APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

JEKISONDAS HARKISONDAS (ORIGINAL DEFENDANT NO. 2), APPELLANT v. RANCHODDAS BHAGVANDAS (ORIGINAL PLAINTIFF), RESPONDENT.* 1916. September 5.

Damages—Breach of contract of marriage—Procuring a breach of the contract—Liability for the breach—Conspiracy to break the contract.

Defendant No. 1 agreed to give his daughter in marriage to the plaintiff; but subsequently he broke the contract and married her to the son of defendant No. 2. The plaintiff having sued to recover damages for the breach of contract from defendants, the lower Courts decreed the claim. On appeal,

Held, that there was no sufficient foundation for a verdict against defendant No. 2, inasmuch as there was nothing to show that defendant No. 2 directly and personally attempted to influence defendant No. 1 to break his contract with the plaintiff, nor was there anything like conspiracy between defendant No. 2 and his son to bring about that result.

SECOND appeal from the decision of M. S. Advani, District Judge of Surat, confirming the decree passed by P. C. Desai, Joint Subordinate Judge at Surat.

Suit to recover damages for breach of contract of marriage.

In 1910, defendant No. 1 agreed to give his daughter in marriage to the plaintiff at Surat. He broke the contract and gave his daughter in marriage to the son of defendant No. 2. The son of defendant No. 2 was an adult; and the marriage took place at Malad near Bombay.

The plaintiff filed the present suit to recover Rs. 3,000 from the defendants as damages for breach of the contract. It was contended by defendant No. 2 that he was not aware of the contract, and was not aware of the marriage till after it took place.

* Second Appeal No. 577 of 1915.

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The Subordinate Judge awarded Rs. 800 as damages against both defendants, on the following grounds :—

The next question that arises then is as to whether defendant is not liable in respect of this breach. I cannot of course believe the defendant No. 2 when he says that he was not aware of the betrothal of Kamla with the plaintiff. As I have already shown all the caste people knew it and he was admittedly acting as the Seth or leader of the caste. It is further admitted that the marriage with his son took place at Malad, and that in the circumstance of this case appears to have been arranged with the evident intention of avoiding any possible interference by the caste in case the marriage was celebrated at Surat. There is ample proof that defendant and his son are living together and I cannot for one moment believe that the marriage could have taken place without defendant No. 2's consent. And under definition of the term 'proved' as given in section 3 of the Indian Evidence Act even in the absence of the direct evidence of his knowledge of the fact, I am prepared to hold that defendant No. 2's hand in bringing about the breach is proved.

On appeal, this decree was confirmed by the District Judge on the following grounds :—

As to the fifth issue there is no direct evidence that appellant No. 2 brought about the breach of the contract but there are circumstances which go to show that he had a hand in it. This son lives with him and is joint with him. He was a widower. The marriage did not take place in Surat. The family priest was not present. Appellant No. 2 was not present when it took place on an inauspicious day at Malad. After the marriage the son came back to the house of appellant No. 2 with his wife and continued to live. Appellant No. 2 never drove away his son. He did not make a report about his conduct to the caste. Taking these circumstances into my consideration the marriage could not have taken place without the connivance of appellant No. 2 who was aware of the betrothal. If there had been no betrothal then the marriage would have been properly celebrated in Surat. Appellant No. 2 who was the Seth of the caste was aware that his action would not be approved of by the caste and so he did not take part in it openly and purposely stayed behind in Surat. If he had no hand in it then how is it that he did not reply to the notice which the respondent served upon him after the marriage. It is admitted by him that he did receive the notice. The case would have been otherwise if the son had been separate from him. In a joint Hindu family an important ceremony like a marriage is never performed without the consent of the manager of the family. Where it is performed without such consent then generally the member is made to leave the house.

Defendant No. 2 appealed to the High Court.

P. B. Shingne and *J. G. Rele*, for the appellant:—The rule of *Lumley* v. *Gye*,[1] though approved of in *Allen* v. *Flood*[2] and *Quinn* v. *Leathem*,[3] has been much restricted in its application by later decisions: *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.*;[4] see *Mogul Steamship Company* v. *McGregor, Gow & Co.*[5]

The case of *Khimji Vassonji* v. *Narsi Dhanji*[6] shows that a promissor cannot have any right against a third person on the ground that he has induced the promissor to break his promise, unless it can be shown that he has done so maliciously or by the use of unlawful means.

There being no malice or unlawful means found against us, nor any conspiracy established, the decree passed against us is bad in law.

The causes of action against the defendants being totally different, their joinder in one suit is objectionable.

K. N. Koyajee, for the respondent:—The real cause of action in cases like the present is neither malice nor conspiracy, but the bringing about a breach of contract to the harm of another: *South Wales Miners' Federation* v. *Glamorgan Coal Company*[7].

The two defendants can be sued jointly, for one of them is liable for breaking his own contract, and the other for procuring such breach of contract: see *Fred, Wilkins and Brothers, Limited* v. *Weaver*;[8] *De Francesco* v. *Barnum*;[9] *Nagindas* v. *Thakordas*[10].

(1) (1853) 22 L. J. Q. B. 463.
(2) [1898] A. C. 1.
(3) (1901) 85 L. T. 289.
(4) (1906) 76 L. J. Ch. 194.
(5) [1892] A. C. 25.
(6) (1914) 39 Bom. 682.
(7) [1905] A. C. 239.
(8) [1915] 2 Ch. 322.
(9) (1890) 63 L. T. 514.
(10) (1916) F. A. No. 56 of 1913 (Un. Rep.).

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BEAMAN, J.:—This case has given rise to a very interesting argument. The suit was brought by the plaintiff to recover damages from defendant No. 1, the father of a girl who had been promised in marriage to the plaintiff and actually betrothed, and from defendant No. 2, on the allegation that he had procured the breach of the prior contract with the plaintiff and induced the defendant No. 1 to consent to the marriage of his daughter with the defendant No. 2's son.

The lower Courts found that although the son of the defendant No. 2 was a major, the defendant No. 2 had, to use the words of the Court of first appeal, a hand in bringing about the breach of the first contract.

The case is virtually the same in principle as that of *Khimji Vāssonji* v. *Narsi Dhanji*,[1] in which sitting alone on the Original Side of this Court I examined critically the whole English case law out of which the present doctrine has been slowly evolved. Looked at merely as a theoretical discussion I see no reason yet to modify any part of the reasoning or conclusions which I then used and reached. Though that point did not engage my attention in *Khimji's case*,[1] it struck me in the course of the argument here that an additional difficulty would be caused if the plaintiff in actions of this kind joined a mere tort-feasor with the breaker of the contract. I find that this was done in two comparatively recent cases, *De Francesco* v. *Barnum*[2] and *Fred. Wilkins and Brothers, Limited* v. *Weaver*.[3] The question does not appear to have been even raised much less to have occasioned the learned Judges concerned any doubt or difficulty. The least examination will show that the causes of action are totally different. I should have thought that on objection taken to the array in such a

(1) (1914) 39 Bom. 682.

(2) (1890) 45 Ch. D. 430.

(3) [1915] 2 Ch. 322.

suit the plaintiff would surely have been put to his election either to proceed against one defendant for breach of contract, or against the other on the case.

Both the cases, *Fred. Wilkins and Brothers, Limited* v. *Weaver*[1] and *De Francesco* v. *Barnum*[2], were founded upon *Blake* v. *Lanyon*,[3] an old case of 1795, where it was held that continuing a servant in employment after notice that he was in the service of another gave a good cause of action. *Lumley* v. *Gye*[4] first extended the old rule of law governing all master and servant cases of the kind, to analogous relations, not strictly of the kind originally contemplated by the Statute of Labourers. And in *De Francesco* v. *Barnum*[2] the facts were, so far as the contract went, virtually the same as in *Lumley* v. *Gye*.[4]

But in the case of *Exchange Telegraph Company* v. *Gregory & Co.*,[5] decided in 1895, Rigby L. J., in the course of his judgment, gave exactly such a case as we have before us, *mutatis mutandis*, after making allowances for the differences between the marriage customs of England and India, as a *reductio ad absurdum* of the contention that the principle of *Lumley* v. *Gye*[4] should be extended to all contracts. Whatever then is now to be said, merely from a theoretical point of view, for or against the decision in *Lumley* v. *Gye*[4] I adhere emphatically to the opinion I expressed in *Khimji's case*[6] that it should not be extended anywhere, least of all in India where it is not a binding authority, to contracts of every kind irrespective of their own special features and character. I am still of opinion that a person who induces a girl betrothed to another to break that engagement and marry him, has

(1) [1915] 2 Ch. 322.
(2) (1890) 45 Ch. D. 430.
(3) (1795) 6 T. R. 221.
(4) (1853) 22 L. J. Q. B. 463.
(5) [1896] 1 Q. B. 147.
(6) (1914) 39 Bom. 682.

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committed no tort which would give the aggrieved party a cause of action against him. Nor can I see that the principle is affected by substituting first the father of the betrothed girl for the girl herself, and next the father of the boy or man whom in fact she marries for the husband.

In the case of *South Wales Miners' Federation* v. *Glamorgan Coal Company*[1] Earl Halsbury says "to combine to procure a number of persons to break contracts is manifestly unlawful." This takes us back at once to the element of conspiracy with which I dealt fully in my former judgment. But it is plain that where the element of conspiracy is wanting the principle of such cases is materially impaired, and it will be an open question whether it can be applied at all, and if it can, then how far? If we next turn to Lord Lindley's judgment in the same case we shall see still more clearly that the old law of conspiracy is the foundation of the decision. The learned Lord goes on to say "to break a contract is an unlawful act, or in the language of Lord Watson in *Allen* v. *Flood*[2] a 'breach of contract is in itself a legal wrong.' The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract. Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect. Non-lawyers are apt to think that everything is lawful which is not criminally punishable; but this is an entire misconception. A breach of contract would not be actionable if nothing legally wrong was involved in the breach." This goes to the root of the matter and would need very careful and subtle analysis before its whole content could be

(1) [1905] A. C. 239. (2) [1898] A. C. 1.

exhausted. It is of course true that breaking a contract is doing a "wrong" in the ordinary legal sense. The law provides a remedy which in itself presupposes a wrong. But when we turn back to Erle Chief Justice's formula we see that what he says is "procuring the violation of an existing right, &c. ..." And the question thus opened is what is a man's legal right under a contract? Certainly not always to have it performed. In a vast majority of cases it goes no further than to have money compensation for any loss which the promisee may have suffered owing to nonfulfilment. In dealing with cases of conspiracy it is very necessary to insist upon the object of the conspirators being unlawful, and that is why in the case I am considering the learned law Lords declared that a combination to compel people to break their contracts is a conspiracy to do an unlawful thing. For before a conspiracy can be actionable it must be shown to be a conspiracy to do a lawful thing by unlawful means or to do an unlawful thing even by lawful means. Eliminate the elements of conspiracy and it becomes extremely difficult, if not impossible, to say that being the instrument (I use that phrase in preference to "procuring" which implies knowledge) of breaking an existing agreement *per se* makes such instrument liable in tort. But if not, then knowledge at any rate becomes essential, and again it becomes extremely difficult, remembering the wide reach of legal malice, to distinguish this from malice. But the point of theoretical importance is that from the purely legal standpoint the injury done to the first promisee is exactly the same whether he in whose favour the intended contract is in fact performed knew or did not know of the prior agreement. To take the case before us. A girl is betrothed to A ... X persuades her to marry him. Now if X knew of the girl's engagement to A, he would be

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liable under the principle of *Lumley* v. *Gye*.[1] But if he did not, he would not. In either case the injury to A would be exactly the same, and that is the only "wrong" of which the law has any knowledge. Morally X might be more culpable in one case than in the other, but so far as A is concerned the "wrong" would be exactly the same. So that it appears that if the old doctrine of conspiracy, procuring or enticement is to be extended to such cases, then "malice" remains, as it always was considered to be before certain *dicta* of the most eminent Judges in the *Lumley* v. *Gye*[1] string of decisions, the gist of the action. There is a passage in Erle Judge's judgment in *Lumley* v. *Gye*[1] which suggests that long before that case the wide principle on which it rests had been recognised and given effect to. Two cases are cited in support of this: *Green* v. *Button*[2] and *Sheperd* v. *Wakeman*,[3] but both were actions on the case for false and malicious misrepresentations and have nothing whatever to do with the case limited to merely persuading one bound by contract to break it. But if we survey the whole field of English law before *Lumley* v. *Gye*[1] I do not believe that a single case can be found in which (*a*) there was not conspiracy; (*b*) or the use of unlawful means; (*c*) or the act complained of was unlawful in itself, and (*d*) where in cases of procuring the breach of a contract of service a joint action lay against the breaker and him who procured the breach. On that last point I may be wrong. It is not of the first importance. The recent cases to which my attention was drawn in the course of the argument show that it has not been considered to be so. But the other points are of capital importance in considering whether (*a*) the doctrine of *Lumley* v. *Gye*[1] is suitable to Indian conditions and need be adopted here at all; (*b*) whether, if in proper cases it

(1) (1853) 22 L.J. Q.B. 463. (2) (1835) 2 Cr. M. & R. 707.
(3) (1661) 1 Sid. 79.

should, that doctrine could possibly be so far extended as to take in every form of contract. I am aware that as recently as July of this year a division bench of this High Court (Scott C. J. and Heaton J.) on a first appeal[1] found facts, in a case almost exactly the same as this, which led them to the conclusion that the person situated there as the defendant-appellant is here, was liable. And that judgment is of course, not only entitled to the highest respect but is binding as far as it goes. It is clear, however, that it turned upon the facts found in the case and those facts are expressed in the judgment in terms of conspiracy.

I would only add that after having on more than one occasion studied the case of *Lumley* v. *Gye*[2] I can find no answer to the reasoning of Coleridge J. in his weighty dissenting judgment. Although it was against the majority of the Court, and the decision of the majority was again affirmed by a majority in the House of Lords (*Bowen* v. *Hall*[3]) as a mere question of theoretical reasoning I shall always remain, with respect, of the opinion that the true principles governing this class of cases are to be found correctly stated in the judgment of Coleridge J. And this at least might give us, in the Courts of this country, pause before being too ready to introduce the rule laid down in *Lumley* v. *Gye*.[3] As far as I can see we are not bound to adopt it at all, much less to extend it in all directions. No Court in England yet has ever gone the length or anywhere near the length of doing what we are asked to do in this case. Speaking for myself I am very strongly of opinion that there is no good cause of action against the defendant-appellant.

Coming now to what is common ground between my learned brother and myself having regard to the

(1) (1916) F. A. No. 56 of 1913 (Un. Rep.) (2) (1881) 6 Q. B. D. 333.
(3) (1853) 22 L. J. Q. B. 463.

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essential ingredients of the action in tort brought against defendant No. 2, we are not satisfied that the findings in either Court below, badly expressed as they are, amount to what is necessary to be found before damages can be awarded in such an action on the case. As far as we can gather from the judgment of the learned Judge of first appeal, what he does find is that the son of defendant No. 2 married the daughter of defendant No. 1 who was at the time betrothed to the plaintiff and thereby rendered the fulfilment of the contract between the plaintiff and the defendant No. 1 impossible of fulfilment. He further appears to find upon a process of inference from materials given, that defendant No. 2 had a hand in this matter. But when we look at those materials and the vague manner in which the conclusion has been expressed, it seems to us that he meant no more than to find that defendant No. 2 approved and encouraged the action of his grown up son in obtaining the defendant No. 1's daughter in marriage. Now if this were the real limit of the finding of fact in both the Courts below, it will not amount, in our opinion, to that form of knowingly procuring the breach of an existing contract by the defendant No. 2 which alone would make him liable under the principle of *Lumley* v. *Gye*.[1] We do not understand that the Court of first appeal either did find or meant to find that the defendant No. 2 directly and personally attempted to influence the defendant No. 1 to break his contract with the plaintiff. We do not understand that the Court meant to find that there was anything like conspiracy between the defendant No. 2 and his son to bring about that result. In the absence of such findings we must suppose, particularly having regard to the grounds of inference shown, that the learned Judge of first appeal meant no more than what he said

[1] (1853) 22 L.J. Q.B. 463.

and that is that the defendant No. 2's part in this matter was limited to an encouragement, more or less tacit at first, to his son in what that son was doing of his own accord. That being so, there would be no sufficient foundation for a verdict against this defendant in a suit of this kind.

Upon that ground I am in entire agreement with my learned colleague. We ought not to accept the decree of the lower Court as regards defendant No. 2, while of course we do accept it as regards defendant No. 1 and we must now reverse so much of the decree of the Court below as is adverse to and affects defendant No. 2 and direct that the suit against him be dismissed with all costs throughout.

HEATON, J.:—I will assume for the purpose of this case that if it be proved that defendant No. 2 procured the breach of the contract for the marriage of the daughter of defendant No. 1 to the plaintiff, then defendant No. 2 would be liable in damages. The question, therefore, is whether it has been found as a fact by the lower appellate Court that defendant No. 2 did procure the breach of this contract.

The first Court found in the affirmative on this issue: "whether defendant No. 2 is proved to have had a hand in bringing about the breach of the contract?" Then in appeal the appellate Court raised this point: "whether the lower Court erred in holding that defendant No. 2 was responsible for the acts of his son?"

I do not understand that the trial Judge based the liability of defendant No. 2 on the fact that he was responsible for the acts of his son, the person who eventually did marry the daughter of defendant No. 1. I gather that the trial Court based the liability on the finding that defendant No. 2 had some hand in bringing about the breach. If the Judge in appeal

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was under the impression that defendant No. 2 would be liable in damages not for a thing that he himself had done, but because in some unexplained way he was responsible for what his son had done, then I think he was entirely wrong. However in his judgment he also finds, as we see when we come to read it in detail, that defendant No. 2 had a hand in the matter, the matter being the breach of the contract. What that means again is difficult to understand. If it means that defendant No. 2 personally had taken an active and effective part in the proceedings or negotiations, whatever they might be, which had induced defendant No. 1 to break off the contract with the plaintiff, then it is a finding which properly supports the decree. But I find it very difficult to believe that the appellate Court by its expression did mean anything of this kind, because the circumstances he enumerates as the basis of his inference do not in my judgment, at any rate, in any way justify such a conclusion as that defendant No. 2 did personally take an active and effective part in bringing about the breach of contract. There are two matters in particular which, it seems to me, it would be very important to consider in dealing with this matter. The first is, what price, if any, was paid on the occasion of the girl's marriage to defendant No. 2's son and who it was who provided the money; and the second matter would be the extent to which defendant No. 2's son was dependent on his father and under his influence; and whether the circumstances suggested that it would be improbable that defendant No. 2's son would be taking an active part of his own in the matter and probable that the active part would be taken by the father.

Neither of these points has been considered in the judgment of the appellate Court and from the points it has considered I am unable to find that the appellate

Court meant to find as a fact that defendant No. 2 did take an active and effective part in the matter which resulted in the breach of the contract. Therefore I am unable to find from the judgment appealed against that those facts are established which would justify throwing any portion of the damages on defendant No. 2.

Therefore I agree to the order proposed.

Decree modified.

R. R.

CRIMINAL REVISION.

Before Mr. Justice Beaman and Mr. Justice Heaton.

EMPEROR *v.* MAHOMED NATHU.*

1916.

September 7.

Bombay Prevention of Gambling Act (Bombay Act IV of 1887), section 12†—Gambling in the court yard of a mosque—Sentence.

The accused who were peons and mill-hands betook themselves on a hot afternoon to the cool shades of a musjid, where they amused themselves by playing cards for very insignificant stakes. They were convicted for an offence under section 12 of the Bombay Prevention of Gambling Act, 1887, and sentenced to undergo simple imprisonment for fifteen days :—

Held, that the sentence passed was, under the circumstances, out of proportion to the criminality of the acts charged ; and that a sentence of small fine would have been adequate.

* Criminal Application for Revision No. 176 of 1916.

† The section runs as follows :—

12. A Police Officer may apprehend without warrant—(*a*) any person found playing for money or other valuable thing with cards, dice, counters, or other instruments of gaming used in playing any game, not being a game of mere skill, in any public street, place or thorough fare.

* * * *

Any such person shall, on conviction, be punished with fine which may extend to fifty Rupees, or with imprisonment which may extend to one month.