

# Interference With Contractual Relation: A Survey of the Wisconsin Law

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## INTEFERENCE WITH CONTRACTUAL RELATIONS: A SURVEY OF THE WISCONSIN LAW

### INTRODUCTION

Man invariably gives serious consideration to obligations incurred as a consequence of his entering into a contract. Less cognizance is given to the responsibility to refrain from interfering with the contractual relations of others. However, a person who intentionally interferes with a contractual relation in a manner which destroys or diminishes another's advantage in being a party to the relation may, under some circumstances, incur liability for the resulting damage.<sup>1</sup> The purpose of this article is to examine the Wisconsin decisions in this area and attempt to determine the circumstances under which liability will be imposed.

Cases concerning tortious interference with commercial relations which are not based on existing contracts, but are merely prospective or potential, while related to this study, are not considered here except insofar as they contain issues in common with the principal subject.<sup>2</sup> Cases involving interference with contractual relations by labor unions are also not considered because of the special problems there involved.<sup>3</sup> The article is further limited to a consideration of intentional interference with contracts of a pecuniary or commercial nature.<sup>4</sup>

### HISTORY

The rule that contractual relations are entitled to protection against unreasonable interference has its probable origin in the fourteenth century when, after the Black Death, the Ordinance of Labourers<sup>5</sup> was enacted to alleviate some of the problems resulting from the shortage of laborers. That statute provided employers with a remedy against persons who induced servants to leave their employ.<sup>6</sup>

One of the first cases extending the action established by the Ordinance of Labourers to relations other than those of strict master and

<sup>1</sup> See PROSSER, TORTS §106 (2d ed. 1955). In actions for intermeddling it is not necessary that the party breaching the contract be made a party to the action. *E. L. Hustung Co. v. Coca Cola Co.*, 194 Wis. 311, 216 N.W. 833 (1927).

<sup>2</sup> *Id.* §107. See also Annot. 99 A.L.R. 12 (1935); Annot. 9 A.L.R. 2d 228 (1950).

<sup>3</sup> Unions can be held liable for interference with a contractual relationship under state law. *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1958). In many instances, however, state authority is pre-empted by the National Labor Relations Act, see *Plumbers, etc. Local 298 v. County of Door*, 359 U.S. 354 (1959); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Hehl v. Chippewa, etc. District Council*, 4 Wis. 2d 629, 91 N.W. 2d 226 (1958).

<sup>4</sup> Excluded are contracts to marry or of marriage. See Annot. 47 A.L.R. 442 (1927); Annot. 73 A.L.R. 1452 (1931); *Ableman v. Holman*, 190 Wis. 112, 208 N.W. 889 (1926); *Randall v. Lonstorf*, 126 Wis. 147, 105 N.W. 663 (1905). Also excluded are cases involving negligent interference. See PROSSER, *supra* note 1 at 732.

<sup>5</sup> 23 Edw. III, St. 1, 1349.

<sup>6</sup> PROSSER, *supra* note 1 at 723.

servant was decided by the Court of Queen's Bench in 1853.<sup>7</sup> In that case the defendant was held responsible for persuading an opera singer to refuse to carry out her agreement to sing at the plaintiff's theatre. The case is significant because the singer was clearly not a servant and because the method of inducement was not itself tortious.<sup>8</sup> The court placed much emphasis upon the defendant's "malice."

In 1881 the earlier extension of the doctrine was reconsidered and confirmed in *Bowen v. Hall*.<sup>9</sup> Because the case involved a personal servant contract, some doubt existed as to the type of contract to which the tort was applicable even though the principle enunciated in the opinion was stated so as to apply to all types of contracts. That doubt was removed by the decision in *Quinn v. Leatham*,<sup>10</sup> wherein that it was said ". . . a violation of legal right committed knowingly is a cause of action, and . . . it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference."

The American courts were at first slow to recognize liability for intentional interference in contractual relations. Some limited recovery to cases involving personal service contracts.<sup>11</sup> However, in 1893 the United States Supreme Court adopted the English law relating to the tort of inducing a breach of a contract and extended it so as to impose liability for acts rendering performance of a contract impossible.<sup>12</sup> Since that time the tort has gained widespread acceptance although the cases indicate little unanimity in approach or reasoning.<sup>13</sup>

The Wisconsin cases resolving claims of tortious interference with contracts, even though few in number, have considered many issues. The first case recognizing the doctrine, *Martens v. Reilly*,<sup>14</sup> expressly predicated liability upon a conspiracy theory even though the court cited and quoted extensively from earlier American and English cases which recognized interference as an independent tort. Recent Wisconsin decisions have not discussed the conspiracy aspect,<sup>15</sup> although the frequent citation of the *Martens* case is strong indication that the law of conspiracy there enunciated is still accepted. In fact it is suggested that the right to recover from one who interferes with an enforceable contract is based *sub silentio* upon the law of conspiracy.<sup>16</sup>

<sup>7</sup> Lumley v. Gye, El. and Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 707 (1853).

<sup>8</sup> RESTATEMENT, TORTS, §766, comment b at 52 (1939).

<sup>9</sup> 6 Q.B.D. 333 (1881).

<sup>10</sup> (1901) A.C. 495.

<sup>11</sup> PROSSER, *supra* note 1 at 724.

<sup>12</sup> Angle v. Chicago, St. Paul etc. Railway, 151 U.S. 1 (1893).

<sup>13</sup> See Annot. 26 A.L.R. 2d 1227 (1952).

<sup>14</sup> 109 Wis. 464, 84 N.W. 840 (1901).

<sup>15</sup> E. L. Husting Co. v. Coca Cola Co., 205 Wis. 356, 237 N.W. 85 (1931), *cert. denied* 285 U.S. 538 (1932).

<sup>16</sup> See *Bitzke v. Folger*, 231 Wis. 513 at 523, 286 N.W. 36 (1939). The decision indicates that the contract need not be enforceable in its entirety.

## CONDITIONS OF LIABILITY

A. *Existence of the Contract*

This article is limited to cases involving interference with a contract. As has been noted, however, that liability may be incurred by one who prevents another from entering into a contract, or in some way interferes with a commercial relationship which is merely prospective and not existent by contract.<sup>17</sup> By definition a contract is a prerequisite to an action based on interference with a contractual relationship. Nevertheless, it is not necessary that there be a breach of that contract in order for the tort to arise. This is demonstrated by those instances in which a cause of action has been recognized to exist even though interference culminated in termination of the contract in accordance with its terms.<sup>18</sup> Further, even though no obligations exist to be breached in the instance of an unenforceable contract, nevertheless some cases sustain the right of action for intermeddling with unenforceable contracts.<sup>19</sup>

B. *Interference with the Contract.*

Interference with an existing contract relationship may occur in the following ways: (1) deliberately soliciting a breach, (2) aiding or participating in a breach, or (3) causing the termination of a contract in accordance with its terms. Of course, it is possible that a person may both solicit and participate in a breach. These methods of interference and the necessary conditions of liability under each will be taken up *seriatim*.

(1) *Deliberately Soliciting a Breach.*

*Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal*<sup>20</sup> is illustrative of the factors requisite to charge one with liability for inducing a breach of contract. In that case the plaintiff was granted an injunction restraining the defendants from buying or attempting to buy tobacco from persons who as members of the plaintiff-pool were under contract to sell their tobacco crops to the plaintiff.

The defendants conceded that they would be liable if their interference with the marketing contracts was motivated by malice or if methods were employed which were tortious in themselves. The defendants contended, however, that in the interest of free trade and competition one is allowed to purchase products offered to him in an open market although the person offering such products may be under contract to sell them to someone else. Without accepting or rejecting that principle the court held it inapplicable because the interference by *Bekkedal* was malicious. The court did not undertake to define or fix

<sup>17</sup> *Supra* note 2.

<sup>18</sup> *E.g.* Johnson v Aetna Life Ins. Co., 158 Wis. 56, 147 N.W. 32 (1914).

<sup>19</sup> *E.g.* No. Wis. Co-op. Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N.W. 936 (1923).

<sup>20</sup> *Ibid.*

the limits of malicious interference but merely held it to be present under the facts.<sup>21</sup>

The defendants in the *Bekkedal* case defended by showing that they had been in the tobacco business for 30 years and were seriously harmed by the plaintiff's marketing contracts. The court, however, noted that the defendants deliberately solicited persons known by them to be under contract to the plaintiff to break those contracts. They did this by telling the growers that the contracts were inoperative, that the price offered by the plaintiff was too low, that they would pay more and that they would indemnify and protect the growers against any liability incurred toward the plaintiff.

Since the Bekkedals do not appear to have been motivated by malice in the sense that they sought to inflict harm for its own sake but rather sought to protect their own position in the Wisconsin tobacco market, and since the means utilized by the Bekkedals were not in themselves tortious, it seems that any requirement that the interference be malicious can be met by a mere showing of a deliberate solicitation of a breach. Support for this conclusion is found in *E. L. Husting Co. v. Coca Cola Co.*<sup>22</sup> where it was ruled that liability was incurred by one who persuades a party under contract that its business interests would be better served by ceasing its contract relations and breaching its contract by giving an exclusive contract to the persuader. In further negating any requirement of actual ill will, the court said that ". . . the definition of 'malice' has been broadened to include unjustified interference with the contractual relationship."<sup>23</sup>

Where the interference occurs through deliberate solicitation and where the parties to the contract prior to the solicitation treated the contract as valid and subsisting, it does not seem necessary that the contract be in fact enforceable. In *Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal* the contracts which were the basis of the

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<sup>21</sup> Many courts have required that the interference be malicious. This requisite is accurately described by the following language quoted in *E. L. Husting Co. v. Coca Cola Co.*, 205 Wis. 356, 237 N.W. 85 (1931) and *Sweeney v. Stenjem*, 271 Wis. 497, 74 N.W. 2d 174 (1956).

"The great weight of authority in this country and in England is to the effect that if A. has a legal contract with B., either for the rendition of service or any other purpose, and C., having knowledge of the existence thereof, intentionally and knowingly, and without reasonable justification or excuse, induces B. to break the contract, by reason of which A. sustains damage, an action will lie by A. against C. to recover the same . . . The action of C. is malicious, in that, with the knowledge of A's rights, he intentionally and knowingly, and for unworthy or selfish purposes, destroys them by inducing B. to break his contract. It is a wrongful act, done intentionally, without just cause or excuse, and from this a malicious motive is to be inferred. This does not necessarily mean actual malice or ill-will, but the intentional doing of a wrongful act without legal or social justification." *Campbell v. Gates*, 236 N.Y. 457, 141 N.E. 914 (1923).

<sup>22</sup> *Supra* note 15.

<sup>23</sup> *E. L. Husting Co. v. Coca Cola Co.*, *supra* note 21, at 365.

action provided that they would not be effective unless a specified number of growers signed similar contracts by a certain date. The defendants contended that the contracts never became operative because the condition was not met. The court refused to consider this defense and said:

All parties acquiesced in the validity of the contracts. Under such circumstances we are unable to perceive any legitimate reason for permitting a mere intermeddler with relations thus created to assert the right to challenge the validity of these contracts. If the immediate parties saw fit to treat them as legal contracts, defendants' interference with relations thereby created is no less immoral because the grower members might have had a legal defense thereto.<sup>24</sup>

Despite the clear language of the *Bekkedal* decision, it cannot be positively stated that an enforceable contract is never a condition of liability where the manner of interference is deliberate solicitation. The court in the *Husting* case apparently deemed it necessary to decide that the contract there in question was enforceable and devoted a large portion of the decision to the question of whether or not a contract right existed. A possible explanation is that the "malice" present in the *Husting* case did not measure up to that in *Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal* or, stated another way, that more justification for the interference existed under the facts of the *Husting* case. A better explanation is that in the *Husting* case not all the immediate parties to the contract prior to the solicitation acquiesced in the validity of the contract.<sup>25</sup>

Where interference with a contract is motivated by actual malice (in spite or ill will) the question of whether or not the contract is enforceable between the parties should be immaterial. Causing the termination of an employment at will is tortious if done with actual malice even though no contract right to continued performance exists in either the employer or the employee.<sup>26</sup> Since a contract right against the party induced to terminate the relationship is not necessary in those situations no reason is perceived why it should be where a breach of an unenforceable contract is solicited.

<sup>24</sup> No. Wis. Co-op. Tobacco Pool v. Bekkedal, *supra* note 19, at 584. The court, however, did consider at length the defendants' contention that the plaintiff's contracts with its members were in restraint of trade, thus indicating that the illegality of the contract interfered with is a valid defense. See also *Singer Sewing Machine Co. v. Lang*, 186 Wis. 530, 203 N.W. 399 (1925) where a similar defense was considered.

<sup>25</sup> It is reasonably certain that the *Husting* case, *supra* note 15, did not have the effect of overruling the *Bekkedal* case, *supra* note 19. In *Bitzke v. Folger*, *supra* note 16, the court ruled that as long as a party to a contract was willing and ready to continue performance, an intermeddler had no right to maliciously procure that party to refuse performance of the contract even though it did not comply with the Statute of Frauds.

<sup>26</sup> See *Bitzke v. Folger*, *supra* note 16, at 523, 286 N.W. 36 (1939).

(2) *Aiding or Participating in a Breach.*

As was pointed out above, the first Wisconsin case recognizing liability for tortious interference with a contract was based upon the law of conspiracy.<sup>27</sup> The plaintiffs in that case had a lease on real property with an option giving them the first privilege to buy the leased premises. The inter-meddling defendants induced the lessor to breach the agreement by granting to them an option to purchase. The intermeddlers then caused the plaintiffs to be served with a written cancellation of their lease and notice to cease improving the property. Liability was imposed on the defendants under the simple theory outlined by Justice Marshall in the syllabus as follows:

The violation of a contract is an unlawful act. Therefore, if one or more persons conspire with another to commit, or two or more persons combine together to effect, such violation, and the object of the combination be consummated to the damage of a third person, such third person has his action to recover the damages against him who breached the contract and every person who, by reason of the combination, is connected with the wrong.

Even though the *Martens* case involved a deliberate solicitation of a breach, the conspiracy theory there enunciated may cause liability to be imposed on one who does not solicit but merely aids or participates in a breach. Purchasing goods from a vendor who is under contract to sell the same goods to another is not generally considered tortious where the purchase does not solicit the sale but merely makes it economically feasible by his readiness to buy.<sup>29</sup> However, if a purchaser buys goods which he knows or should know are under a contract of sale to another,<sup>30</sup> the purchaser and the seller have combined to effect the violation of that contract. It appears that under the theory of the *Martens* case no actual malice is required but only a combination to violate a contract and the resulting damage.<sup>31</sup>

Since it is necessary that there be a combination to do an unlawful act under the law of conspiracy set forth in the *Martens* case, it is possible that the Wisconsin court may be slow to apply the rule of that case in those instances in which there is in fact no enforceable contract. In the decision the term "unlawful" was said to include all willful, actionable violations of civil rights and, of course, a breach of

<sup>27</sup> *Martens v. Reilly*, 109 Wis. 464, 84 N.W. 840 (1901).

<sup>28</sup> *Id.* at 465.

<sup>29</sup> RESTATEMENT, TORTS, §766, comment i (1939). *Accord*, *Caldwell v. Gem Packing Co.*, 52 Cal. App. 2d 80, 125 P. 2d 901 (1942); *Lampport v. 4175 Broadway*, 6 F. Supp. 923 (S.D. N.Y. 1934).

<sup>30</sup> Knowledge of the contract appears necessary. PROSSER, TORTS §106 at 734 (2d ed. 1955). However, constructive knowledge will suffice. *Sweeney v. Stenjem*, 271 Wis. 497, 74 N.W. 2d 174 (1956).

<sup>31</sup> In a conspiracy action the gravamen of the charge is not the conspiracy but the damage done pursuant to it. *Kile v. Anderson*, 182 Wis. 467, 196 N.W. 762 (1924).

an unenforceable contract or a termination of a relation which exists only through the acquiescence of the parties to it is not an actionable violation of a civil right by the party to the relationship. Although no Wisconsin case has considered the problem it would be seen that, even though one does not solicit a breach of a contract but instead accepts an offer of the goods or services under contract to another, it is possible that the circumstances under which he accepts the goods or services, and thereby aids in the breach of the contract, may cause a court to view his act as "malicious" as that term was used in the *Bekkedal* decision.<sup>32</sup> If the acceptance of goods or services under contract to another is in a given case as "malicious" or as unjustified as the deliberate solicitation present in the *Bekkedal* case, it would seem that a defense that the contract was unenforceable should fail as it did there. Possibly the selfish intent to obtain the benefits of another's bargain under the contract would preclude any defense based on the unenforceability of the contract.<sup>33</sup>

Although liability may be imposed without regard to the law of conspiracy upon one who deliberately solicits a breach of a contract, it is difficult to see how facts justifying recovery for damages resulting from that method of interference can fail to constitute a conspiracy where the contract is enforceable.<sup>34</sup> As the *Martens* case makes clear a combination to effect a violation of a contract which results in damage is an actionable conspiracy. One advantage, however, which may be gained by the allegation and proof of a conspiracy is that the intermeddler may be held liable for more damage than is actually caused by him. Thus, it has been indicated that even though parties to an option may have bound themselves beyond their right in the property, those who acted in combination with them in breaching the agreement were liable for all the resulting damage.<sup>35</sup>

(3) *Causing the Termination of a Contract in Accordance with its Terms.*

The defendant in *Johnson v. Aetna Life Ins. Co.*<sup>36</sup> attempted to cause its insured, Simmons Manufacturing Company, to terminate the employment of the plaintiff because he had filed a claim for personal injuries against the insured. Johnson's right to continue working for Simmons was held to be entitled to protection from unjustified interference by third parties even though he had no formal contract of service and could quit or be fired at any time. The ruling is in accord with the general rule that one who knowingly interferes with the

<sup>32</sup> *Supra* note 19.

<sup>33</sup> *McLennan v. Church*, 163 Wis. 411 at 419, 158 N.W. 73 (1916).

<sup>34</sup> *Contra*, *E. L. Hustung Co. v. Coca Cola Co.*, 205 Wis. 356, 237 N.W. 85 (1931), *cert. denied* 285 U.S. 538 (1932).

<sup>35</sup> *Martens v. Reilly*, *supra* note 27; *in accord*, *Bitzke v. Folger*, *supra* note 16.

<sup>36</sup> 158 Wis. 56, 147 N.W. 32 (1914).

relationship of master and servant without just cause is liable for the resulting damage even though there is no right of action against the person who was induced to terminate the relation.<sup>37</sup>

The court in the *Johnson* case indicated that if the insurer was justified in attempting to procure Johnson's discharge, the fact that it acted with malice would not give rise to a cause of action. Malice would simply allow the recovery of punitive damages if the defendant acted without justification.<sup>38</sup> However, it was held that the defendant would not be justified in attempting to deprive the plaintiff of his earning power so that he could not maintain a suit against his employer and that Johnson had made out a *prima facie* case.<sup>39</sup> The decision, consequently, seems to establish that an action will lie for interference with a relationship terminable at will which interference is merely unjustified and not prompted by ill will.

Only one other case in which the defendant caused the termination of a contract in accordance with its terms has been found among the Wisconsin decisions.<sup>40</sup> In that case the defendant who entertained hostile feelings towards the plaintiff induced his tenants to discontinue using the plaintiff's electrical current. It was conceded that the tenants themselves might discontinue the use of the plaintiff's current on reasonable notice. The court recognized that the plaintiff had legal right to sell its current to those who desired it and that such a right was entitled to legal protection. However, the court ruled that whatever a man may lawfully do on his own property he may do regardless of his motive.

Because of the paucity of Wisconsin precedent, doubt exists as to what constitutes justification for interference with contracts which are terminable at will or upon the giving of notice. It would be unreasonable to impose liability upon one who, motivated by a legitimate business purpose, offers a person an attractive salary and thereby induces him to lawfully terminate a contract even where the offeror has no knowledge of the relationship. Since the right to continue a contract which has no definite term is clearly not absolute, it appears that there must be some degree of actual malice or of improper methods before a court could characterize interference with it as unjustified.

Several recent New York cases<sup>41</sup> have considered the problem and

<sup>37</sup> 57 C.J.S. *Master and Servant* §625 b (1948).

<sup>38</sup> The rule that actual malice does not make wrong that which is lawful now seems to be rejected by most courts. See PROSSER, *TORTS*, §106 at 721 (2d ed. 1955). The Wisconsin court had declined to follow the rule prior to the *Johnson* case. See *State ex rel. Durner v. Huegin*, 110 Wis. 189, 257-260, 85 N.W. 1046 (1901).

<sup>39</sup> *Johnson* failed to recover, however, because the defendants' acts were held not causal.

<sup>40</sup> *People's Land & Mfg. Co. v. Beyer*, 161 Wis. 349, 154 N.W. 382 (1915).

<sup>41</sup> *American League Baseball Club v. Pasquel*, 187 Misc. 230, 63 N.Y.S. 2d 537, (1946); *Coleman & Morris v. Pisciotta*, 279 App. Div. 656, 107 N.Y.S. 2d

that state seems to have evolved the rule that an inducement to an employee at will to discontinue his employment is not actionable "unless the purpose of the actor was solely to produce damage, or unless the means employed were dishonest or unfair."<sup>42</sup> The omission of the word "solely" would bring this rule in line with the decision in the *Johnson* case and probably cause it to be acceptable to the Wisconsin court.

The *Johnson* and *Beyer* cases are the only Wisconsin cases which have been found which directly consider the tort liability of one who causes the termination of a contract in accordance with its terms.<sup>43</sup> In each case the plaintiff's right to continue to benefit from his contract was held entitled to protection from unjustified interference. However, the defendant in each case escaped liability. Consequently, the limits of liability in this area have yet to be clearly defined in Wisconsin.

Even though the Wisconsin law recognizing the right to continue a contractual relationship which has no definite term is not well settled, it is reasonably certain that remedial responsibility may be imposed in Wisconsin where an intermeddler persuades a party to the relationship to discontinue it for the purpose of injuring the other party to the relationship. This is so because of the Wisconsin law relating to conspiracies to injure.<sup>44</sup> In Wisconsin two or more can be liable for doing jointly what one person might legally do acting alone.<sup>45</sup> Consequently, if a party to the relationship which has no fixed term combines with another for the purpose of injuring the other party to the relationship and the relationship is terminated pursuant to the combination and damage results, the terminating party may incur tort liability even though no contract action would succeed against him. It seems, how-

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715, (1951); *Rampell, Inc. v. Hyster Co.*, 3 N.Y. 2d 369, 144 N.E. 2d 371 (1957); *Taller & Cooper, Inc. v. Neptune Meter Co.*, 8 Misc. 107, 166 N.Y.S. 2d 693 (1957).

<sup>42</sup> *Coleman & Morris v. Pisciotto*, *id.*; *Rampell, Inc. v. Hyster Co.*, *id.*; *Taller & Cooper, Inc. v. Neptune Meter Co.*, *id.*

<sup>43</sup> In a third case the Wisconsin court indicated its approval of the general rule imposing liability upon one who "maliciously and wantonly" procures the termination of an employment at will. *Bitzke v. Folger*, 231 Wis. 513 at 523, 286 N.W. 36 (1939).

<sup>44</sup> "Injury to business; restraint of will. Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding \$500." Wis. Stat. §134.01 (1957). The statute has been held declarative of the common law relating to civil actions for damages. *State ex rel. Durner v. Huegins*, 110 Wis. 189, 85 N.W. 1046 (1901); *Hawarden v. Youghiogheny & Lehigh Coal Co.*, 111 Wis. 545, 87 N.W. 472 (1901).

<sup>45</sup> *State ex rel. Durner v. Huegins*, *supra* note 44; *Hawarden v. Youghiogheny & Lehigh Coal Co.*, *supra* note 44; *State v. Lewis and Leidersdorf Co.*, 201 Wis. 543, 230 N.W. 692 (1930); *Contra*, *Shannon v. Gaar*, 233 Iowa 38, 6 N.W. 2d 304 (1942); see also Annot. 84 A.L.R. 99.

ever, that the terminating party and the intermeddler who combines with him must have the purpose of inflicting harm as an end in itself and not to cause the termination as a means to some other end.<sup>46</sup>

#### DEFENSES

The Wisconsin law relating to defenses to the action for damages resulting from interference with contractual relations appears to be even less settled than that relating to the conditions of liability. Only two Wisconsin cases directly considering tortious interference with contractual relations have been found in which the defendants prevailed.<sup>47</sup> Of course, the decisions in which the court imposed liability do provide some indication of what will or will not constitute a defense. As an example the decision in *Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal*<sup>48</sup> makes it fairly clear that Wisconsin follows the general rule that no liability may be imposed where the contract which is the basis of the action is illegal.<sup>49</sup> Other defenses will be considered under the following headings: A. Lack of knowledge, B. Causality, and C. Equal or Superior Right.

##### A. *Lack of Knowledge*

Lack of knowledge of the contract with which the intermeddler interferes can constitute a defense.<sup>50</sup> Thus, if one makes an offer to purchase real estate without knowledge that the owner has contracted to sell to another, no liability attaches to the second offeror by reason of the owner's acceptance of his offer and breach of the first contract.<sup>51</sup> However, in *Sweeney v. Stenjem*<sup>52</sup> the Wisconsin court held the second offeror liable where he had knowledge which would put a prudent man on inquiry and failed to use ordinary diligence in ascertaining the plaintiff's interest. Stenjem was informed by the vendor and his attorney that the contract with the plaintiff, which was conditional, had been terminated. The court said that this information ". . . constituted notice of the existence of such contract, and it was incumbent upon him to make such inquiry as would apprise him of the true facts." Hence, in Wisconsin when one is told that a contract is at an end he has received constructive notice that it still exists.

In this area ignorance of the law is not a defense in Wisconsin. In *McLennan v. Church*<sup>53</sup> the plaintiff's contract to purchase the land of the defendant, the Churches, was breached when the Churches sold it

<sup>46</sup> *Aikens v. Wisconsin*, 195 U.W. 194 (1904).

<sup>47</sup> *People's Land & Mfg. Co. v. Beyer*, *supra* note 40; *Johnson v. Aetna Life Ins. Co.*, *supra* note 36.

<sup>48</sup> 182 Wis. 571, 197 N.W. 936 (1923).

<sup>49</sup> See *Gunnels v. Atlanta Bar Ass'n.*, 191 Ga. 366, 12 S.E. 2d 602 (1940); see also Annot. 26 A.L.R. 2d 1242 (1952).

<sup>50</sup> *Supra* note 30. See also RESTATEMENT, TORTS, comment e (1939).

<sup>51</sup> *Stannard v. McCool*, 198 Md. 609, 84 A. 2d 862 (1951).

<sup>52</sup> 271 Wis. 497, 74 N.W. 2d 174 (1956).

<sup>53</sup> 163 Wis. 411, 158 N.W. 73 (1916).

to their co-defendant, Curby. The circuit court found that Curby purchased in good faith without any intention of defrauding the plaintiff and held him not liable for damages. The supreme court, in modifying the judgment so as to make all defendants liable for damages, stated that Curby knew the circumstances requisite to charge him with knowledge that the contract had not lapsed. The court held that while Curby's erroneous supposition that a default terminated the plaintiff's contract rights might relieve him from any taint of moral turpitude, nevertheless it did not relieve him of remedial responsibility.

### B. *Causality*

Generally in order for liability to attach, the acts of the intermeddler must exert a causal effect and actually induce the breach.<sup>54</sup> The Wisconsin court has followed this rule.<sup>55</sup> However, as was pointed out above, a person who obtains goods or services which he knows are under contract to another cannot defend on the grounds that he did not cause the breach where he aids or participates in the breach.<sup>56</sup> Where the party bound by the contract, prior to any solicitation, effectively breaches the contract and places the goods or services upon the open market, it seems that anyone may purchase them. Thus, on the rehearing of *Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal*,<sup>57</sup> the judgment affirming the injunction was modified so as not to prohibit the intermeddler from buying tobacco from growers who had contracted to sell only to the plaintiff after those growers "voluntarily" breached their contract and placed their tobacco on the market.

The defense that the intermeddler's acts were not causal would seem to be a difficult one to establish because of the difficulty in proving the fact that the party to the contract reached its decision to breach or terminate the contract independently. However, the testimony of the one allegedly induced may be conclusive. The defendant in *Johnson v. Aetna Life Ins. Co.*<sup>58</sup> sent a letter to a Simmons Manufacturing Company official recommending that Johnson be fired. Mr. Simmons testified that he knew nothing of the letter and ordered the discharge for his own reasons. The official who received the letter testified that he did the actual firing because of Mr. Simmons' order and not because of the letter. This testimony was held to be conclusive on the issue of causality and allowed the defendant to escape liability.

### C. *Equal or Superior Right.*

One well recognized defense to the action for interference with a contract is that the interference occurred only through "the exercise

<sup>54</sup> PROSSER, TORTS, §106 at 728 (2d ed. 1955).

<sup>55</sup> *Johnson v. Aetna Life Ins. Co.*, *supra* note 36.

<sup>56</sup> See discussion of *Interference with the Contract, (2) Aiding or Participating in a Breach, infra*.

<sup>57</sup> *Supra* note 48.

<sup>58</sup> *Supra* note 36.

of an equal or superior right."<sup>59</sup> The defense was recognized but not found present under the facts in *Johnson v. Aetna Life Ins. Co.* where the court indicated that the defendant insurance company might have the right to refuse to assume the added hazard that would be liable to follow from the employment of a careless worker but did not have the right to prompt the limiting of a worker's earning power so as to prevent his maintaining a damage suit. The defense was successful in *Peoples Land and Mfg. Co. v. Beyer*.<sup>60</sup> The court in that case, while holding that the plaintiff had the legal right to sell its electrical current to those who desired it, held that the defendant land owner had the equal or superior right to use his property as he chose and to insist that his tenants discontinue using the plaintiff's electricity.

Although no Wisconsin case has discussed the point, it should be noted that an equal or superior right should be more easily found in the defendant where the plaintiff's contract is unenforceable or subject to termination at will or upon notice. Generally, the fact that the intermeddler is engaged in an industry similar to the plaintiff's and interfered only in order to further his own interests does not give him an equal or superior right where the plaintiff's right is based upon an enforceable contract.<sup>61</sup> The *Bekkedal* case<sup>62</sup> indicates that the protection of the defendant's business interests will not constitute a defense in Wisconsin for interference by deliberate solicitation even though the plaintiff's contract may not be enforceable. However, where the plaintiff's right to continued performance of a contract is subject to termination at will or upon notice, it might well be that the defendant has the equal or superior right to protect his business by inducing a termination of the plaintiff's contracts.

Closely related to the defense that the interference occurred only through the exercise of an equal or superior right is the defense based upon the intermeddler's privilege to render advice. No Wisconsin case has been found in which the privilege was recognized other than the *Bekkedal* decision wherein the court in passing recognized that one acting in good faith may advise another to breach a contract without incurring liability.<sup>63</sup> Generally the privilege seems to be limited to honest advice within the scope of a request for advice,<sup>64</sup> except where the person giving the advice is charged with the welfare of the person he advises. In such a case the privilege extends to unsolicited advice and even persuasion but it is necessary that the person giving the ad-

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<sup>59</sup> See Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 763, wherein the phrase "equal or superior interests" is thoroughly discussed.

<sup>60</sup> *Supra* note 40.

<sup>61</sup> See Annot. 26 A.L.R. 2d 1265 (1952).

<sup>62</sup> *Supra* note 48.

<sup>63</sup> *Id.*, 182 Wis. at 581.

<sup>64</sup> RESTATEMENT, TORTS, §772 (1939).

vice have the purpose of protecting the welfare of the person whom he advises.<sup>65</sup>

#### CONCLUSION

It is difficult to accurately and concisely state the Wisconsin law relating to interference with contract relations. This is so because of the small number of cases and because each case, to a large extent, has been decided upon the basis of its own facts. It seems, however, that the following general statements may be made:

(a) One who without justification solicits another to breach a contract with a third person is liable to that third person for the resulting damage. It is not necessary that the solicitation be motivated by ill will or actual malice. The solicitation may be justified if the contract is illegal, if the actor has no knowledge of the contract or if he acts in the exercise of an equal or superior right but it is not justified merely by reason that the contract is not enforceable.<sup>66</sup>

(b) One who interferes with a contract relation and who is motivated by actual malice or uses illegal means is liable to the party harmed even though no contract action is possible against the other party to the relation, except where the actor acts in the exercise of a legal right of an absolute nature, such as exercise of control over one's own property.

(c) One who aids or participates in the breach of a contract is liable to the party harmed if the contract is enforceable and the actor has knowledge of it. The actor may be liable even where the contract is not enforceable if his purpose was to produce damage or if the means employed were dishonest. These latter conditions allow liability to be imposed on one who induces a party to terminate a contract in accordance with its terms.

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<sup>65</sup> *Id.*, §770.

<sup>66</sup> No Wisconsin case has been found in which the solicitation of a breach of a contract was held justified.