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# Boycotting

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# COMMENT ON RECENT CASES

BOYCOTTING.—[England] A case has at length reached the House of Lords, which has already created more than the usual interest during its progress through the court of original jurisdiction and the Court of Appeal. This is *Sorrell* v. *Smith*.[1] A large number of London retail newspaper agents (we are nowhere told how large a proportion of the total number) formed a union, of which the plaintiff was a member. This organization undertook to prevent the coming of new dealers into territory which they regarded as already sufficiently supplied. Such dealers having come into certain territory, the organization called on the wholesaler, Ritchie, to cease furnishing papers to them. On Ritchie's refusal to do as asked, the plaintiff, who also bought from Ritchie, volunteered to aid in bringing pressure to bear, and to this end transferred his business to another wholesaler, Watson. Ritchie reported his difficulties to the defendants, a committee of the circulation managers of the newspapers themselves. The defendants, being opposed to any limitation on the number of retailers, informed Watson that if he continued to sell papers to the plaintiff his entire supply would be cut off, either directly, by their refusal to sell to him, or indirectly by their refusal to sell to any other wholesaler who might sell to him. Watson at once submitted and told the plaintiff that he would not renew his contract to supply him. The plaintiff asked an injunction restraining the defendants from interfering with his making such contracts with Watson as he chose. This was granted in the lower court,[2] but the judgment was reversed in the Court of Appeal.[3] The plaintiff's appeal is here dismissed by the House of Lords, opinions being read by Lords Cave, Dunedin, Sumner, and Buckmaster.

The law of England on the subject of boycotting has for long been in great confusion, decisions being hard to reconcile, and opinions even more so.[4] In these circumstances it is no wonder that the Court of Appeal in deciding this case breathed the fervent hope that it might finally result in getting from the House of Lords "a clear expression of the law."[5] This hope will be entirely disappointed, if a universally applicable rule of thumb was looked for. Although there is unanimity as to the result, it is reached by two principal channels of reasoning which are only

1. L. R. (1925) A. C. 700.
2. L. R. (1923) 2 Ch. 32.
3. L. R. (1924) 1 Ch. 506.
4. The confusion and the divergent viewpoints are nowhere more strikingly presented than in one of the monographs of the Institute of Comparative Law of the University of Lyons by *El-Araby*. "La Conscription des Neutres dans les Luttes de la Concurrence Economique." This volume is built up on the opinion rendered by the trial court in the instant case. The author, as a foreigner, free from any preconceived notions, is particularly able to distinguish the confused positions taken in prior cases.
5. See Bankes's Opinion, L. R. (1924) 1 Ch. 506 at 514.

partially in harmony with each other as to their fundamentals and which display even more divergence as to their details. It demonstrates once more our good fortune in the practice of our highest courts of confining themselves to a single opinion. Either Lord Sumner's or Lord Dunedin's opinion (these are the principal ones), would have clarified the law if it had stood alone; read together they tend rather to obfuscate it even more. The bulk of the latter's efforts is devoted to showing that a combination to do harm to another, without a proper motive, is actionable, even though the means used are per se "lawful." It is to be inferred from his words that both of these elements, combination and bad motive, must be present, but he stresses the need of showing a combination, apparently because he believes that this need has not previously been sufficiently appreciated. Thus he states[6] that the effect of *Allen* v. *Flood*[7] was to settle that where it was merely an individual who was acting, his motive was immaterial, he was on the right side of the law so long as he confined himself to lawful methods. To Lord Sumner on the other hand the factor of combination is almost, if not entirely, irrelevant. He agrees that proof of a combination may strengthen the inference that intimidation was practiced, but per se the circumstance of there being a combination seems to be of little interest to him.[8] The presence or absence of evil motive is the touchstone to him, and if it is present then conceivably he would hold that even an individual acting alone would be liable.[9] By thus stressing motive he is not far removed from the view of Lord Cave, who takes a position half way between the two already referred to and whose creed is so brief as to justify quotation:

"(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.

(2) If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed, and no action will lie, although damage to another ensues."[10]

The difficulty with this statement, or rather the vice which renders it impossible of use as a working rule, is that the two parts are not in antithesis to each other. Not only is there nothing impossible in an act being wilfully meant to injure another and at the same time meant to further the doer's trade, thus falling into both categories; but it is highly probable that this is true of most trade activities. With certain exceptions not here significant, it is true that one man's success means his competitor's failure. To

6. At p. 724.
7. (1898) A. C. 1.
8. See particularly at p. 741 and 742.
9. Surprisingly enough he makes no reference at all to *Allen* v. *Flood*. Apparently he would hold it to be rightly decided on the ground that no evil motive for the defendant's acts was shown.
10. At p. 712.

the successful one the encounter presents itself in terms of his own benefits; to the loser in terms of his injury. One of them would therefore assign the transaction to one category, because there certainly was an intent to injure; the other to the other category because he was advancing his own interests. This difficulty would be a step farther removed therefore, if the distinction were drawn between those acts which were done *merely* to injure another, on the one hand, and those on the other which, while intentionally causing injury as their immediate consequence, were nevertheless done because as a more remote consequence they would gratify the desires of the doer. Probably this is what Lord Cave actually had in mind, as it certainly is what Lord Sumner had. The difficulty, however, is thereby only rendered a little less obvious. In a broad sense every act, whatever it may be, is done to gratify some desire of the doer. The so-called mere infliction of injury, too, is the means of achieving a desire and of obtaining a pleasure, viz. the pleasure of satisfied revenge, for example. Thus the two categories again overlap, and the second necessarily includes all possible acts. It may, however, be answered that the law, in saying that acts are justified if done to satisfy a desire, is confining itself to legitimate desires, and that it will not recognize so anti-social a one as the wish to wreak vengeance, for instance. This opens the door to an entirely new investigation, and for the first time, it is submitted the inquiry touches the heart of the matter. What desires are of so little social utility that their accomplishment will not justify the inflicting of any hurt on another, and what ones are sufficiently valuable or at any rate sufficiently approved, to permit their fulfillment even at some cost to others? From Lord Cave's creed it would appear that the desire to further one's trade interests and to succeed in the economic struggle is such a legitimate desire. But can the question whether the gratifying of the desire is a useful one and hence outweighs the hurt inflicted be determined by examining only the nature of the desire? The extent of the hurt inflicted is just as important in finding which one weighs more heavily in the scales. Good and bad desires are merely relative terms and only acquire significance when measured against the harm that they may cause to others. From a social point of view, then, bad desires "may be defined as those which tend to thwart the desires of others, or, more exactly, those which thwart more desires than they assist."[11] It would follow that the "legitimacy" of a desire can not be determined without a simultaneous weighing of the hurt inflicted.

It is this weighing of the relative desirability of conflicting aims which the courts have had to do and will doubtless have to do more and more frequently. Consciously or unconsciously this is what they have done, and the attempt to explain their conclusions as being the mere application of fixed and immutable rules has been no more futile than the attempt to harmonize these cases

11. *Bertrand Russell* "What I Believe" p. 66.

without reference to the considerations of practical expediency that they involved. Indeed, the attempt to explain them in terms of the rules applicable to malice, conspiracy, threats, and the like rather seems to be harmful by inducing the belief that just around the corner is a self-working formula which will solve all future cases, and by hiding the fact that this is a problem for the application, not of rules, but rather of standards.[12] To recognize that the line is being drawn between due and undue pursuit of one's desires is at least to clarify the issue, and to say that the courts are not capable of estimating so complex a social problem is no answer since that is in any case what they must do and are doing. It may be that with more cases and a clearer appreciation of what is being done a few somewhat definite rules can be worked out. In fact it would seem that it is just such a rule that Lord Cave has worked out in saying that the desire to forward one's trade and economic interests is so laudable and useful a one as to justify and counterbalance any amount of hurt to others.[13] It may be that this will prove a real beacon to guide the way, and again it may be that the future will show rather a drift away from such economic individualism—no one can tell. But at any rate, reading the opinions with the points just made in mind, the case does unmistakably show a new and striking tendency to give less weight to past cases merely because they are precedents, and an equally striking appreciation that the task in hand is really to measure the comparative utility of two conflicting sets of interests, a measurement in which past cases, involving different conflicts between other interests can be of only small aid.[14]

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CONFLICT OF LAWS—EQUITY DECREES AFFECTING FOREIGN PROPERTY—ALLEGED DISTINCTION BETWEEN NEGATIVE AND AFFIRMATIVE DECREES.—[New York] There has been abundant discussion—almost to the point of satiety—of equity's power or jurisdiction, and of the propriety of exercising such jurisdiction, when the prayer is for a decree affecting foreign property or commanding or enjoining acts abroad. Yet it may be worth while to consider the reasons advanced in explanation or justification of existing rules, particularly with reference to the supposed difference, in these cases, between affirmative and injunctive relief.

12. The meaning with which the word 'standard,' is used, is that explained by Professor Pound (1919) Reports of American Bar Ass'n 44:445 at 456 ff.

13. It should be remembered that the discussion here is not as to the *methods* by which the defendant accomplishes his desire, to the hurt of the plaintiff. These, of course, may be illegal. It is assumed that they are legal and that the only question is as to whether the desire is in itself one which the defendant will be allowed to gratify with impunity, even with wholly lawful methods.

14. This new orientation is most noticeable in the opinion of Lord Dunedin, who says that strict legal definition cannot be relied on here, and that in reality we can only appeal to "an inner standard of right and wrong" (p. 717).