the general rule, recognized exceptions expose its extraordinary vulnerability when it is hard pressed by the demands of natural justice and customary responsibility. "Privity of contract" is of course the concept about which the battle rages. No doubt it was a current view that if A had made a contract with B, its operative effect was limited to legal relations between A and B, and that it excluded or limited any liability of A to C, apart from a contractual duty, arising out of an act which as between A and B was

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case. See discussion in (1893) 7 HARV. L. REV. 124. Three cases have been found which are apparently in accord, but their authority for the present decision is weakened because they involve either physical injury or defamation. *George v. Skivington* (1869) L. R. 5 Exch. 5 (B bought hair-wash of A, stating that it was to be used by X. A negligently represented that the liquid was fit for use on the hair. X used the wash, suffering physical injury, and was allowed to recover against A); *Harriott v. Plimpton* (1896) 166 Mass. 585, 44 N. E. 992 (A, a physician, being employed by B to examine C, the plaintiff, negligently reported that C had a certain disease, which in fact he did not have. C recovered against A); *Edwards v. Lamb* (1899) 69 N. H. 599, 45 Atl. 430 (A, a physician, was employed by B, and negligently advised C that it would be safe for C to attend B. C was infected by B and recovered from A). See Smith, *Liability for Negligent Language* (1900) 14 HARV L. REV. 184, where these cases are cited as instances of the author's theory of negligent misrepresentation as a basis for tort liability. The instant case is perfectly covered by this doctrine, the essentials of which are: (1) Defendant knows his statement will be communicated to plaintiff. (2) The statement is not true in fact. (3) Defendant, though believing the statement, had no reasonable ground for such belief. (4) Defendant made the statement with the intention that plaintiff should act on it. (5) The subject-matter was such that one who acted in reliance upon it would be likely to incur substantial pecuniary loss if statement were incorrect. (6) Plaintiff acted in reasonable reliance upon the statement. (7) Plaintiff was damaged by so acting. See *Houston v. Thornton* (1898) 122 N. C. 365, 29 S. E. 827, imposing liability for negligent misstatement without privity of contract. Discussed in (1898) 12 HARV. L. REV. 221. Some few states have reached this same result by "conclusively presuming" knowledge where truth ought to have been known, and so finding fraud. *Watson v. Jones* (1899) 41 Fla. 241, 25 So. 678; *Cotzhausen v. Simon* (1879) 47 Wis. 103.

[7] An action for deceit would not lie. *Derry v. Peek* (1889) L. R. 14 A. C. 337. Its general interpretation, that an action of deceit based on fraud cannot be supported by proof of negligent misrepresentation, is followed in New York. *Marsh v. Fuller* (1869) 40 N. Y. 562. See full discussion of doctrine by Sir Frederick Pollock in (1889) 5 LAW QUAR. REV. 410.

[8] *Cann v. Wilson* (1887) L. R. 39 Ch. 39; see (1889) 2 HARV. L. REV. 389. The solicitors of the plaintiff, the intending mortagee of the property, required the owner to obtain a valuation of it. The latter employed the defendant to do so, who, knowing the purpose for which the valuation was to be used, carelessly fixed a value. The plaintiff, in accordance with the representations of the defendant, advanced money upon the security of a mortgage. The plaintiff was allowed to recover the amount of the damage he sustained from the great overvaluation. Overruled by *Derry v. Peek, supra* note 9. See 20 Halsbury, *Laws of England,* 665, note.

a breach of contract.[9] Such a view is no longer tenable.[10] The real question between A and C is one of general duty and reasonable care; a relationship arising from A's acts and position with regard to C, not from A's promises to B, although perhaps it may be due to them. A's liability to C is not based upon his broken contract with B. "Proximate "cause" and the recognized rules of responsibility for negligent acts should replace a fetish of "privity of contract."

This the courts are recognizing in extending the scope of exceptions to the general rule. The negligence of a manufacturer or vendor imminently dangerous to life or health, committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer.[11] Negligence which causes injury to one who is "invited" to use a defective appliance may form the basis of an action against the manufacturer, although the article has passed from the defendant's possession and the harm arises purely from a remote use.[12] One who sells or delivers an article known to be imminently dangerous to life or limb without giving notice of its qualities is responsible for ensuing injuries regardless of any contractual relationship.[13] These are the more apparent and general exceptions. In addition there is a myriad of decisions involving in essence the matter under discussion but disguised as cases of "implied warran-"ties."[14] We might so disguise the instant case, and by plausible analogy find many cases in accord. We are bordering quite obviously upon the question of whether a third party beneficiary to a contract may sue for its negligent performance. Was the present plaintiff

[9] See 16 LAW QUAR. REV. 190, note by the editor. See Anson, *Contract* (Corbin's ed. 1919) 335.

[10] See notes, *post.*

[11] See Bohlen, *op. cit.* note 2. *Thomas v. Winchester* (1852) 6 N. Y. 397, is the leading case. See discussion and authorities cited in *Huset v. Case* (1903, C. C. A. 8th) 120 Fed. 865. See cases collected in 19 L. R. A. (N. S.) 923, and 48 L. R. A. (N. S.) 213.

[12] This is an obligation to take care that appliances supplied for use for the purpose of the business of the person supplied should be safe therefor. *Heaven v. Pender, supra* note 5; *Elliott v. Hall* (1885) L. R. 15 Q. B. Div. 315; *Hayes v. Coal & Iron Co.* (1889) 150 Mass. 457, 23 N. E. 225; *Sweny v. Rozell* (1900, Sup. Ct.) 31 Misc. 640, 64 N. Y. Supp. 721; *Roddy v. R. R.* (1891) 104 Mo. 234. 45 S. W. 1112; *Travis v. Rochester Bridge Co.* (1918, Ind.) 118 N. E. 693; discussed in (1918) 27 YALE LAW JOURNAL, 691.

[13] *Langridge v. Levy* (1837, Exch.) 2 M. & W. 519; *Wellington v. Downer* (1870) 104 Mass. 64; *Lewis v. Terry* (1896) 111 Calif. 39, 43 Pac. 398. See *Blagdon v. Perkins-Campbell Co.* (1898, C. C. A. 3d) 87 Fed. 109, for extensive discussion of cases in support of the three exceptions listed above. See *Wood v. Sloan* (1915) 20 N. M. 127, 148 Pac. 507: "Certain exceptions to the general rule . . . exist, and they may be divided into two classes, viz. (1) Those where the thing dealt with is imminently dangerous in kind; and (2) those where the thing dealt with is not imminently dangerous in kind, but is rendered dangerous by defect."

[14] See discussion and collection of cases in COMMENTS (1920) 29 YALE LAW JOURNAL, 782. The American cases are based in tort. See also COMMENTS (1918) 27 *id.*, 961.

intended as such a party?[15] The answer is not so obvious as on first impression it may appear.[16] Perhaps the nearest analogy to the present case is where a defendant has negligently prepared an abstract of title and a plaintiff not in privity has been damaged. This situation has been dealt with in many cases, the weight of authority being that the responsibility extends only to the persons by whom the abstracter was employed.[17] There must be a contract or privity of contract, since no relief may be had in tort.[18] But where the abstracter was aware that the plaintiff was being served, a number of recent decisions have recognized a cause of action without any privity whatever,[19] and a larger

[15] See Anson, *Contract* (Corbin's ed. 1919) 345: "In order that a third party may sue upon a contract made by others he must show that he was intended by them to have an enforceable right or at least that the performance of the contract must necessarily be of benefit to him and such benefit must have been within the contemplation and purpose of the contracting parties." He cites many cases in illustration of his point. Curiously enough, the case most closely analogous to the one under discussion is a Massachusetts decision, a jurisdiction where the rule is not avowedly recognized. *Phinney v. Boston El.Co.* (1909) 201 Mass. 286, 87 N. E. 490: "The contract with the city, whereby the defendant undertook to relieve the city of the performance of its statutory duty, brought the defendant into a relation to those travellers which was the foundation of a legal obligation to provide for their safety."

[16] The water company cases are nearly in point, where a water company has contracted with a municipality to maintain a certain supply of water for putting out fires and has failed to do so, with resulting injury to a citizen's property. The general rule undoubtedly denies recovery, chiefly for lack of privity, following the leading case of *Nickerson v. Bridgeport Hydraulic Co.* (1873) 47 Conn. 24; see Corbin, *Liability of Water Companies* (1910) 19 YALE LAW JOURNAL, 425, where the cases are collected and the possible liability in tort is also considered. The courts of Kentucky, North Carolina, and Louisiana take a directly contrary view and allow recovery without privity. See (1905) 3 MICH. L. REV. 445. Individual citizens are generally allowed to sue transportation companies and other public service companies on contracts made with the municipality. See 49 L. R. A. (N. S.) 1166, note. But see note by A. M. Kales in (1907) 19 GREEN BAG, 130: "The difficulty in this class of cases is the opportunity which is offered to a court, swayed by sentiment and sympathy, of making a special rule for particular case contrary to a general rule of the greatest fundamental importance, and by way of infringement upon the peculiar province of the legislature." And in (1905) 3 MICH. L. REV. 518: "Was there ever a more monstrous exception to the general rule?"

[17] 1 Cyc. 215; 1 C. J. 369. See doctrine adversely criticized in NOTES (1908) 21 HARV. L. REV. 439.

[18] See *Thomas v. Guarantee Title Co.* (1910) 81 Ohio St. 432, 91 N. E. 183.

[19] *Brown v. Sims* (1899) 22 Ind. 317, 53 N. E. 779; *Western Loan Co. v. Silver Bow Abstract Co.* (1904) 31 Mont. 448, 78 Pac. 774; *Economy Bldg. Assoc. v. West Jersey Title Co.* (1899, Sup. Ct.) 64 N. J. L. 27, 44 Atl. 854; *Denton v. Nashville Title Co.* (1903) 112 Tenn. 320, 79 S. W. 799; *Dickle v. Nashville Abstract Co.* (1890) 89 Tenn. 531, 14 S. W. 896; *Anderson v. Spriestersbach* (1912) 69 Wash. 393, 125 Pac. 166. In the last case, in discussing the general rule, it was said: "This rule is sustained by the weight, considered in numbers, of authority; but we are not willing to apply it, unless it is plain that there was no duty on the part of the abstracter to the party injured. . . . He knew that the trade, if made at all, would be made upon the faith of his certificate." See, *contra*, in regard to certified public accountants, *Sandell v. Lybrand* (1919) 264 Pa. 406, 107 Atl. 783; criticized in (1920) 29 YALE LAW JOURNAL, 234.

number have strained the doctrine of privity to unusual extremes.[20] The struggle is again significant.[21]

The courts have thus outgrown the recognized exception of dangerous instrumentalities.[22] The law has been moving fast toward just such a decision as the present, but the cases have moved on parallel lines and the busy judge has not had the time to correlate them. A cursory survey will disclose the coming orthodoxy of a rule so foreign to its prototype that a new day is upon us before we are aware of the dawn. The instant case may be reversed without affecting the progress of its imperative analogies. The principle is of to-morrow and its importance is far reaching. Judges have long expatiated upon the withering effects of such extensions of liability,[23] but their instincts of justice are destroying the terrors of their logic.

The business of furnishing information has stood on a different plane than all others, and those engaged in it have owed no duty to any save those who personally employed them. Apparently that is all that is still intact of a once sweeping rule; the decision under discussion is indeed significant.

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[20] *Murphy v. Fidelity Abstract Co.* (1921, Wash) 194 Pac. 591. The cases cited in the decision are illustrative.

[21] See its first beginning in *Savings Bank v. Ward* (1879) 100 U. S. 195. A, an attorney, employed solely by B, made out a negligent opinion on title to certain land. C, with whom A had no contract, relied upon the certificate as true, and loaned money to B, who was insolvent. The court held that C should not recover, but Chief Justice Waite, and Swayne and Bradley, J.J., dissented.

[22] Sometimes, however, doing lip service by considering such articles as "pop bottles" to be "inherently dangerous." See *Johnson v. Cadilac Motor Car Co.* (1920, C. C. A. 2d) 261 Fed. 878, where they are classed with "poisons, dynamite, gunpowder, and torpedoes." (1920) 5 IOWA L. BULL. 6, 86, has full discussion of this aspect, as well as of the food cases. A cake of soap has been held to be an "intrinsically dangerous article." *Hasbrouck v. Armour & Co.* (1909) 139 Wis. 357, 121 N. W. 157; *Armstrong Packing Co. v. Clem* (1912, Tex. Civ. App.) 151 S. W. 576.

[23] In *Winterbottom v. Wright, supra* note 2, Lord Abinger remarked: "If the plaintiff can sue, every passenger or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." See, to practically the same effect, *Collis v. Selden* (1868) L. R. 3 C. P. 495, and practically all cases denying such relief. It has been suggested, for instance, that the doctrine would permit a disappointed legatee to sue the testator's lawyer for negligence in not causing a will to be duly attested. See *Robertson v. Fleming* (1861) 4 Macq. H. L. 167. In (1907) 19 GREEN BAG 131, Mr. Kales, speaking of the majority rule, said: "It is so obvious that it hardly needs extended comment. Any departure from it would make every sort of human activity, whether founded upon contract or tort, highly speculative in character. The amount of liability which might be incurred for the failure to perform any obligation would remain uncertain and too frequently incalculable. An infinity of suits must not infrequently ensue upon the breach of an obligation." For a disposal of these objections, see (1900) 16 LAW QUAR. REV. 186.

POSSESSION AND CUSTODY IN THE LAW OF LARCENY

An investigation of the modern law of larceny gives an impression of utter confusion, a field for the courts to exercise their abilities in making fine, technical, and narrow distinctions. Frequently it appears to be largely a matter of guess-work as to whether or not the offense committed is larceny, embezzlement, obtaining property by false pretenses, or some other form of statutory offense created by the legislature in a vain attempt to fill up some loop-hole in the existing laws. Without a study of the early common law and its development this confusion is inexplicable.

A recent case in one of the English police courts, (1920, Westminster Pol. Ct.) 84 JUSTICE OF THE PEACE, 508, illustrates the difficulties involved in the subject. An employee of the London General Omnibus Company was discharged; at the time of her dismissal the company had demanded the return of a staff pass issued to her, which she claimed to have lost. Later she was found travelling with the pass, and was accused of stealing it, as bailee.

From early times a fundamental characteristic of the offense of larceny has been the trespassory taking from the owner.[1] The act had to be done *animo furandi* and *invito domino*.[2] It can therefore readily be seen that the common-law definition, if accurately construed, would not include cases dealing with the misappropriation of property by bailees or servants, nor would it include cases of wrongful acquisition of property by fraud or artifice. The present confusion in the law is due to the attempts of the courts and the legislative bodies to provide for the punishment of such offenses as seem not to be covered by the common law.

One of the first qualifications found necessary was some provision for holding bailees who fraudulently misappropriated property entrusted to them. Accordingly, in 1473, the Court of Star Chamber decided that, if a bailee, in violation of the terms of his bailment, "breaks bulk," the bailment is terminated and the subsequent conversion of a part of the property is the felonious taking constituting the crime of larceny.[3] This decision created an anomalous situation, in that, when the entire object was converted, there was no larceny, but when part only was converted, there was larceny. This distinction is obviously unsound, and probably the original decision was the result of a compromise to

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[1] Joseph H. Beale, *The Borderland of Larceny* (1892) 6 HARV. L. REV. 244.

For various early definitions of larceny see 3 Stephen, *History of the Criminal Law* (1883) 129.

"Larceny is the treacherously taking away from another moveables corporeal, against the will of him to whom they do belong, by evil getting of the possession, or the use of them." *Mirrours of Justices*, 31.

[2] See (1894) 28 IR. L. T. 290; reprinted in (1894) 27 CHI. LEG. NEWS, 101.

[3] *The Carrier's Case* (1473) Y. B. 13 Edw. IV, p. 9, pl. 5; reported also in Pollock & Wright, *Possession in the Common Law* (1888) 134.

propitiate the Lord Chancellor;[4] nevertheless it is still recognized as law.[5] Many states, however, have enacted statutes which make the misappropriation of property by a bailee larceny whether or not there has been a breaking of bulk.[6]

In 1779 the doctrine of larceny by trick was introduced by *Pear's Case*,[7] which held that if a person obtains the delivery of a thing by fraud, artifice, or trick, intending at the time to convert it, such a taking is larceny. This decision, which really only followed the precedent set by the *Carrier's Case*,[8] introduced a highly burdensome qualification which has clogged the courts with subtle questions only determinable by juggling the terms "possession" and "custody" to meet the needs of the particular case. To convict the accused of larceny, the court held that, since the original intent was fraudulent, the contract was a mere pretense and that the possession remained unaltered in the true owner at the time of the conversion. The courts still continue to follow the reasoning of this decision[9] and have even developed it in some cases to include installment contracts, in which they hold that the title does not pass until the whole contract is performed on both sides.[10]

In 1779 *Bazeley's Case*[11] caused the enactment of the English embezzlement statute[12] intended to cover cases dealing with the misappro-

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[4] Stephen, *op. cit.* note 1, at p. 139.

[5] *Reg. v. Poyser* (1851) 5 Cox. C. C. 241; *State v. Ruffin* (1913) 164 N. C. 416, 79 S. E. 317; COMMENTS (1916) 4 CALIF. L. REV. 341. See also 2 Wharton, *Criminal Law* (11th ed. 1912) sec. 1208.

[6] Crim. Code Ill. 1874, sec. 170, applied in *Bergman v. People* (1898) 177 Ill. 244, 52 N. E. 363; Penal Code N. Y. 1881, sec. 528, applied in *In re McFarland* (1891, Sup. Ct.) 59 Hun, 304, 13 N. Y. Supp. 22.

See *Burns v. State* (1911) 145 Wis. 373, 128 N. W. 987, applying Wis. St. 1898, sec. 4415: Whoever being bailee of any chattel . . . shall fraudulently take . . . the same . . . , although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny." See also 20 & 21 Vict. c. 54, sec. 4 (1857); *In re Wakeman* (1912) 8 Cr. App. 18; (1874) 38 JUSTICE OF THE PEACE, 194, which shows how strictly the courts have construed the English statute.

[7] *Rex v. Pear* (1779) 1 Leach C. L. 253, 2 East P. C. 685 (prisoner hired a horse, ostensibly to take a journey, promising to return the horse that same evening; subsequent conversion of the horse held to be larceny).

[8] *Carrier's Case, supra* note 3. See Beale, *op. cit*, 6 HARV. L. REV. 250: "The decision is an application of the rule established, or supposed at that time to have been established, by the Carrier's Case, the only other authority cited by the court."

[9] *People v. Miller* (1902) 169 N. Y. 339, 62 N. E. 418; *State v. Fitzsimmons* (1918) 30 Del. 152, 104 Atl. 338; *People v. Rae* (1885) 66 Calif. 423, 6 Pac. 1; *Williams v. State* (1905) 165 Ind. 472, 75 N. E. 875.

See also *People v. Mills Sing* (1919, Calif. App.) 183 Pac. 865, for a rather extreme application of the principle.

[10] *Regina v. Russett* [1892] 2 Q. B. 312.

[11] *Rex v. Bazeley* (1799) 2 Leach C. L. 973. A bank clerk received a £100 note to put to the credit of a customer and converted it to his own use. The court held this to be a mere breach of trust and not a felony, for the bank never had possession.

priation of property by servants and clerks. It was impossible to distort the common-law doctrine of larceny to cover these cases where the property misappropriated had never even come into the master's possession, but had been converted by the servant by virtue of his employment. This statute has been adopted in substantially the same form in the United States[13] and re-enacted in England,[14] although the offense now is usually extended to include all cases of taking by bailees and other persons in a confidential relationship to the principal who have a rightful possession.[15]

Under the old common-law doctrine many cases arose where the owner delivered property to his servant to be dealt with in the course of his employment. In the *Carrier's Case*[16] the court in a dictum seemed inclined to hold that in such cases a subsequent conversion by the servant would be larceny. This was reconsidered in 1488,[17] but shortly thereafter a statute was enacted making this sort of misappropriation a felony.[18] Since that time the courts have consistently so ruled on the theory that the servant has custody only, the possession being in the master up to and at the time of the conversion.[19] When the crime of embezzlement was first created these cases were clearly distinguishable,

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[13] 39 Geo. III, c. 85 (1799). This statute enacted that if any clerk or servant should, by virtue of his employment, receive or take into his possession any chattel, money, or valuable security for, or in the name of, or on account of his master, and should fraudulently embezzle the same, he should be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of the master otherwise than by the actual possession of the offender.

See also NOTES (1916) 5 CALIF. L. REV. 73, distinguishing Larceny and Embezzlement and stating the so-called doctrine of "ultimate destination."

[14] Calif. Penal Code 1903, sec. 508; Mass. Gen. St. 1860, ch. 161, sec. 38.

[14] 24 & 25 Vict. c. 96, sec. 68 (1861); see also Larceny Act, 1916, sec. 17 (1).

[15] See (1920) 20 COL. L. REV. 318, 320; See also *Sykes v. State* (1919, Fla.) 82 So. 778; *Bivens v. State* (1912) 6 Okla. Cr. App. 52, 120 Pac. 1033; *Campos v. State* (1918, Tex. Cr. App.) 207 S. W. 931; *Moore v. United States* (1895) 160 U. S. 268, 16 Sup. Ct. 294.

[16] *Carrier's Case, supra* note 3. [17] (1488) Y. B. 3 Hen. VII, p. 12, pl. 9.

[18] 21 Hen. VIII c. 7 (1529), providing that a servant who converts goods delivered to him by his master shall be guilty of a felony and punishable as other felons by the course of the common law.

[19] 2 East P. C. 564; *Aabel v. State* (1910) 86 Neb. 711, 717, 126 N. W. 316, 319; *People v. Kawananakoa* (1918) 37 Calif. App. 433, 174 Pac. 686; *Bonatz v. State* (1919) 85 Tex. Cr. App. 292, 212 S. W. 494; *Chanock v. United States* (1920, App. D. C.) 267 Fed. 612.

See Pollock and Wright, *op. cit.* note 3, at p. 138: "Here it was once thought the possession passed to the servant, at any rate when the charge was to be executed away from the master, and particularly when the thing was not to be kept, but to be delivered absolutely to a third person; but it has long been settled that in all such cases the master's possession continues. The servant is said to have not the possession but a mere charge (*onus*) or custody." See authorities cited in text.

See also L. R. A. 1918 A, 318, note.

but under some of our modern statutes a misappropriation may be either larceny at common law or embezzlement under the statute, or *vice versa*.[20]

There is one more important group of cases, that which deals with the obtaining of property by false pretenses. This offense very closely resembles larceny by trick. The distinction between the two is based entirely on the question of possession, the courts holding the misappropriation to be larceny where the owner intended to part with the temporary possession only, and obtaining by false pretenses where the owner intended to part with his entire title to the property by reason of the defendant's misrepresentations.[21] This is another offense which the courts could not include in the common-law definition of larceny without entirely doing away with the basic requirement of a trespassory taking. An English statute was enacted in 1757 making this offense a misdemeanor.[22] The distinction above given between larceny and obtaining by false pretenses is the one generally accepted as the better view,[23] but the courts have confused the issue by extending the offense of obtaining by false pretenses to include cases where the title never passed to the accused at all, the intention of the owner being to use him as a mere conduit or means of conveying the property to a third party.[24] Such a misappropriation is really larceny.[25]

It has been pointed out rather forcefully that the existence of the subtle distinctions in these crimes is largely "due to accidental, historical

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[20] *State v. Taberner* (1883) 14 R. I. 272, holding that the offense could be larceny either under the statute or at common law. The statute provided that embezzling by a clerk or servant of property entrusted to him constituted larceny.

But other courts hold that one cannot be convicted under such a statute, on an indictment for larceny at common law, and that, in order to convict the accused under these statutes, the indictment must show acts of embezzlement and aver that the accused so committed his act of larceny. *Kibs v. People* (1876) 81 Ill. 599; *State v. Harmon* (1891) 106 Mo. 635, 18 S. W. 128; *Commonwealth v. Doherty* (1879) 127 Mass. 20.

[21] See 2 East P. C. 668: "The next inquiry is whether the owner, in making the delivery, intended to part with the *property*, or only with the *possession* of the thing delivered. For if he parted with the *property* to the prisoner, by whatever fraudulent means he was induced to give the credit, it cannot be felony."

See also, 1 Bishop, *Criminal Law* (8th ed. 1892) secs. 583-586; 3 Stephen, *op. cit.*, note 1, 160.

[22] 30 Geo. II c. 24, sec. 1 (1757). See also 33 Hen. VIII c. 1 (1541) making the obtaining of goods by false tokens a misdemeanor.

[23] *Rex v. Pear, supra* note 7; *Williams v. State* (1905) 165 Ind. 472, 75 N. E. 875, 2 L. R. A. (N. S.) 249, note; *People v. Miller, supra* note 9; *People v. Mills Sing, supra* note 9.

But see *Rex. v. Sanders* [1919, Cr. App.] 1 K. B. 550, for an extreme case, held to be false pretenses.

[24] *Zink v. People* (1879) 77 N. Y. 114; *Rex. v. Coleman* (1785) 2 East P. C. 672.

[25] See Beale, *op. cit.* 6 HARV. REV. 254, showing the existing confusion in the application of the distinction.

"causes" and that their continuance is entirely unnecessary.[26] These criticisms are merited and the legislatures are gradually coming to realize the necessity of action. New York has endeavored to meet the situation by consolidating the offenses into one crime of larceny;[27] England has adopted similar measures which have worked out even more effectively;[28] but the best results have been obtained in Massachusetts, where the existing statutes appear to have solved all difficulties.[29] Here the crimes of larceny, embezzlement, and obtaining property by false pretenses are consolidated as in New York and a further provision is made so that an indictment for larceny "may be supported by proof "that the defendant committed larceny of property, or embezzled it, "or obtained it by false pretenses." This legislation, as indicated by the decisions of the court, appears to meet the requirements.[30] It is to be hoped that the legislative bodies in other states will soon follow the lead of Massachusetts and do away with the present cumbersome and antiquated laws which have now for so long needlessly perplexed the courts and retarded justice.[31]

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[26] NOTES (1914) 2 CALIF. L. REV. 334. See also 3 Stephen, *op. cit.* note 1, at p. 158, for full explanation of the development of the law of larceny. ". . . These provisions contain the present law as to criminal breaches of trust. They constitute a series of exceptions to the old common law so wholly inconsistent with its principle as to make it at once unintelligible and, so far as it still exists, a mere incumbrance and source of intricacy and confusion."

[27] 4 N. Y. Cons. Laws 1909, 2696. *People v. Brenneauer* (1917, Sup. Ct.) 101 Misc. 156, 166 N. Y. Supp. 801: "Since the adoption of the Penal Code it has been repeatedly held that an indictment charging larceny in the common-law form is not supported by proof showing the crime of larceny by false pretenses or by what formerly constituted the crime of larceny by false pretenses or by what formerly constituted the crime of embezzlement."

[28] The Larceny Act, 1916. See also 24 & 25 Vict. c. 96 (1861) and authorities in note 6, *supra.*

There appear to be no recent English cases which disclose how effectively the 1916 statute will operate. Sections 1, 17, 32, and 40 are especially interesting for the purposes of this comment.

The principal case would seem to be correctly decided under section 1.

[29] Rev. Laws Mass. 1902, ch. 208, sec. 26; ch. 218, sec. 40. See also ch. 218, sec. 39, providing that defendant may order the prosecution to file a bill of particulars so as to inform him more fully of the nature and grounds of the crime charged. This provision meets the objection that these consolidation statutes fail to protect the right of the defendant to be fully informed of the accusation.

[30] *Commonwealth v. Kelley* (1903) 184 Mass. 320, 68 N. E. 346; *Commonwealth v. McDonald* (1905) 187 Mass. 581, 584, 73 N. E. 852, 853: "But since this enactment it has been unnecessary to state the fiduciary relation existing between a defendant and the person entitled to the property embezzled, or to allege that the defendant to whom it has been entrusted converted it to his own use, for the crime of larceny under this statute includes the criminal appropriation of property where no trespass, or fraud which has been held equivalent to trespass, in obtaining its possession appears."

[31] For an excellent summary of this problem with references to modern statutes see NOTES (1920) 20 COL. L. REV. 318.

PRESENT DAY LABOR LITIGATION

The extent to which contractual relations enter into the various phases of labor litigation makes it advisable that they be discussed separately. In the preceding comments[1] questions involving contractual relations were expressly excluded. Where one party to a dispute violates a contractual obligation, to what extent does this modify the general rules suggested previously? This question is of particular importance at this time because of the recent extension of collective bargaining and the tendency to settle all labor questions by contract.

The primary situation is that in which the A employees strike against their employer B in violation of their contract of employment. Once the existence of a contract between A and B is proved, it follows that the violation of that contract is wrongful. It is true that it is difficult at times to determine the remedy to be applied, as will be taken up below, but still there seems to be unanimity of opinion that B should have a remedy.[2] If it is held otherwise, there would be but little benefit to A and B in governing their relations in this manner.

A more difficult situation arises, however, when a third person causes a breach of contractual obligations. This is now generally recognized as a tort when such third person is aware of the contract and intends to have one of the parties break it.[3] Where force or fraud is used, of course, it is everywhere a tort,[4] and we shall therefore exclude such

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[1] COMMENTS (1921) 30 YALE LAW JOURNAL, 280, 404, 501.

[2] "In cases of persons under a contract to work, a strike or combination not to work, in violation of that contract, to secure something not due them under the contract, would be a combination interfering without justification with the employers' business." *Reynolds v. Davis* (1908) 198 Mass. 294, 84 N. E. 457. In *Nederlandsch Amer. S. M. v. Stevedores' & L. B. Soc.* (1920, E. D. La.) 265 Fed. 397, the union employees quit against the advice of their officers, and told B he could employ non-union men. The court said "The contract is inartificially drawn and in terms imposes no obligation on respondents to furnish labor. It must be given a reasonable construction, however, and so as to maintain its validity, if possible. . . . By it the respondents establish the principle of collective bargaining, obtain the closed shop, 44 hour week, extra rates of pay for overtime, and their own working conditions, all that union labor, so far, has ever contended for. I think the contract is valid, and imposes the reciprocal obligation on respondents to work according to the contract in good faith. There is no doubt the action of the men was arbitrary and amounted to a breach of the contract."

[3] Our law now recognizes a contract right as property which is to be protected against undue interference by persons not parties to the contract. When a third party intentionally, by the use of any kind of means, causes a breach of the contract involving damage, he is *prima facie* guilty of a tort." *Booth & Bros. v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 226. For a discussion of the use of persuasion to induce a person to refrain from contracting, see Smith, *Crucial Issues in Labor Litigation* (1907) 20 HARV. L. REV. 253, 266.

[4] *Morgan v. Andrews* (1895) 107 Mich. 33, 64 N. W. 869; *Doremus v. Hennessy* (1898) 176 Ill. 608, 52 N. E. 924; *Beekman v. Marsters* (1907) 195 Mass 205, 80 N. E. 817.

cases from further discussion. This action by a third person may be of importance in labor litigation either: (1) by causing a breach of contract for personal services; or (2) by causing a breach of a trade contract.[5]

A breach of contract for personal services may be procured or brought about by a third party in one of two ways: F (outsiders, generally other unions) may induce A (a group of laborers) to strike in violation of their contract with B; or A (union employees of B) may, by threat of a strike, compel B to discharge C. Thus a third person is interfering through the employer or employee.[6] The first question to be answered is whether a contract has in fact been broken. This can be determined only by analyzing the actual relationship between B and C. There may be a definite contract of employment between the two, but very seldom is that the case. It is true that wherever C is in B's employ, this relationship is often called a contract of employment. But it is submitted that there is often no effective contract at all between them, or at most there is only a contract from day to day or from week to week. Upon analysis it may be seen that in many instances B merely makes to C an offer to pay him a stated wage per day. C accepts this offer by working. Thus a unilateral contract comes into existence—B being under a duty to pay C the amount stipulated for the work done. Consequently the only breach of a contract possible is in case B should refuse to pay C. Thus any inducement brought to bear on B or C to terminate the employment at the end of the day can accomplish but two things—a withdrawal of B's offer or a rejection of the offer by C. Neither of the parties is under a contractual duty as to succeeding days and consequently no third person can induce a breach thereof. There is, of course, a certain interest in fact involved, which the courts protect to a limited extent. They have created the right to a free flow of labor, as explained previously; but this is quite different from a right that one who has already contracted shall not be induced to commit a breach.[7]

[5] The general view is to consider that the same rules are applicable to both cases. *Beekman v. Marsters, supra.* There is a minority doctrine, however, that holds that there is no liability in the latter case. *Ashley v. Dixon* (1872) 48 N. Y. 430 (see discussion of this case in *Posner Co. v. Jackson* (1918) 223 N. Y. 325, 119 E. 573); *Boyson v. Thom* (1893) 96 Calif. 578, 33 Pac. 492.

[6] "That the interest of an employer or an employee in a contract for services is property is conceded. Where defendants in combination or individually undertake to interfere with and disrupt existing contractual relations between the employer and the employee. it is plain that a property right is directly invaded." *Jersey City Printing Co. v. Cassidy* (1902) 63 N. J. Eq. 759, 53 Atl. 230. An excellent discussion as to what constitutes justification is to be found in *Glamorgan Coal v. South Wales Miners Federation* [1903] 2 K. B. 545.

[7] "A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancies.' When they fail, civilization as at present organized, may go down. As social and industrial life develops and grows more complex these 'probable expectancies' are bound to increase. It

Despite the fact in the case put there is no contractual relation between B and C, some courts are inclined to treat it substantially as if there were. This is doubtless due to the origin of this kind of action. Originally its basis was in tort for the seduction of C, causing a loss of C's services to B. Even though this seduction theory is properly exploded, there seems to be a vestige of it still remaining in the minds of the courts.[8]

The other important situation is that which involves the breach of a trade contract.[9] Thus A may strike against B to compel B to cease

would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these 'probable expectancies.'" *Jersey City Printing Co. v. Cassidy, supra.* It may be observed, however, that an express contract also creates that sensation called a "probable expectancy." In both classes of cases alike the question is as to whether there exist rights *in rem* that third persons shall not cause disappointment in the fulfilment of reasonable expectations.

[8] The history of this remedy is discussed in *Employing Printers' Club v. Doctor Blosser Co.* (1905) 122 Ga. 509, 50 S. E. 353. The court then sums up its opinion in this manner. "In the case at bar the relation of master and servant did exist between the plaintiff and his employees, and even applying the common-law rule of liability, the defendants would be answerable in damages to the plaintiff for a malicious procurement of the breach of contract by its employees. The term 'malicious,' used in this connection, is to be given a liberal meaning. The act is malicious when the thing done is with the knowledge of the plaintiff's rights, and with the intent to interfere therewith. It is a wanton interference with another's contractual rights."

In *Thacker Coal Co. v. Burke* (1906) 59 W. Va. 253, 53 S. E. 161, the court said: "A party cannot have a justifiable cause to instigate, to move, the breach of a contract between master and servant. . . . When his action, with knowledge on his part of a contract, causes, by intention, a breach of that contract, he is liable to damages, even though he acts for the promotion of his own interest." While this court recognizes that there is actually no contract in existence, yet "it is a subsisting contract between the company and its servants in process of execution." Obviously this is merely an expectancy that C will continue to work, and is an expectancy and not a contract, and should be treated as such. In principle, there seems to be no difference from the situation where X has bought from Y's store for years, and Z suddenly induced him to stop buying. A contract would have resulted, but any interference by Z is merely interference with an expectancy. The court, however, would imply a contract—"by the language used in the books a contract must exist. This count says the miners were *'employed'* by the plaintiff and in actual service. Now, if the law gives action for enticement of a servant, it is not conceivable that a third person can maliciously entice away a lot of employees, simply because there was no contract fixing term of service. The relation of master and servant exists. In such case there is a contract recognized by law, an implied contract by which the employee can recover for his service. By entering such service the employee agrees, contracts to work."

"A right of action against a third party for enticing one party to breach its contracts with another is universally recognized. . . . The principle is also equally applicable whether the contract is at will or otherwise." *Third Ave. Ry. v. Shea* (1919, Sup. Ct.) 109 Misc. 18, 179 N. Y. Supp. 43; *Lamb v. Cheney & Son* (1920) 227 N. Y. 418, 125 N. E. 817.

[9] As shown in note 5, this is not considered a tort in some jurisdictions.

dealing with D, B having a contract of purchase or sale with D. This is of frequent occurrence at the present time, and presents a question of considerable difficulty. There is here a clear case of a third person procuring a breach of contract. The courts which hold this to be a tort are disposed to be more liberal in finding a justification than where there is a procurement of a breach of contract of service.[10]

This liberality is based on economic reasons. Since the mores have permitted an extension of the privilege to strike, and since most commercial transactions are in contract form, the only way to give effect to such broader liberty of action by employees is to qualify the doctrine that interference by a third person with contractual obligations is actionable.

There still remain various situations involving contractual obligations which are not included in the preceding general classification. A few of these may be discussed briefly. A case of not infrequent occurrence is that in which A is under a contract with B not to join a union, or to do or refrain from some similar act not in the nature of personal service. X (union organizer) attempts to unionize A in violation of this contract. The general rule is to hold that B has a cause of action against X.[11]

Another situation of frequent occurrence is that in which A strikes against B, because of some dispute involving only these two parties, but D suffers a loss because B is now unable to carry out his contract with D, and supply him with goods, for instance. Since A's acts are not for the purpose of injuring D, and this is an incidental damage, it seems that the mere existence between B and D should not give a right to D as against A: yet D is sometimes given a remedy.[12] An even

[10] "The law is pretty thoroughly settled both in England and in this country that causing another to violate his contract with a third party, without a legal justification, is an actionable injury, from which it follows that if the defendants [A] by sending the notices to the contractors caused some of them to break their contracts, and did so maliciously and without justification, they made themselves liable at least to an action for damages. But I do not think it can be said that the sending of the notices was without justification. . . . If this is so—if the notice to the contractors [B] was proper and essential to fair dealing, as between them and the plaintiff [C]—the fact that some of them violated their existing contracts cannot be deemed a wrong caused by the defendants." *Parkinson Co. v. Building Trades Council* (1908) 154 Calif. 581, 98 Pac. 1027; *Cohn & Roth Electric Co. v. Bricklayers' Union* (1917) 92 Conn. 161, 101 Atl. 659.

[11] *Flaccus v. Smith* (1901) 199 Pa. 128, 48 Atl. 894. *Callan v. Exposition Cotton Mills* (1919) 149 Ga. 119, 99 S. E. 300. Many courts simply put these cases on the ground of an unjustified interference with B's business without regard to the question whether it is an interference with contractual obligation. *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U. S. 229, 38 Sup. Ct. 65. Cf. *Diamond Block Coal Co. v. United Mine Workers* (1920, Ky.) 222 S. W. 1079.

[12] "We find the complainant (D) to be in the position of one seeking to preserve his contract with another from impairment through the unlawful acts of a third person, *stranger both to the contract and to the affairs of either party thereto.* There can be no distinction in principle between a right of action founded on an attempt to *induce* a breach of contract and an attempt by force

stronger case than this, is where A strikes against B to have C discharged, and B has A restrained because A's acts would cause B to violate his contract with D.[13]

The chief difficulty, however, in cases of violation of contract rights in labor cases—in fact in almost any case involving a labor dispute—is the problem of remedies. Obviously the natural and ordinary remedy would be to compel A to work by means of a mandatory injunction. This, however, is opposed to our present mores. It is thus impossible to compel A to work.[14] Where a strike is held to be illegal, the usual remedy is to enjoin the officers of the union from calling and aiding the said strike, and from paying strike benefits, etc.[15]

The use of the injunction is in this way partly successful, but does not always prevent a continuance of a strike. In addition to this, there may be considerable harm suffered before the injunction is obtained. Thus it seems that damages are often necessary in addition to an injunction (if an injunction can be had), but here, too, damages are ineffective where the harm is irreparable. The present tendency of the courts and of legislation seems to be to award damages instead of injunctive relief.[16] There is a further difficulty resulting from the fact that labor unions are often unincorporated and loose associations. Yet

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or violence to bring about the same results. From the authorities referred to, it seems clear that a right of action between the complainant and the defendants, who are alleged to be fomenting a strike by violence, is stated in the bill, one which is independent of any right of action in the Overland, which was not, therefore, an indispensable or even a necessary party." *Dail-Overland Co. v. Willys-Overland* (1919, N. D. Ohio) 263 Fed. 171. *Niles-Bement-Pond Co. v. Iron Moulders' Union* (1917, S. D. Ohio) 246 Fed. 851; *Carroll v. Chesapeake & Ohio Coal Co.* (1903, C. C. A. 4th) 124 Fed. 305.

[13] *Aberthaw Construction Co. v. Cameron* (1907) 194 Mass. 208, 80 N. E. 478.

[14] This is well brought out in the opinion of Mr. Justice Harlan in *Arthur v. Oakes* (1894, C. C. A. 7th) 63 Fed. 310, "It would be an invasion of one's natural liberty to compel him [A] to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude,— a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. . . . The rule, we think, is without exception that equity will not compel the actual performance by an employé of merely personal services any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for services of that character." See, however, the case of *Toledo Railroad Co. v. Pa. Co.* (1893, N. D. Ohio) 54 Fed. 746, affirmed in *Ex parte Termon* (1897) 166 U. S. 548, 17 Sup. Ct. 658, where an employee remaining in employment, was adjudged in contempt of court for refusing to perform acts specified in the injunction.

[15] The effect of statutes prohibiting injunctions in labor disputes and other labor legislation will be discussed in a later comment.

[16] *Barnes v. Berry* (1907 S. D. Ohio) 156 Fed. 72; *Purvis v. United Brotherhood* (1906) 214 Pa. 349, 63 Atl. 585; *Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 114 S. W. 997. Of course an injunction may be had against illegal means, such as violence, intimidation, or fraud. See COMMENTS (1921) 30 YALE LAW JOURNAL, 404.

in a number of recent cases courts have granted relief against such an association of employees whether incorporated or not.[17]

FREEDOM OF SPEECH AND STATES' RIGHTS

In *Gilbert v. Minnesota* (1920) 41 Sup. Ct. 125, the question of freedom of speech was presented to the federal Supreme Court from a new angle. The issue was the constitutionality of a state statute making unlawful any advocacy against enlistment in the federal military or naval forces or against aiding the United States in the prosecution of war. This question is of great importance, in view of the number and drastic character of state sedition laws passed as a result of the World War, many of them after the Armistice.[1] It raises primarily the issue of conflicting state and federal powers. The issue of freedom of speech was, however, directly raised, since Justice Brandeis, dissenting,[2] held that freedom of speech was a "privilege or immunity" of a United States citizen within the terms of the constitutional protection, and was also a "liberty" of which a citizen cannot be deprived without due process of law. The majority did not decide the point further than to hold that Gilbert's conviction would not violate such constitutional guarantees of freedom of speech if they existed.[3] The opinion

[17] *St. Germain v. Bakery Workers' Union* (1917) 97 Wash. 282, 166 Pac. 665; *Michael v. Hillman* (1920) 112 Misc. 395, 183 N. Y. Supp. 195. Where there is a strict observance of the common-law rules, however, it is necessary to sue the individuals composing the association. An excellent discussion of this question is to be found in *St. Paul Typothetae v. Book-binders' Union* (1905) 94 Minn. 351, 102 N. W. 725. That a voluntary association (i. e. unincorporated) is liable for punitive damages, see *Clarkson v. Laiblan* (1919, Mo.) 216 S. W. 1029. The court held the association liable for the wrongful acts of its officers acting within authority. For opposing view see *Michaels v. Hillman* (1920, Sup. Ct.) 112 Misc. 395, 183 N. Y. Supp. 195.

[1] These are collected in Chafee, *Freedom of Speech* (1920) Appendix V, 399-405. For comment on the Connecticut statutes of 1919, see (1919) 29 YALE LAW JOURNAL, 108. The Minnesota statute in question (Laws 1917, ch. 463) is not limited to the period of war and makes unlawful any kind of teaching against enlistment. Even this was not sufficiently drastic, and hence in 1919 (Laws 1919 ch. 93) it was strengthened and the usual maximum penalty of twenty years' imprisonment was incorporated. The latter act seems, however, to be limited to the time of war.

[2] The majority opinion was by Mr. Justice McKenna, Mr. Justice Holmes concurring in the result. Chief Justice White dissented on the ground that after Congress had passed the Espionage Act, there was no further room for state action. Mr. Justice Brandeis dissented for similar reasons and also for the reason stated in the text.

[3] Quoting *inter alia* from *Schenck v. United States* (1919) 249 U. S. 47, 39 Sup. Ct. 247. But in that case the entire court agreed that the words used must be used in such circumstances and be of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress may prevent. See (1919) 29 YALE LAW JOURNAL, 337. This case has never been overruled. A recent application of this test to set aside a conviction under the federal Act appears in *Beck v. United States* (1920, C. C. A. 7th) 268 Fed. 195 (conviction of a native born citizen, for twenty years a county judge, because at a

betrays no small trace of war emotion.[4]

On the issue of sovereignty it is perhaps surprising to find that a majority of a court generally so federalistic in its views[5] felt that a state might constitutionally circumscribe the discussion of national problems even after Congress had legislated upon the subject. Their reasons are of interest. They considered that any other view must be based upon a theory that there is something antagonistic between citizenship in a state and citizenship in the United States. Repudiating this theory, they held that the interests of the United States are also those of a state and may be cherished and fostered by that state. Hence if a state is not satisfied with a federal sentence of twenty years against an agitator, it may add a like sentence of its own. One may admit all but the conclusion and yet doubt how this settles the question as to which sovereignty shall control the subject. Again the court suggested that the state statute might be upheld as a simple exercise of the state police power to preserve the peace. Certainly every state must and does have such power; in fact it would seem that this should be the limit of its power to restrict the discussion of national issues. But a statute making it unlawful to interfere with the enlistment of men in the military or naval service of the United States is surely more than a mere police regulation designed to quell disorder. Hence Chief Justice White would seem properly to have dissented on the ground that after Congress passed the Espionage Act—which was prior to the occa-

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meeting called to reorganize the county council of defense he had made what one hostile witness thought was an economic and another a patriotic address in criticism of the calling together of the county board). See also *Erhardt v. United States* (1920, C. C. A. 7th) 268 Fed. 326, reversing a conviction for words claimed to have been spoken at a neighborhood party nearly three months before defendant's arrest.

[4] Gilbert, an official of the Non-Partisan League, was convicted for a speech in which he attacked the democracy of America, saying that we had better make America safe for democracy first and asking his hearers if they had had anything to say as to who should be President or as to whether we should go into the war, and that we should have voted on conscription and were stampeded into the war to pull England's chestnuts out of the fire. Unless this does so, there was no advocacy against enlistment or against prosecution of the war. Mr. Justice McKenna says that "every word" uttered by Gilbert in denunciation of the war was false and was deliberate misrepresentation and that "he could have had no purpose other than that of which he was charged." In this connection and as bearing on Gilbert's purposes, one should bear in mind the claims made for the League that it is conducting a struggle for the agrarian interests against large financial and business interests. See criticism of the case by Professor Chafee in (1921) 25 NEW REPUBLIC, 259. At the trial Gilbert had denied the speaking of the words in question. (1918) 141 Minn. 263, 169 N. W. 790. In *State v. Martin* (1918) 142 Minn. 484 169 N. W. 792, the majority at first upheld a conviction of a defendant for approving Gilbert's speech in the course of a barber shop altercation, but on August 1, 1919, a majority of the court decided that the issues should be submitted to a new jury.

[5] Witness for example its decisions as to the inapplicability of state workmen's compensation acts to injuries occurring in harbors. See (1920) 29 YALE LAW JOURNAL, 925, collecting previous notes in the JOURNAL.

sion when Gilbert made the speech in question—no further power in this field remained in the states. So Justice Brandeis, holding that such power was exclusively in the federal government, pointed out how a state by severely repressive measures might hamper the federal prosecution of war, and quoted an official of the Department of Justice to the effect that the Minnesota policy was a cause of real embarrassment and danger to the federal government.[6] Inasmuch as most of the state statutes, unlike the federal Espionage Act, are not limited to a time of war,[7] it may be added that a state, under such a condition of affairs as existed from 1915 until our entrance into the war, might easily force the hands of the federal government by stern repression of the sympathizers with one of the belligerents.[8]

There is, however, a suggestion, explicit in the Gilbert Case and implicit in all those in accord with it, which gives ground for a possible explanation. That suggestion is that the action of the state must be one of co-operation with the federal government. Herein may lie an opportunity for the avoidance of danger. During the recent crisis the government showed beyond the possibility of a doubt its hostility to criticism, and state repressive statutes were plainly in co-operation with the federal policy. Under a government more amenable to public opinion *Gilbert v. Minnesota* need not be a precedent to hamper the execution of federal policies.

C. E. C.

DEPORTATION OF ALIEN COMMUNISTS

The Act of Congress of October 16, 1918, provides that aliens who are members of, or affiliated with, any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States may be deported.[1] This statute

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[6] John Lord O'Brian, *Civil Liberty in War-Time* (1919) 42 N. Y. State Bar Asso. Rep. 275, 296.

[7] See note 1, *supra*.

[8] Decisions of inferior tribunals on this subject seem for the most part in accord with the principal case. See *State v. Holm* (1918) 139 Minn. 267, 166 N. W. 181, L. R. A. 1918 C, 304, with note giving the few analogous precedents prior to the war. A fairly complete picture is given by the majority and minority opinions in *State v. Tachin* (1919, Sup. Ct.) 92 N. J. L. 269, 106 Atl. 145, (1919) 93 N. J. L. 485, 108 Atl. 318. See also *State v. Gibson* (1919, Iowa) 174 N. W. 34. *Contra, Ex parte Meckel* (1920, Tex. Cr. App.) 220 S. W. 81. In *Ex parte Starr* (1920, D. Mont.) 263 Fed. 145, the Montana act was upheld for the period prior to the passage of the federal Espionage Law, although Judge Bourquin strongly condemned the act. See (1920) 29 YALE LAW JOURNAL, 936. Mr. Justice McKenna cites the Minnesota decision upholding state bonuses to veterans. *Gustavson v. Rhinow* (1920) 144 Minn. 415, 175 N. W. 903. This point is not, however, beyond controversy. See (1920) 29 YALE LAW JOURNAL, 690; (1920) 33 HARV. L. REV. 846; (1920) 18 MICH. L. REV. 535; (1920) 4 MINN. L. REV. 233. Cf. as to state soldiers' civil relief acts, *Konkel v. State* (1919) 168 Wis. 335, 170 N. W. 715; cf. also *State v. Darwin* (1918) 102 Wash. 402, 173 Pac. 29.

[1] U. S. Comp. St. Ann. Supp. 1919, sec. 4289¼b (1) and sec. 4289¼b (2).

has received judicial consideration in two United States District Court decisions, the aliens involved being some of those taken in the raids of January 2, 1920, and following.[2] As the opinions in these cases cannot be harmonized, the question awaits the determination of the Supreme Court. Other aliens are being deported under this statute on the authority of the Secretary of Labor, who is giving the statute a far reaching application.[3]

In the Massachusetts District, Judge Anderson held that the mere fact that an alien was a professedly active member of the Communist Party of America was not sufficient grounds for his deportation. The theory of his decision is that the end of that party is radically to change our government, but not to overthrow it; and further, that the means advocated in their manifesto and programme to accomplish this end is not the use of force or violence but only the use of the general strike. "Force or violence" he interprets to mean the use of bombs and weapons for the destruction of life and property. Judge Knox, in the Abern Case, on the other hand, holds that the clear import of the Communist literature is that the party does advocate the destruction of life and property. The Communists advocate the expropriation of private property, and Judge Knox contends that, as the officers of the present government are charged with the protection of property rights, these officers, as well as the property owners, would necessarily employ force to protect those rights. The Communists would then use such force as would be necessary for the achievement of their success. The problem thus seems to raise three questions. Would the expropriation of private property mean the overthrow of our government? Is the use of the general strike the use of force or violence? Assuming that the general strike is not the use of force or violence, do the Communists urge the use of force or violence as incidental to, or in addition to, the use of the strike?

The promulgation of political views by the use of force or violence is subversive of democratic government. The use of the general strike is very close to the use of force and violence. Whether it is a legitimate means is a question of policy. The policy of our government has always been to encourage immigration, as Judge Anderson points out. We also have highly regarded our freedom of speech and press, and it is questionable policy to attempt to combat radicalism by penalizing mere opinion.[4] These deportations may perhaps be legally sustained; but it seems the better policy to limit the operation of this statute to cases clearly within its provisions.

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[2] *Colyer v. Skeffington* (1920, D. Mass.) 265 Fed. 17; *United States v. Wallis* (1920, S. D. N. Y.) 268 Fed. 413.

[3] That the Secretary of Labor proposes to enforce this statute extensively may well be inferred from his opinion in the recent case of the deportation of Martens, the "Soviet Ambassador." See the NEW YORK TIMES, Dec. 17, 1920.

[4] See (1920) 29 YALE LAW JOURNAL, 561; NOTES (1920) 20 COL. L. REV. 680.