William & Mary Law Review

Volume 1 (1957-1958)
Issue 1

Article 10

October 1957

Interference with Right of Contract

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In the *Davis* case, *supra,* and the *Tri-State Coach Corp.* case, *supra,* the impulse or emotion arose out of an act which was within the scope of employment and the defendant was held liable. In *Cary* v. *Hotel Reuger, Inc.,*[13] the impulse or emotion arose out of an act outside of the scope of employment and the defendant was found not liable.

Thus in Virginia the requirements for a proper charge to the jury on the scope of employment question are as follows: The jury must initially consider whether or not the act of the defendant's servant occurred within the course of the master's business. In determining this fact the jury should be guided by the Strict Scope of Employment Test and the Furtherance of the Master's Business Test. If the jury finds that the act which the defendant's servant was engaged in performing at the time the cause of action arose was not within the scope of his employment, they shall find the defendant not liable. However, if the jury finds that the defendant's servant was acting within the scope of employment, they must then consider whether the impulse or emotion incident to the act upon which the cause of action is predicated, was itself within the scope of employment. If the jury finds that it was, they shall find for the plaintiff; otherwise, their verdict shall be for the defendant.

D. C. R.

CONTRACTS—INTERFERENCE WITH RIGHT OF CONTRACT

The conflicts arising from the interference of free competition with the individual's right to contract has long been a difficult problem to solve within the frame-work of legal principles. Attempts to formulate a concrete doctrine on this subject have induced, in many instances, more confusion than clarification.[1]

The key issue involved in these disputes is the extent to which interference with contractual relations may be privileged as a protection of defendants interests or as a benefit to society.

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[13] 195 Va. 980, 81 S.E.2d 421 (1952).

[1] See Sayre, *Inducing Breach of Contract,* 36 Harv. L., Rev. 663 (1923); Holmes, *Privilege, Malice, and Intent,* 8 Harv. L. Rev. 1 (1894); *Restatement of Torts,* Secs. 762, 766, 767, 771, 772; Note, 9 Va. L. Rev. 212 (1923).

The case of *Zoby* v. *American Fidelity Company*,[2] presents a unique question in this area of Virginia litigation.

Defendants were sureties on a bond for performance of a Navy Department contract which stood in default. When called upon by the Navy for performance on their bond, the agent for the sureties recommended that the $268,738.00 bid of plaintiff construction company be accepted to complete the original contract. Defendants intimated that plaintiff "had the job" and plaintiff immediately placed a Watchman on the site and took other steps preliminary to performance of the contract.

Later, defendant's agent revoked his recommendation of plaintiff and substituted a recommendation that the contract for completion of the construction be given to a second contractor who had underbid plaintiff by $7,785.00. The contract was subsequently awarded to the second contractor, and plaintiff sued for willful and malicious prevention of his contemplated contract with the Navy.

In granting defendant sureties' motion for summary judgment and thus resolving the outcome in favor of free competition, the court said:

> . . . the better rule seems to be that the right of free competition offsets the interests of the unsuccessful party plaintiff where defendant interferes with the plaintiff's right to contract.

In reaching a verdict the court compared the principal case with *Kurtz* v. *Oremland*[3] and *Bailey* v. *Barrister*.[4]

In the *Kurtz* case, plaintiff had contracted to purchase a retail leather business, subject to approval of the lessor of the premises. Defendant offered lessor's agent a larger commission for securing lessor's approval in favor of his purchase, resulting in the selection of defendant's offer over plaintiff's offer due to the agent's statements in favor of defendant.

In rendering a verdict for defendant, the court held that plaintiff's loss was a "mere incident of competition" and no actionable wrong was effected.

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[2] 143 Fed. Supp. 763 (1956).
[3] 33 N. J. Super 443, 111 A. 2d 100 (1954).
[4] 200 F. 2d 683 (1952).

In the *Bailey* case, plaintiff had contracted to purchase a 105 acre tract of land for $16,000 from a restricted Indian, subject to approval of the Department of Interior. Defendant offered to purchase five acres of the tract from plaintiff for $2,500 and advised plaintiff that if he did not accept their offer, they would bid $20,000 for the tract and "run up" the price. Plaintiff refused defendant's offer and defendant notified the Department of Interior that they would bid not less than $20,000 for the entire tract, whereupon the Department of Interior deferred action on plaintiff's contract and advertised the property for sale to the highest bidder. Plaintiff purchased the property at auction for $25,025 or $9,025 in excess of the original price.

In dismissing plaintiff's suit, the court said:

> . . . even in cases where a breach of contract has been procured, there is no liability if the breach was caused by the exercise of an absolute right.

Thus, in both the *Kurtz* and *Bailey* cases the defendant's act, while bordering on the unethical, was in the eyes of the court nothing more than a buyer making a higher offer than his competitor.

In comparing these two cases, the court expressed the view that they came closer to justifying a recovery than the controversy presented by the principal case.

In neither of the two cited cases nor the principal case was there an actual enforceable contract; thus, the issue is clearly one of interference with prospective contractual relations and not the inducing of a breach of contract.

The case law on this subject is difficult to rationalize. Due to the inherent nature of the problem, the development of the law has been based more on historical and economic policies than on strict legal theory[5]. The absence of a legal principle was very troublesome to the courts in deciding the earlier cases,[6] but this general reluctance to allow a recovery has been overcome by the desire to de-

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[5] Jones, *Historical Development of the Law of Business Competition,* 35 Yale L. J. 905, (1926); continued 36 Yale L. J. 42 and 351 (1926-27).

[6] 99 A. L. R. 12 (1935).

velop a flexible legal system that will keep pace with the changing needs of society.[7]

Today the law does recognize the right to protection of an interest in anticipated business relationships[8] and has even gone so far as to indicate that an action will lie for injury to plaintiff's social relations.[9] Thus, the distinction between inducing a breach of an existing contract and interfering with a prospective contract is important, primarily, in measuring the extent to which the privilege of interference will outweigh the plaintiff's right to contract without interference.

Judge Hoffman, in deciding the *Zoby* case, adopts Prosser's[10] general statement that in cases of prospective advantage, the privilege is more extensive than in cases where an actual contract exists. The court very wisely attempts to go no further than this and concludes that each case must be determined on its own facts.

In the principal case, the court felt that the substantial economic obligation imposed upon defendants by their bond was a sufficient interest to afford them the protection of privilege.[11]

While the outcome in each case will depend upon its own peculiar circumstances, the decided cases offer a valuable indication of the points considered by the courts in reaching a verdict. In general, there must be a reasonable expectation of economic advantage[12] and the interference must be unlawful or malicious,[13] although there is considerable disharmony on this latter point.[14] At any rate, the interference must be something more than mere

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[7] "The law of England is a living law. It develops, and must develop, according to changes in the social life and social outlook. It has long since been pointed out that under our system of law the novelty of a claim is no answer to it." Best v. Fox, 2 All.E.R. 798, 800 (K. B. 1950). And see Grismore, *Are Unfair Methods of Competition Actionable at the Suit of a Competitor,* 33 Mich. L.Rev. 321 (1935).

[8] *Prosser on Torts,* 2nd Ed., Sec. 107 (1955).

[9] Deon v. Kirby Lumber Co., 162 La. 671, 111 So. 55 (1925).

[10] *Prosser on Torts,* 2nd Ed., p. 745 (1955).

[11] Actual loss to sureties due to default of original contractor amounted to $30,000.

[12] Campbell v. Rayburn, 129 Cal. 232, 276 P.2d 671 (1954).

[13] Owen v. Williams, 322 Mass. 356, 77 N.E.2d. 318 (1948); Outdoor Sports Corp. v. A.F. of L., Local 23132 et. al., 6 N.J. 217, 78 A.2d 69 (1951).

[14] Huskie v. Griffin, 75 N.H. 345, 74 A. 595 (1909). And see note, 38 Minn. L.Rev. 415 (1954).

competition.[15] The doctrine is not fully established and there are recent cases indicating that an action will not lie, unless a valid contract was in existence.[16] But, the majority rule and decided trend is in accord with the *Zoby* case.

The *Zoby* case, while no more than persuasive authority in the state courts at the present time, offers a rational and legally sustainable approach to the troublesome problems that are certain to arise in this area of litigation. Its adoption is recommended as the guiding rule for Virginia.

P. T. W.

CRIMINAL LAW—CONTEMPT OF PROBATION ORDER

The Supreme Court of Appeals of Virginia in a recent case[1] reversed a judgment of the Circuit Court of Hanover County which was a summary punishment for contempt of judicial process.

The appellant, appearing in the trial of his wife on a housebreaking charge, had requested that she be released on probation, and in response to the court's verbal order had promised to assist in her probation. Subsequent reports by probation officers resulted in a rule against appellant to show cause why he should not be punished for contempt. Appellant was convicted and sentenced to twelve months in jail for contempt in interfering with the probation of his wife.

Two basic issues were presented to both the trial court and the Court of Appeals: (1) The jurisdictional power of the court to issue the order to assist in probation; and (2) The sufficiency of the evidence to support the charge of contempt. The trial court held that it had general jurisdictional power of both the subject matter and the parties, and further that the evidence of the husband's conduct was sufficient to support a contempt proceeding.

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[15] Union Car Advertising Co., Inc. v. Collier et. al., 263 N.Y. 386, 189 N.E. 463 (1934).

[16] Morgan v. Speight, 242 N.C. 603, 89 S.E.2d 137 (1955).

[1] Bryant v. Comomnwealth, 198 Va. 148, 93 S.E.2d. 130 (1956).