CANADIAN LAW OF TRADE COMBINATIONS *

In dealing with the subject of trade combinations, it seems fitting to enter a plea of confession and avoidance. It must be admitted at the outset that the whole subject of the Canadian Law of Trade Combinations cannot properly be considered in one article: it is contended, on the other hand, that there are a number of important problems relating to the general subject which are suitable for essay treatment. It is proposed, therefore, to limit the present essay to one of those problems,—perhaps, indeed, the central problem,—namely, the criminal and civil liability of trade combinations as such. Accordingly, the legality of acts to which trade combinations seem inclined,—strikes, lockouts, picketing, trespass to property, etc., will not be considered in this essay, except insofar as the acts done reflect the purpose and affect the character of the combination itself.

In a case[1] which recently came before the Supreme Court of Canada, Duff C.J.C. expressed himself as follows: "If B commits an indictable offence and the direct consequence of that indictable offence is that A suffers some special harm different from that of the rest of His Majesty's subjects, then, speaking generally, A has a right of action against B. This well-settled doctrine may apply to indictable offences under s. 498 of the Criminal Code."

In this manner was raised one of the most debatable questions of the law of conspiracy, namely, the relation between the civil and criminal remedies. This is a question which can be definitely answered only after a consideration of the early history of conspiracy, a history which stretches back in unbroken formation to the earliest period of English law. It is submitted that it is impossible to understand almost any fundamental problem of the law of conspiracy, without having in mind a general conception of the historical background. For the purpose of convenience it is proposed to divide what is really one continuous historical period, into four sub-periods:

(1) The beginning, to the era of the Star Chamber

(2) The era of the Star Chamber (Conspiracy jurisdiction, 1487–1640)

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* The present article was written in 1941 for the Wallace Nesbitt Essay Competition at Osgoode Hall Law School. As the author is on active service overseas it has been impossible to bring it down to date.

[1] *Philco Products Ltd. et al.* v. *Thermionics Ltd. et al.*, [1940] 4 D.L.R. 1.

(3) 1640 to 1800
(4) 1800 to the present time.

1. *The Beginning to the era of the Star Chamber.*

The early history of conspiracy both as a crime and a tort has been exhaustively examined by Professor Winfield.[2] His conclusion is that conspiracy was not known to the early common law,[3] but was the creature of statute, owing its existence to the Statute of Conspirators, of the probable date 21 Ed. I. This statute was followed by 33 Ed. I which defined the term conspirators so as to include:—

(1) Those who combine falsely and maliciously to indict or cause others to be indicted.
(2) Those who combine falsely to move or maintain pleas.
(3) Those who cause infants to appeal men of felony.
(4) Those who retain men in the country with liveries or fees to maintain their malicious enterprises.
(5) Stewards and bailiffs of lords who by virtue of their office undertake maintenance of pleas concerning other persons.

As in the case of trespass, no distinction was at first made between conspiracy as a crime, and conspiracy as a tort: compensation to the injured person and punishment of the accused could be obtained in the same proceeding. It appears, moreover, that at a very early date the injured person had a double remedy on the same facts, in that he could proceed either by writ of conspiracy or by indictment.[4] This is the first historical evidence of the close interrelation of the civil and criminal remedies in relation to conspiracy.

As is apparent from the definition of conspirators, conspiracy at this period was restricted to actions tending to pervert the course of justice. It seems possible that before the exhaustive statutory definition, there was a tendency to give the offence a wider scope, but by the statute, this tendency was checked.[5] Indeed the third, fourth and fifth heads of the statutory definition came in time to be neglected, not because the evil had

[2] *Winfield, The Writ of Conspiracy* (1917), 33 L.Q.R. 28; THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE by P. H. WINFIELD.
[3] (1917), 33 L.Q.R. 28, at p. 35. See also, WRIGHT, CRIMINAL CONSPIRACY 15.
[4] HARRISON, LAW OF CONSPIRACY, p. 8.
[5] THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE, P. H. WINFIELD, p. 33.

disappeared, but because the disorder of the times required measures in the nature of administrative justice, of the type ultimately dispensed by the Star Chamber.[6]

The essence of the offence so created lay in the combination to do the forbidden acts, but it was soon recognized that one powerful or ingenious person might do as much damage in obstructing and perverting the course of justice, as a combination of many. Accordingly an action on the case in the nature of conspiracy was developed, in which combination was not an essential element. For this reason, and because procedure was more expeditious, the action on the case tended to oust the statutory writ, and during the sixteenth and seventeenth centuries the latter was practically superseded.[7]

The action on the case was similar to the statutory writ in that it applied only to acts which tended to abuse of legal procedure. Eventually too, following a course parallel to trespass, the criminal element in the action evaporated, and by the sixteenth century the action on the case for conspiracy had developed into the torts of malicious prosecution, and malicious abuse of legal process.[8]

It is clear that the writ of conspiracy, and the action on the case developed therefrom, could not, because of this restricted development afford a remedy for conspiracies which did not tend to abuse of legal procedure as such, but which, nevertheless, were disruptive of public order. Indeed, stronger instruments than common law writs were necessary to quell the recurrent disorders of the fifteenth and sixteenth centuries, and in that fact lies the justification for the development of the Court of Star Chamber.

2. *The Era of the Star Chamber.*

The Star Chamber originated as a committee of the King's Council and gradually assumed jurisdiction over all matters which seemed contrary to public policy. It was here that the old statutory writ of conspiracy, even in its period of decline, fulfilled an invaluable function, in that it furnished the Star Chamber with the conception of a special crime, the essential element of which was a combination for some unlawful purpose.[9]

[6] (1917), 33 L.Q.R. 47.

[7] THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE, P. H. WINFIELD; Holdsworth (1921), 37 L.Q.R. 464.

[8] P. H. WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE. See also Holdsworth (1921) 37 L.Q.R. 463.

[9] Holdsworth (1921) 37 L.Q.R. 464.

By an act of 1487 a special committee of the Council was constituted to deal with criminal offences akin to conspiracy. In 1582 and 1589 the Council resolved not to hear private cases, unless of public importance; but nevertheless it reserved to itself the right to hear private cases where there was an information for treason or conspiracy. Accordingly all the cases of conspiracy down to 1640, when the Court was abolished, were heard in the Star Chamber.[10]

In the Star Chamber was developed by the middle of the seventeenth century a much wider doctrine of conspiracy, the essential conceptions of which were (1) that the crime consisted in a combination of persons (this idea was taken from the old statutory writ); (2) that the gist of the offence was the conspiracy and not the acts done in pursuance thereof;[11] (3) that the crime was committed if persons conspired for any unlawful purpose, or to commit any unlawful act, or any lawful act by unlawful means.[12]

The eventual results[13] of this third concept, in conjunction with the wide interpretation placed upon the word "unlawful" were twofold. (1) Combination to do an act or accomplish a purpose might be criminal in cases where that purpose held, or that act done by an individual might be unlawful in the sense of being a tort or breach of contract but would not be criminal. For example there is no authority for holding that it is a criminal offence for one person to induce a breach of contract, though this, in some circumstances, may be a tort; but there is authority for holding that a conspiracy to induce a breach of contract is a crime.[14] (2) In some cases a combination which held a purpose or which did an act might be criminal, even though were that purpose held or act done by an individual, it would neither be a crime, nor even be unlawful in the sense of being a tort or breach of contract. For example, there is much authority which indicates that a conspiracy to cheat was criminal at common law at a time when the act done was not a crime, a tort, or a breach of contract.[15]

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[10] On this point see HARRISON, LAW OF CONSPIRACY, p. 21.

[11] *Poulterers Case* (1611) Co. Rep. 55 b. Moore K.B 814: "A false conspiracy betwixt diverse persons shall be punished though nothing be put in execution." This became known as the Seventeenth Century rule.

[12] See Holdsworth (1921), 37 L.Q.R. 464.

[13] It is not suggested that these results were immediately apparent; but they became so in the following period, and the cause is to be found in the conceptions developed in the Star Chamber at this time.

[14] *R.* v. *Parnell* (1881), 14 Cox C. C. 505.

[15] Holdsworth (1921), 37 L.Q.R. 465. See also *R.* v. *Wheatley* (1761) 2 Burr. 1127.

In short, during this period the jurisdiction exercised by the Court of Star Chamber was a loose variety of criminal equity. "It punisheth errors creeping into the Commonwealth, yea, although no positive law or continued custom of the Common law giveth warrant to it".[16] In that manner, as Professor Kenny pointed out,[17] the interpretation placed by Judges on the purpose of the combination made it possible "for judges to treat all combinations to effect any purpose which happens to be distasteful to them as indictable crimes, by declaring the purpose to be unlawful."

This wide jurisdiction in conspiracy was rendered particularly effective by the existence during this period of a large number of common law and statutory offences, which have since become obsolete. The conduct of trade and the conditions of labour were minutely regulated by statute, and violations thereof were punished as criminal offences.[18] This period too witnessed further development of the old common law offences of engrossing, forestalling and regrating. These offences had statutory definition given to them in 1552.[19] "Engrossing" was described in effect as the buying up of growing corn or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, to the intent to sell them again. "Forestalling" consisted in the buying or contracting to buy any goods before they came to the market, or dissuading persons from bringing their goods to market, or persuading them to enhance the price; while "regrating" was the buying and selling again in the same market or within four miles thereof. In 1844[20] these offences were utterly abolished in England.

3. *1640 to 1800 — Criminal Liability for Conspiracy.*

After the abolition of the Star Chamber in 1640, its wide jurisdiction in conspiracy was continued by the common law courts.[21]

By 1682[22] it was definitely established that a conspiracy to commit a crime was itself criminal. This became known as the

[16] HUDSON, THE STAR CHAMBER, at p. 107, quoted by Holdsworth, *loc. cit.* 466.
[17] CRIMINAL LAW (13th ed.) p. 29 .
[18] See generally HARRISON, LAW OF CONSPIRACY, p. 13.
[19] 5&6 Edw. 6, c. 14.
[20] 7&8 Vict., c. 24.
[21] HARRISON, LAW OF CONSPIRACY, p. 21, quotes a statement of the King's Bench to Sir E. Sedley that "although there was not now a Star Chamber still they would have them know, that the court is *custos morum* of all the subjects of the King".
[22] *R.* v. *Lord Grey* (1682), 2 St. Tr. 519.

17th century rule,[23] and it formed the stem from which the wide jurisdiction in conspiracy branched out. Already in 1665[24] it had been said that any combination was criminal which was directed against the Government, or dangerous to the public security. In 1795[25] a criminal conspiracy was said to exist where there was a confederacy falsely to charge a man with an act that was a crime by any law; by 1717[26] the net was extended to enmesh a conspiracy to commit any tort; by 1721[27] to a conspiracy to injure; by 1752[28] to a combination to defeat the course of public justice; by 1761[29] to a conspiracy to defraud even where no criminal object or means were intended by the combination; by 1763[30] to a combination against morality; by 1769[31] to a conspiracy to procure a breach of contract; by 1783[32] to a conspiracy in restraint of trade.

The present article is not concerned with the exact delimitation[33] of the field of criminal conspiracy as such, except insofar as it throws some light on the attitude of the common law towards trade combinations of employers and workers. However, inasmuch as trade combinations occasionally contemplate the commission of crimes; not infrequently contemplate the com-

[23] See HARRISON, pp. 13 *ff.*

[24] *Starling's Case* (1665), 1 Sid. 174.

[25] *R.* v. *Best* (1705), 2 Ld. Raym. 1167.

[26] HAWKINS, PLEAS OF THE CROWN. There can be no doubt but that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law. See also *R.* v. *Duffield* (1851) 2 Den. 364; *R.* v. *Warburton* (1870), 1 C.C. 274; *R.* v. *Parnell* (1881), 14 Cox 505. For the contrary view see *R.* v. *Turner* (1811), 13 East 228; *R.* v. *Seward* (1834), 1 A. & E. 706; *R.* v. *Kenrick* (1843), 5 Q.B.D. 49.

[27] *R.* v. *Journeymen Tailors of Cambridge* (1721), 8 Mod. 10.

[28] *Chetwynd* v. *Linden* (1752), 2 Ves. Sen. 450.

[29] *R.* v. *Wheatley* (1761), 2 Burr. 1127.

[30] *R.* v. *Delaval* (1763), 3 Burr. 1434. See also *R.* v. *Howell* (1864), 4 F. & F. 160.

[31] *Vertue* v. *Lord Clive* (1769), 4 Burr. 2472. See also *R.* v. *Parnell* (1881), 14 Cox 505.

[32] *R.* v. *Eccles* (1783), 1 Leach 274. For a very early case see *The Dyers Case* (1414), 2 Hen. 5, 5 pl. 26. An action was brought on a restrictive covenant. Hall J. exclaimed "Per Dieu if the plaintiff were here he should go to prison till he had paid a fine to the King."

[33] It is not suggested that the foregoing correctly represents the present law of criminal conspiracy, or even that those propositions were definitely established during this period. There are text book authorities to the contrary. See HARRISON, LAW OF CONSPIRACY, pp. 77–148. His conclusions are that criminal conspiracy is limited to (1) conspiracy within the ancient ordinances of conspirators, (2) conspiracy expressly prohibited by statute, (3) conspiracy to commit a crime, (4) conspiracy to defraud, (5) conspiracy to produce a public mischief, (6) conspiracy to injure in a limited number of cases. See HASLAM, THE LAW RELATING TO TRADE COMBINATIONS, pp. 78–90, to the same effect. See also WRIGHT, CRIMINAL CONSPIRACY.

Whatever the correct position may be there can be no doubt but that during this period, the profession and the courts believed that the crime of conspiracy was wide though indefinite. Only if this is realized can the later cases on trade combinations be understood.

mission of torts, and the inducing breaches of, and the breaking of, contracts; and invariably contemplate restraints of trade and injury to competitors, it does become of importance to determine the following questions :

1. Is a combination to commit a crime, a criminal conspiracy?
2. Is a combination to commit a tort, a criminal conspiracy?
3. Is a combination to break contracts, a criminal conspiracy?
4. Is a combination in restraint of trade, a criminal conspiracy?
5. Is a combination to injure a person, a criminal conspiracy?

We have seen that the first question at least was definitely answered as early as 1682.

The other four questions raise more difficult problems; and perhaps definite answers cannot yet be given. They should be kept in mind, however, as the early cases more specifically relating to trade combinations are now passed in review.

In *R.* v. *Starling*[34] certain brewers of London were found guilty of conspiring to depauperate the farmers of the excise, so as to prevent the due collection of the revenue. In *R.* v. *Journeymen Tailors of Cambridge*[35] the tailors were indicted for combining to raise their wages contrary to statute. The court held that it was not for the refusing to work that they were indicted, but for conspiring. "A conspiracy of any kind is unlawful although the matter about which they conspired might have been lawful for them, or any one of them to do, if they had not conspired to do it."

In *R.* v. *Eccles*[36] the defendants, master tailors, were indicted for a conspiracy to impoverish and prevent a rival firm from trading. No means were stated, but the indictment was held sufficient, Lord Mansfield saying: "the illegal combination is the gist of the offence. Persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what

[34] (1665) 1 Sid. 174.
[35] (1721) 8 Mod. 10.
[36] (1783) 1 Leach 274.

price he pleases, but a combination not to work under certain prices is an indictable offence."

In *R.* v. *Turner*[37] Lord Ellenborough stated that the Eccles Case "was one of a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public."

In *R.* v. *Mawbey*[38] Grose J. said: "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal, as in the case of journeymen conspiring to raise their wages; each may insist in raising his wages, if he can; but if several unite for the same purpose it is illegal and the parties may be indicted for a conspiracy."

R. v. *Leigh*[39] suggests that a conspiracy to hiss an actor off the stage was indictable.

In *R.* v. *Hammond*[40] workmen were convicted of conspiracy to raise wages, and Lord Kenyon said that a conspiracy of masters who agreed to raise wages would also be indictable.

This short review would seem to indicate that during the period there prevailed the view

(1) That certain conspiracies in restraint of trade were indictable. Included in these were conspiracies by employers to raise prices, and by workers to raise wages.

(2) That conspiracies to injure another were indictable even though the means employed were not criminal.

1640 to 1800 — Civil Liability for Conspiracy.

During this period the reports disclose no cases where damages were recovered in a civil action based on conspiracy. This may indicate that at this period conspiracy was regarded as a criminal offence only, and did not give rise to a civil action, even where special damages were suffered by an individual.

We have seen, however, that the "old" offence of conspiracy was regarded both as a crime and a tort,[41] and it would be extraordinary if the same rule did not apply when the scope of the crime of conspiracy had been widened by the Star Chamber. Moreover it has been suggested that just as the

[37] (1811) 13 East 228.
[38] (1796) 6 T. R. 619.
[39] (1775) 1 C. & K. 282.
[40] (1799) 2 Esp. 719.
[41] *Pedro* v. *Barrett* (1697), 1 Ld. Raym. 81. In this case it was held that a civil action lay for malicious prosecution, "for the conspiracy was a thing punishable at common law by fine and imprisonment."

development of the crime of libel gave birth to the tort of libel, so the development of the new crime of conspiracy gave birth to a new tort of conspiracy.[42] If this is so, pregnancy appears to have been prolonged, because it was not until the next period of our history that the House of Lords, after much travail, laid the new born babe on the threshold of its alleged father, the English Common Law.[43]

4. *1800 to the present time — Criminal Liability for Conspiracy.*

In 1799 and 1800 were passed the combination laws,[44] which made illegal agreements by workmen for altering hours, lessening quantity of work, and hindering or controlling masters in the conduct of their business. These laws were in force for a quarter of a century, and during that time the impression was general that they were merely a declaration of the common law principle that all combinations to injure, and all combinations in restraint of trade were criminal.[45]

In 1824[46] the combination acts were repealed and it was provided that combinations by workmen and others as to wages and conditions of labour should not be indictable eitner at common law or by statute.

The Act was regarded as too liberal and was repealed in 1825.[47] This latter statute again repealed the old combination laws, but made no reference to the common law offences. Moreover, it made it a crime *inter alia* . . . . (2) to prevent or endeavour to prevent any unemployed person from obtaining employment; (3) by violence, threats, intimidation, molestation or obstruction to force anyone to belong to any trade union or to observe any trade union rule; (4) in any of the above ways to force, or endeavour to force anyone to alter his mode of carrying on business.

The Trade Union Act, 1871,[48] and the Criminal Law Amendment Act, 1871,[49] provided that the purposes of a trade union should not be held unlawful so as to render any member thereof liable to prosecution for conspiracy or otherwise. The earlier Acts were also repealed but threatening, intimidation, molesta-

[42] Holdsworth (1921), 37 L.Q.R. 469.
[43] *Quinn* v. *Leathem*, [1901] A.C. 495. See also, HARRISON, LAW OF CONSPIRACY, p. 51.
[44] 39 Geo. 3, c. 81; 39 & 40 Geo. 3, c. 106.
[45] Report of a Select Committee of the House of Commons (1824).
[46] 5 Geo. 4, c. 95.
[47] 6 Geo. 4, c. 129.
[48] 34 & 35 Vict. c. 31.
[49] 34 & 35 Vict. c. 32.

tion, and obstruction, in order to coerce, were all retained as penal offences.

The cases after[50] 1825 and before 1871 indicate that conspiracies in restraint of trade were still regarded as criminal at common law though not by statute; and even after 1871, when a combination in restraint of trade could no longer be considered criminal either at common law or by statute, the courts nevertheless held that a combination of workmen might be indictable at common law as being a conspiracy to injure.[51]

In 1875, therefore, the Conspiracy and Protection of Property Act[52] was passed. It provided by sec. 3 that no combination to do or procure any act in contemplation or furtherance of a trade dispute should be indictable as a conspiracy unless the same act committed by an individual would be a crime. Section 7 specified certain acts which were still regarded as offences. Since 1875 there have been many changes in England; but these changes are not relevant to the present discussion, since in Canada, trade union legislation, first introduced in 1872,[53] still remains unchanged in the books.

During this period appear the first definite indications that a combination to break contracts, or to commit torts may be criminal. Thus in *R.* v. *Jones*[54] it was said: "A criminal conspiracy consists in a combination to accomplish an unlawful end or a lawful end by unlawful means." Unlawful in this connection might mean some act which merely gave rise to a civil action.[55]

1800 to the present time — Civil Liability for Conspiracy.

Gregory v. *Duke of Brunswick*[56] suggested that a civil action might be brought in respect of damage caused to an individual as a result of a riot and a criminal conspiracy entered into for the purpose of ruining the plaintiff's reputation and prejudicing his career as an actor. Other cases[57] in the same period suggest the view that conspiracy adds nothing to the cause of action.

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[50] Summarized in HARRISON, LAW OF CONSPIRACY, pp. 40–47.
[51] *R.* v. *Bunn*, 12 Cox C.C. 316.
[52] 38 & 39 Vict. c. 86.
[53] Trade Union Act, 35 Vict., c. 30.
[54] (1832), 4 B. & A. 345.
[55] See *R.* v. *Seward* (1834), 1 A. & E. 706; *O'Connell* v. *Reg.* (1884), 11 Cl. & F. 155; *Mulcahy* v. *Reg.* (1868), L.R. 3 H.L. 306; *R.* v. *Parnell et al.* (1881), 14 Cox C.C. 505; *Quinn* v. *Leathem*, [1901] A.C. 495.
[56] (1843), 1 C. & K. 24, 6 M. & G. 205, 903.
[57] *Solomon* v. *Warner* (1891), 7 L.T.R. 431, 484; *Kearney* v. *Lloyd* (1891), 26 I.R. 268.

The years following these cases have seen a large number of conspiracy cases before the courts. It is impossible to consider them all, and indeed unnecessary because all the problems have been raised in five leading cases, namely,

(1) *Mogul Steamship Company* v. *McGregor, Gow & Co.*;[58]
(2) *Allen* v. *Flood*;[59]
(3) *Quinn* v. *Leathem*;[60]
(4) *Ware & De Freville Limited* v. *Motor Trade Association*;[61]
(5) *Sorrell* v. *Smith*.[62]

These cases have given rise to considerable controversy, and it has even been asserted that they raise more problems than they settle. It is submitted that this is not so; that the cases are not inconsistent; and that most of the trouble has arisen as a result of the tactics of critics who seize upon particular expressions used — often in dissenting judgments — and then attempt to use them not only as an armchair to support the weight of their own theories, but also as a cudgel to beat down the theories of their opponents.

Since these five cases are of such vital importance it is necessary to examine the facts and the reasons for judgment in some detail.

In the *Mogul* case[63] the defendants, shipowners, formed themselves into an association and offered to merchants and shippers a rebate of 5% if goods were shipped exclusively by association ships. The association also required, upon pain of dismissal, that its agents act only for association ships.

The plaintiffs were rival shipowners injured by the combination.

At the trial Coleridge C.J. held:

(1) If there be an unlawful combination, the parties to it commit a misdemeanour, and are offenders against the state, and if, as a result of such unlawful combination and misdemeanour, a private person receives a private injury, that gives such person a right of action.

(2) If an object of a combination be unlawful, or if the object be lawful but the means employed to effect it be unlawful, then the combination would be unlawful.

[58] (1888) 21 Q.B.D. 555; [1892] A.C. 25.
[59] [1898] A.C. 1.
[60] [1901] A.C. 495.
[61] [1921] 3 K.B. 40.
[62] [1925] A.C. 700.
[63] (1888), 21 Q.B.D. 555; [1892] A.C. 25.

(3) The combination of the defendants being for the purpose of advancing their own interests and employing lawful means, was lawful.

In the House of Lords, Lord Halsbury expressed the opinion:

(1) Contracts in restraint of trade are not unlawful except for the purpose of avoiding the contracts as between the parties to it.

(2) A combination to insult and annoy a person would be an indictable conspiracy.

(3) There was no evidence of an indictable conspiracy since there was no unlawful act and no malicious desire to injure their rivals.

Lord Watson was of opinion:

(1) In order to substantiate their claim plaintiffs must show, either that the object of the agreement was unlawful, or that illegal methods were resorted to in its prosecution.

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

(3) After consideration, the withdrawal of agency could not be regarded as illegal, because it was impossible for any honest man to act as agent for both of two rival masters.

(4) An agreement in restraint of trade was not illegal except for the purpose of avoiding the contract as between the parties to it.

Lord Bramwell was of opinion :

(1) In order that the plaintiffs might maintain their action, they must make out that the combination was a crime. It was not sufficient that they show that the agreement was in restraint of trade and therefore unenforceable.

(2) A combination of workmen to cease work except for higher wages was lawful at common law; perhaps not enforceable *inter se*, but not indictable.

(3) The defendants in this case did no more than they had a legal right to do.

Lord Morris was of opinion :

(1) A body of traders whose motive object was to promote their own trade might combine to acquire, and thereby injure, the trade of competitors provided they did no more than was incident to such motive object, and used no unlawful means.

(2) The only questionable means adopted was the dismissal of agents, which might be questionable according to the circumstances. But in this case the dismissal was justified because the agents were in an impossible position in being agents for two rivals.

(3) Assuming the agreement was unenforceable as being in restraint of trade, the combination was not thereby rendered illegal.

Lord Field was of opinion :

(1) Acts done by a trader in the lawful way of his business, though injuring the trade of another, were not the subject of an action,

(a) unless they were violent or purely malicious, or

(b) unless done in pursuance of a conspiracy where there existed either an ultimate motive of malice, or wrong, or wrongful means of execution involving elements of injury to the public.

(2) Even assuming the agreement was unenforceable as being in restraint of trade, it was not an illegal conspiracy.

Lord Hannen was of opinion :

(1) That an agreement unenforceable as being in restraint of trade was not therefore an indictable conspiracy.

(2) The object, namely to acquire a larger portion of the carrying trade, was legitimate, and the means adopted unobjectionable.

(3) The question would be a different one had there been any evidence of malicious or sinister intent.

(4) An act which was lawful did not become criminal if done by several combining together; but there were some forms of wrong which could only be effected by combination; and combination might afford some evidence of malice.

It is submitted that if the case is read objectively and without any desire to cut the judgment to a preconceived pattern the case stands as authority for the following propositions.

(1) There can be no civil remedy unless the combination was a criminal conspiracy and special damage was suffered by an individual.

(2) An agreement in restraint of trade is void as between the parties, but it is not a criminal conspiracy.

(3) A combination to acquire the trade of another, or to improve one's trade position is not a criminal conspiracy, but quaere as to the position where the motive was malicious in the popular sense of being spiteful.

(4) Inferentially, any combination would amount to a criminal conspiracy if formed for any unlawful purpose, or to accomplish any lawful purpose by unlawful means. "Unlawful" was not defined, but keeping in mind the earlier cases, it might be safe to say that it would include not only crimes, but torts and breaches of contract.

It will have been noticed that the threat to discharge agents gave some trouble to a number of the Judges. There is some suggestion, therefore, that a conspiracy to injure a trade rival by means of pressure exerted on third persons, might be illegal. This idea runs through judgments in the two following cases and was not finally dispelled until the decision in *Sorrell* v. *Smith*.[64]

In *Allen* v. *Flood*,[65] the appellant, defendant, was the delegate of a boilermaker's union. The General Secretary and President of the union were joined as defendants. The plaintiffs, respondents, were shipwrights who had been dismissed from their employment after representations had been made by Allen to their employers. It was not shown that Allen's actions had been authorized by the union. The jury found that Allen had maliciously induced the Glengall Company to discharge the plaintiffs. The direction by the trial judge indicates that he used malice in the popular sense of something having been done not for the purpose of forwarding that which Allen believed to be in his interest as a delegate of his union, but for the purpose of injuring the plaintiffs.

Lord Halsbury in a dissenting judgment was of opinion

(1) that by threatening what would result in a stoppage of the works, Allen had "intimidated" the Company and so forced them to discharge the plaintiffs;

(2) that even if Allen had done what he did with the sole intent of advancing his interest as a union delegate, he would still be responsible, because his motive might still be malicious in the sense of being improper. For example, if the object had been to punish the men belonging to another union because on some former occasion they had worked on ironwork;

[64] [1925] A.C. 700.
[65] [1898] A.C. 1.

(3) that Allen was liable even though not actually supported by others, because he falsely represented that he had a following and so produced the same result.

Lord Watson was of opinion

(1) that a person who has procured the act of another could be made legally responsible on only two grounds:

(A) if knowingly, and for his own ends, he induced the other person to commit an actionable wrong;

(B) where the act induced was lawful, the inducer might be held liable if he procured his object by illegal means directed against that third party.

(2) That malice did not make a lawful act unlawful and was relevant only in those cases where a privilege was thrown around what was *prima facie* a wrongful act.

Lord Ashbourne in effect concurred with Lord Halsbury.

Lord Herschell was of opinion

(1) That the defendant had done no unlawful act and that a bad motive would not render him liable for an act *prima facie* lawful. In any event defendant's motive was not spiteful.

(2) Conspiracy was a special type of case, and had not been alleged.

Lord Macnaghten agreed in effect with Lord Herschell.

Lord Morris was of opinion

(1) There existed a right to trade and any interference with that right by a malicious act was unlawful.

Lord Shand agreed in effect with Lord Herschell.

Lord Davey in essence agreed with Lord Herschell, as did Lord James of Hereford.

It is clear that this case stands for the proposition that an act *prima facie* lawful does not become unlawful when done maliciously, and is of no great importance for our present purpose, inasmuch as conspiracy was not in issue. Lord Halsbury's judgment, however, carried forward the idea suggested in the previous case, namely, that pressure exerted through third persons might be illegal as being intimidation.

Lord Morris also carried forward the idea advanced in earlier cases[66] that there existed a right to trade. It is believed, however, that to postulate a right to trade does not aid in solving any particular problem, since it is well recognized that

[66] All the cases are collected in KENNEDY AND FINKELMAN, THE RIGHT TO TRADE.

at English law the terms right and duty are correlative, and therefore in order to render a defendant liable, a breach of duty, or in other words, a wrongful act, must be shown. Lord Morris recognized this elementary principle when he went on to say that an interference with the right to trade by a malicious and wrongful act, was unlawful.[67]

Lord Shand recognized the same principle when he said:[68] "that right (the right to trade) is subject to the right of others to trade also, and to subject him to competition — competition . . . . which cannot be complained of where no unlawful means have been employed."

The most important case for our purposes is *Quinn* v. *Leathem*.[69] In this case the plaintiff, respondent, brought action against the defendants, officers and members of a trade union. The jury found:

(1) The defendants wrongfully and maliciously induced the customers and servants of the plaintiff to cease dealing with him. With reference to the meaning of the word "maliciously" the judge made it clear that he meant the intentional doing of acts for the purpose and effect of actually injuring the plaintiff, as distinguished from acts legitimately done to secure or advance the defendants' own interests.

(2) The defendants maliciously conspired to induce the plaintiff's customers or servants not to deal with the plaintiff and not to continue in his employment and such persons were induced not to do so.

(3) The defendants published a black list with intent and with the effect of injuring the plaintiff in his business.

The Earl of Halsbury was of opinion that there was a right of action based upon conspiracy to injure the plaintiff by inducing his servants to cease to work for him, and his customers to cease to deal with him. *Allen* v. *Flood* was distinguished on the ground that in that case these were merely a warning, and not a threat.

Lord Macnaghten was of opinion

(1) that disembarrassed of the dicta of Lord Esher regarding motive, the case of *Temperton* v. *Russell*[70] was well decided. Accordingly

(a) maliciously inducing a breach of contract was actionable

[67] [1898] A.C. at p. 160.
[68] *Loc. cit.*, at p. 166.
[69] [1901] A.C. 495.
[70] [1893] 1 Q.B. 715.

(b) A malicious conspiracy to induce persons not to make contracts with the plaintiff was a criminal conspiracy, and gave rise to a civil right to damages; on this point his Lordship cited *Gregory* v. *Duke of Brunswick*;[71] *Duffield's Case*;[72] *Rowlands' Case*;[73] *Reg.* v. *Parnell & others*.[74]

(2) That there was no trade dispute within the meaning of the Conspiracy and Protection of Property Act.[75]

(3) That the provisions of the above Act did not affect civil remedies.

Lord Shand was of opinion that

(1) a combination to injure another, and not to advance the parties' own trade interests was unlawful.

Lord Brampton was of opinion

(1) That *Allen* v. *Flood* established the principle that the exercise of an absolute legal right could not be treated as wrongful and actionable merely because a malicious intention prompted such exercise. He referred to *Bradford Corporation* v. *Pickles*.[76] However it did not follow that a malicious intention could in no case be material to the maintenance of an action; for example, cases of defamation or malicious prosecution.

(2) The real cause of action in this case was an unlawful conspiracy to molest the plaintiff in carrying on his business.

(3) That the Conspiracy and Protection of Property Act applied only to combinations in restraint of trade which were not unlawful for other reasons.

(4) That the above Act did not prevent a civil action being brought.

(5) A conspiracy consisted of an unlawful combination of two or more persons to do that which was contrary to law or to do that which was wrongful and harmful towards another person. Assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts, no one of which taken singly and alone would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such acts would become unlawful and actionable if done by the conspirators acting

[71] 6 M. & G. 205.
[72] (1851), 5 Cox C.C. 404.
[73] (1851), 5 Cox C.C. 436.
[74] (1881), 14 Cox C.C. 505.
[75] See *supra*.
[76] [1895] A.C. 587.

jointly or severally, in pursuance of their conspiracy. A conspiracy to do harm to another was, from the moment of its formation unlawful and criminal, though not actionable unless damage resulted. Cases cited were *R.* v. *Journeymen Tailors of Cambridge*;[76A] *R.* v. *Eccles*;[77] *R.* v. *Mawbey*.[78]

Lord Lindley was of opinion

(1) That *Allen* v. *Flood* merely decided (a) that an act otherwise lawful, although harmful, did not become actionable by being done maliciously in the sense of proceeding from a bad motive; but this proposition only applied to "acts otherwise lawful", *i.e.*, acts involving no wrong to anyone. (b) That on the facts of the particular case no right of the plaintiff was infringed in that Allen merely warned the plaintiff of what might happen.

(2) The plaintiff had a liberty to earn his own living in his own way, and this required as its basis the liberty of other persons to deal with him. Any interference with their liberty, with the intention of injuring him, was actionable unless such interference were justifiable in point of law.

(3) Conspiracy and unjustifiable interference with the plaintiff's customers was a wrongful act. Cases cited were *Temperton* v. *Russell*;[79] *Lumley* v. *Gye*.[80]

(4) It might be assumed that the defendants acted as they did in the interests of union men. His Lordship distinguished the *Mogul* case and *Scottish Co-Operative Society* v. *Glasgow Fleshers Association*[81] on the ground that in those cases the plaintiffs merely exercised their own rights, whereas in the present case the coercion of the plaintiff's customers and servants and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him.

(5) This was no trade dispute within the meaning of the Conspiracy and Protection of Property Act.

(6) Even if this were a trade dispute, that would not affect the civil action for damages: civil liability was not dependent upon criminal liability.

Three points of view appear to be expressed in this case. Lord Halsbury adheres to the view expressed by him in *Allen*

[76A] 8 Mod. 11.
[77] 1 Leach 274.
[78] (1796), 6 T.R. 619, 3 R.R. 282.
[79] [1893] 1 Q.B. 715.
[80] 2 E. & B. 216.
[81] 35 Sc. L.R. 645.

v. *Flood* that pressure excited upon the plaintiff through third parties is wrongful.

Lord Lindley was of opinion that there had been a violation of the plaintiff's "liberty to trade". Accordingly it was immaterial that the defendants had acted in the interests of union men. His Lordship however recognized the necessity of finding some wrongful act which violated the plaintiff's liberty to trade. The wrongful act was found in the interference with the plaintiff's servants and customers; that is to say, striking at the plaintiff through third parties was regarded as an unlawful act.

The majority opinion was (1) that upon the basis of the findings of the jury, there had existed a conspiracy which would have been criminal at common law, and that the Conspiracy and Protection of Property Act did not apply, or if it did apply, did not destroy the civil right to damages. (2) A conspiracy to injure, not for the purpose of advancing the interests of the combination, but merely for the purpose of punishing the defendant was a criminal conspiracy at common law.

The next case in point of time is *Ware & De Freville, Limited* v. *Motor Trade Association.*[82]

In this case the defendant Association was a trade union of manufacturers and jobbers registered as a trade union under s. 2, ss. 3 of the Trade Union Act 1913. The Association fixed prices for a wide range of products, and the names of individuals who sold for more or less than the fixed price were put on a stop list. Other persons, who thereafter had trade relations in the protected articles with individuals on the stop list, would themselves be put on the stop list. Plaintiff was put on the stop list, and thereupon he sued for an injunction.

At the trial, Rowlatt J. found that pressure had been put not only upon the plaintiff himself but also upon those who had dealings with him.

In the Court of Appeal, Bankes L.J. was of opinion:

(1) A conspiracy to injure a third person was wrongful and actionable, but the evidence indicated that the object of the combination was merely the legitimate protection of its trade interests.

(2) The method adopted by the defendants was not unlawful in itself and was not rendered unlawful by the fact that it might be regarded as unreasonable.

Scrutton L.J. was of opinion:

[82] [1921] 3 K.B. 40.

(1) That an act otherwise lawful, though harmful, did not become actionable by being done maliciously in the sense of with a bad motive, or with intent to injure another. His Lordship considered this proposition established by *Allen* v. *Flood.*

(2) A combination to do acts to secure the trade interests of the confederation by reasonable and legitimate means was not actionable; but a combination which exceeded this limit and caused damage by action intended to injure was actionable. His Lordship cited the *Mogul* case; *Quinn* v. *Leathem.*

Atkin L.J. was of opinion:

(1) That a combination acting to advance its own trade interests need not prove that its acts were reasonable provided only they were not unlawful *in se.*

(2) Bringing pressure to bear on third persons in order to prevent them from dealing with the plaintiff was not a wrongful method of achieving the combination's object.

This case therefore appears to be authority for the following propositions:

(1) A plaintiff cannot recover in a civil action for damage sustained as a result of the action of a trade combination, unless he can prove that the combination was a criminal conspiracy.

(2) A combination to advance its own interests is not a criminal conspiracy if no unlawful acts are done. Unlawful, again, is left undefined, but presumably it would include tortious acts, and also breaches of contract.

(3) The bringing of indirect pressure to bear upon an individual through his customers is not a wrongful act. Moreover, according to the majority, it is immaterial whether or not the pressure imposed is unreasonable; the court cannot be expected to go into such a question. Lord Justice Scrutton dissented as to this latter point, holding that the acts done must be reasonable.

This case therefore, is the first direct authority declining to follow suggestions put forth in the two preceding cases, to the effect that pressure exerted upon the plaintiff through third parties might be an unlawful act.

The last[83] of the five English cases to be considered is

[83] Other cases on this subject include *Tarleton* v. *McGawley* (1794), 1 Peake N.P.C. 270; *Lumley* v. *Gye* (1853), 2 E. & B. 216; *Mayor of Bradford* v. *Pickles* [1895] A.C. 587; *Boots* v. *Grundy*, 72 L.T. 769; *Temperton* v. *Russell* [1893] 1 Q.B. 715; *Giblan* v. *National Amalgamated Labourers Union* [1903] 2 K.B. 600; *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *Davis* v. *Thomas*, 36 T.L.R. 39; *Santon* v. *Busnach*, 29 T.L.R. 214; *South Wales Miners Federation* v. *Glamorgan Coal Co.*, [1903] 2 K.B. 545, [1905] A.C. 239; *Sweeney* v. *Coote*, [1906] 1 I.R. 51; *Pratt* v. *British Medical Association*, [1919] 1 K.B. 244.

It is unfortunate that the author did not have an opportunity of considering *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*, [1942] A.C. 435.—Ed.]

Sorrell v. *Smith*.[84] In this case a trade union of retail newsagents had as its object the limitation of the number of agents in certain districts. In pursuance of that policy, the plaintiff Sorrell transferred his patronage from one Ritchie to Watson, on the ground that the former had supplied unlicensed newcomers with papers. The defendants, a committee of newspaper proprietors, ordered the plaintiff to transfer his patronage back to Ritchie, and upon his refusal to do so, threatened to cut off his supply of papers. They effected this purpose (1) by threatening to cut off Watson's supply of papers; (2) by threatening to cut off the supply of papers to Smith & Son who supplied Watson. The action was taken for the protection of the defendants' trade interests.

Viscount Cave L.C. was of opinion:

(1) That a combination of two or more persons wilfully to injure a man in his trade was unlawful, and if it resulted in damage to him was actionable.

(2) If the real purpose of the combination was not to injure another, but to forward or defend the trade of those who entered into it, then no wrong was committed.

(3) The second proposition assumed the absence of means which were in themselves unlawful. Pressure brought to bear upon a third party by means not unlawful, for the purpose of influencing the defendant was not lawful.

Lord Dunedin was of opinion:

(1) In an action against an individual, the whole question was whether the act complained of was legal, and motive or intent was immaterial; but in an action against a set of persons in combination, a conspiracy to injure, followed by injury, would give a good cause of action; and motive or intent was of the essence of the conspiracy. The reason for this difference lay in the fact that the basis of the civil action was the criminal conspiracy, and in criminal law *mens rea* was of the essence of the offence.[85]

(2) There could not be a civil action of conspiracy on facts which fell short of a criminal conspiracy.

(3) A threat was a pre-intimation of proposed action which might either be a legal or illegal action *in se*. If of the first kind, it gave no ground for action; if of the second, it fell

[84] [1925] A.C. 700.

[85] It is interesting to note that this argument—almost to its identical phraseology—was anticipated by twenty years in a Canadian case, *Gibbins* v. *Metcalfe* (1905), 16 Man. L.R. 560.

within the description of illegal means and a right to sue was established.

Lord Sumner was of opinion:

(1) That the *Mogul* case covered the present case.

(2) That *Quinn* v. *Leathem* was based upon a combination acting with malevolent motive.

Lord Buckmaster agreed in essence with Lord Dunedin.

It seems apparent that this case affords merely an authoritative and comprehensive restatement of principles established by the four preceding cases.

It seems to be definitely settled, therefore, that indirect pressure brought to bear upon the plaintiff is not actionable, unless that pressure in itself is unlawful.

The judgment would also appear to reaffirm the principle, already established, that the basis of civil liability is the criminal conspiracy resulting in special damage to the plaintiff; and that a trade combination is not a criminal conspiracy unless its motive is malevolent, or unless its purpose is to do an unlawful act, or a lawful act by unlawful means.

These cases have occasioned some comment, and three notes in the *Law Quarterly Review* deserve close attention.

The earliest note[86] was written immediately after the *Mogul* case. The author stated that that case involved the following propositions:

1. The courts will not undertake to regulate the competition of traders.
2. They will not found new heads of "public policy" on disputed economic propositions.
3. There cannot be an indictable or actionable conspiracy, without a distinctly unlawful end, or distinctly unlawful means.
4. Acts not otherwise unlawful are not unlawful because done in execution of an agreement which is in restraint of trade.
5. Hence the old high common law doctrine of conspiracy, if we may so call it, is no longer tenable, if it ever was.
6. Specific acts of violence, intimidation, fraud or unlawful molestation, and agreements to commit or procure any such acts, remain as unlawful as ever.

[86] Editorial note, presumably by Sir Frederick Pollock, (1892) 8 L.Q.R. 101.

Only a footnote appended to proposition 3, is required to bring this statement of the law up to date. There may be an indictable or actionable conspiracy, if the motive is malevolent, even though the acts done are not "distinctly unlawful".

Ten years later, after the decision in *Quinn* v. *Leathem* another note[87] by the same author, appeared in the *Law Quarterly Review*. According to this note, the conclusions to be drawn from the "conspiracy" cases were—

(1) An act which does not amount to a legal injury cannot be actionable merely because it has been done with a bad motive.

(2) Acts done by X and Y, who are acting in concert, solely for the purpose of protecting and extending their trade and increasing their profits, and which do not involve the employment of any means in themselves unlawful, are not actionable, even though those acts cause damage to A.

(3) A combination of X, Y and Z to damage A in his trade, and, by means of intimidation or coercion, induce his customers or servants against their will either to break their contracts with him, or not to deal with him, or not to continue in his employment, is, if it results in damage to A, actionable (*Quinn* v. *Leathem*).

Time has dealt more harshly with this second note, in that the third main proposition has been definitely overruled in *Sorrell* v. *Smith*. The dangers of prophecy are indeed great even when indulged in by experts.

In 1920 another article[88] appeared in the *Law Quarterly Review*. After a valuable review of all the cases down to 1920, the author inclined to the opinion that the existence of the tort of conspiracy was established, and that the basis of the action was the criminal conspiracy. The author then made a particularly interesting observation. "The necessity for proving an intention to do some unlawful act[89] is constantly insisted on in the cases, and once this intention is proved, it matters little whether the overt acts carrying it out are lawful or unlawful. The result of not thoroughly appreciating this has given rise

[87] (1902), 18 L.Q.R. 1.

[88] Charlesworth, *Conspiracy as a Ground of Liability in Tort*, 36 L.Q.R. 38.

[89] Since *Sorrell* v. *Smith*, it is clear that a malevolent motive also would be sufficient, since a combination with a malevolent motive is regarded as a criminal conspiracy.

to a good deal of confusion, and the question has often been mooted whether an act lawful if done by one becomes unlawful if done by two. Naturally enough, there has been a great reluctance to answer this question in the affirmative, and this reluctance has extended to the admission of the action of conspiracy, the two questions being considered to be and the same. This, however, is not the case. In conspiracy it is the combination which is actionable, not the overt acts and a combination is *ex hypothesi* the act of a plurality of persons. Any act done in pursuance of a conspiracy does not become actionable because it is done by more than one . . . . but because it is one of a number of acts which together show a conspiracy." In short, it is the conspiracy which is actionable, not the acts done in pursuance of the conspiracy.

It is possible, provisionally at any rate to summarize the present position at common law as follows. For the purposes of clarity it is proposed to define the present use of the word "unlawful" so as to include any act which is a crime, tort or breach of contract.

(1) Conspiracies in restraint of trade are not *in se* criminal.[90]

(2) Pressure exerted through third persons is not unlawful provided that the acts, by which pressure is exerted, are not in themselves unlawful. Moreover, the court will not consider whether or not the acts are reasonable.[91]

(3) A conspiracy to do any unlawful act or to do any lawful act by unlawful means is a criminal conspiracy.[92]

(4) A conspiracy to injure another if the motive be malevolent is a criminal conspiracy. If however, the motive is merely to advance the trade interests of the accused, the conspiracy will not be criminal.[93]

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[90] *Mogul Steamship Company* v. *McGregor Gow & Co.*, [1892] A.C. 25; *Ware & De Freville, Limited* v. *Motor Trade Association*, [1921] 3 K.B. 40; *Sorrell* v. *Smith* [1925] A.C. 700. See also *United Shoe Machinery Co.* v. *Brunet*, [1909] A.C. 330; *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co., Ltd.*, [1914] A.C. 46 .

[91] *Sorrell* v. *Smith*, [1925] A.C. 700; *Ware & De Freville, Limited* v. *Motor Trade Association*, [1921] 3 K.B. 40.

[92] *Mogul Steamship Company* v. *McGregor, Gow & Company*, [1892] A.C. 25; *Quinn* v. *Leathem*, [1901] A.C. 495; *Ware & De Freville, Limited* v. *Motor Trade Association*, [1921] 3 K.B. 40; *Sorrell* v. *Smith*, [1925] A.C. 700. See also *Giblan* v. *National Amalgamated Labourers Union of Great Britain and Ireland*, [1903] 2 K.B. 600; *South Wales Miners Federation* v. *Glamorgan Coal Co.*, [1903] 2 K.B. 545, [1903] A.C. 239; *Read* v. *Friendly Society of Cooperative Stonemasons*, [1902] 2 K.B. 732.

[93] *Mogul Steamship Co.* v. *McGregor Gow & Co.*, [1892] A.C. 25; *Quinn* v. *Leathem*, [1901] A.C. 495; *Ware & De Freville Ltd.* v. *Motor Trade Association*, [1921] 3 K.B. 40; *Sorrell* v. *Smith*, [1925] A.C. 700.

(5) A criminal conspiracy which is a criminal conspiracy as above defined will give rise to a civil action for damages at the suit of a person intentionally[94] injured thereby. Moreover, the civil right to damages will not be destroyed even if the criminal conspiracy is rendered non-indictable by protective legislation.[95]

The question is often asked: Is there a separate tort of conspiracy?[96] The practical reason for asking the question is not clear. We have seen that where the elements of a criminal conspiracy exist, a person intentionally injured, may recover in a civil action, if he can prove special damage. Is it important, in view of this fact, to determine whether or not there is a separate tort of conspiracy? It may be, however, that the question is important from the point of view of legal theory and correct legal classification. Accordingly, it is suggested that, since a civil action of conspiracy may now be brought where the criminal conspiracy itself would not be indictable because of protective legislation,[97] the eventual development of a distinct nominate tort of conspiracy has been rendered inevitable. It may well be, however, that its recognition will be delayed for some time.

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[The remainder of this article dealing with the Canadian legislation and cases will appear in the February issue.]

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[94] The cases have not yet gone so far as to give a right of action to a person injured by a combination, who was not intended to be so injured. The problem would depend on difficult questions involving negligence and remoteness of damage.

[95] *Quinn* v. *Leathem*, [1901] A.C. 495; *Sorrell* v. *Smith*, [1925] A.C. 700. See also *Giblan* v. *National Amalgamated Labourers Union of Great Britain and Ireland*, [1903] 2 K.B. 600; *South Wales Miners Federation* v. *Glamorgan Coal Co.*, [1903] 2 K.B. 545, [1903] A.C. 239.

[96] See especially Lord Sumner's judgment in *Sorrell* v. *Smith*, [1925] A.C. 700 at 740. And see also HARRISON, LAW OF CONSPIRACY, pp. 52, 53, where the author while staunchly denying the existence of a separate tort of conspiracy, goes on to say: "It is of course clear that if a combination, which is itself a criminal conspiracy, causes damage, an action will lie."

[97] *Quinn* v. *Leathem*, *supra*.