EXPANDING HORIZONS IN THE LAW OF TORTS—TORTIOUS INTERFERENCE

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I. INTRODUCTION

One of the most fluid and rapidly growing tort theories is that of tortious interference. It symbolizes the ingenuity of the common law and the willingness of the law to remedy injustices under evolving societal standards.[1] The purpose of this article is to review the state of the law of tortious interference with the hope of pointing up its unfathomed potential and its possible boundaries, particularly in Iowa. With recent developments, tortious interference stands as a streamlined remedy for a multitude of business wrongs.

II. DEVELOPMENT

The modern law of tortious interference with business relations or prospective economic advantage is of comparatively recent origin.[2] It was not until three years ago that the theory of interference with prospective economic advantage was explicitly endorsed by the Supreme Court of Iowa.[3]

Beginning at an early date, there were intermittent English cases which held that one person could not interfere with the business of another by use of predatory or unlawful means such as violence, threats of violence, fraud or defamation.[4] In the landmark case of *Lumley v. Gye*,[5] decided in 1853, it was held that inducing breach of an existing contract was legally

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1. In the now famous case of *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N.W. 371 (1910), *second appeal*, 165 Iowa 625, 146 N.W. 830 (1911), it was argued that the ideal of freedom of competition had become so engrained in American jurisprudence by the authorities that almost any act in pursuit of competition was justifiable. The court colorfully rejected the contention stating:

> The laws of competition in business are harsh enough at best; but if the rule here suggested were to be carried on to its logical and unavoidable extreme, there is no practical limit to the wrongs which may be justified upon the theory that 'it is business.' Fortunately, we think, there has been a distinct and growing tendency of the courts to look beneath the letter of the law and give some effect to its beneficient spirit, thereby preventing the perversion of the rules intended for the protection of human rights into engines of oppression and wrong. 152 Iowa at 623, 132 N.W. at 373.

2. W. PROSSER, LAW OF TORTS § 124 (3d ed. 1964) at 973-74 [hereinafter cited as PROSSER].

3. Clark v. Figge, 181 N.W.2d 211 (Iowa 1970).

4. RESTATEMENT OF TORTS § 766, comment b (1939) [hereinafter cited as RESTATEMENT]; PROSSER, *supra* note 2.

5. 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853).

wrong even though predatory or unlawful means had not been used.[6] It was not until 1893 that the *Lumley* rule was extended to protect economic relations or prospects which were not yet in existence and were merely prospective.[7]

It was a slow and begrudging process to secure the approval of American courts for the proposition that there could be liability for interference with contract.[8] Interestingly, one early Iowa case appears to have recognized the doctrine[9] and several later cases accepted tortious interference in cases of interference with prospective customer relationships by false or devious means.[10]

The expansion of tortious interference seems to have paralleled a growth in recognition of business related property rights. It has long been perceived that the right to the benefits of a contract is a property right.[11] More recently, the property right concept has been broadened to include the right to follow one's business, calling, trade or occupation and to profit therefrom.[12]

III. Definitions and Distinctions

Liability for inducing breach of an existing contract is now regarded as but one instance of unjustified interference with business relations.[13] An action for inducing breach of contract generally involves persuasion to breach an existing contract,[14] while an action for interference with prospective economic advantage relates to interference with the opportunity to enter into an advantageous business relationship.[15] Interference can consist of many types of conduct, including persuasion.[16] Although the tort has been variously

6. *Id.* In *Lumley v. Gye* the defendant induced a singer to breach her contract to sing at plaintiff's theatre.

7. Temperton v. Russel, 1 Q.B. 715, 62 L.J.K.B. 412 (1893); Prosser & Smith, Cases and Materials on Torts, at 1145 (3d ed. 1962); Restatement, *supra* note 4.

8. Prosser, *supra* note 2, § 123 at 953-54.

9. Andrews v. Blakeslee, 12 Iowa 577 (1862). In that case, the court held that a cause of action was stated where plaintiff extended time for payment of a note upon the debtor's word that he had entered an arrangement with defendant for the transfer of certain property to plaintff as security for the debt. Subsequently, defendant fraudulently transferred the property to another.

10. In Hollenbeck v. Ristine, 114 Iowa 358, 86 N.W. 377 (1901), the court held that one cannot advise an employer to discharge an employee when the advice is accompanied by libelous charges. The later cases of *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N.W. 371 (1910) and *Boggs v. Duncan-Schell Furniture Co.*, 163 Iowa 106, 143 N.W. 482 (1913) were cases involving interference with customer relationships of a business by a competitor through false or devious means.

11. Iowa Securities Co. v. Schaefer, 256 Iowa 219, 126 N.W.2d 922 (1964).

12. *See, e.g.*, Robinson v. Lull, 145 F. Supp. 134 (N.D. Ill. 1956); Moving Picture Machine Operators Local No. 236 v. Cayson, 205 So. 2d 222 (Ala. 1967); Guillory v. Godfrey, 134 Cal. App. 2d 628, 286 P.2d 474 (1955); Bailey v. Richards, 236 Miss. 523, 111 So. 2d 402 (1959); Di Cristofara v. Laurel Grove Mem. Park, 43 N.J. Super. 244, 128 A.2d 281 (1957).

13. Restatement, *supra* note 4.

14. *Interference with Contractual Relations, A Property Limitation*, 18 Stan. L. Rev. 1406 (1966).

15. Clark v. Figge, 181 N.W.2d 211 (Iowa 1970); Fitt v. Schneidwind Realty Corp., 81 N.J. Super. 497, 196 A.2d 26 (Super. Ct. 1963).

16. *Interference with Contractual Relations, A Property Limitation*, 18 Stan. L. Rev. 1406 (1966).

denominated, the phrase "interference with prospective advantage" probably best describes it.[17]

IV. Elements

A. *Generally*

The elements of a prima facie case of tortious interference have been declared to be: (1) the present or probable future existence of a contract, business relations or business expectancy beneficial to the injured person; (2) knowledge of the contract, relations or expectancy on the part of the interferer; (3) intentional interference which induces or causes a termination of the contract or foreclosure of the business relations or expectancy and, (4) resultant damage.[18]

Some courts have held that an essential element of the tort is malice.[19] It no longer appears that malice should be a formal element of the cause of action. Some of the same jurisdictions define malice as the absence of just cause or excuse.[20] At the same time, such courts declare justification or privilege to be an affirmative defense to the action.[21] It would seem to be logically incongruous to require the plaintiff to prove lack of justification or excuse and yet to require the defendant to prove justification. In addition, it would seem to be unduly onerous to impose the burden of proving a negative upon plaintiff. Finally, it is now clear that malice need not consist of spite, hatred or ill will.[22] The requirement of malice has been abandoned in several jurisdictions.[23] Thus, malice should not be a condition precedent to recovery, although actual malice would certainly satisfy the elements of knowledge and intent. However, there is a *caveat* to these observations. The existence or non-existence of spite, hatred or ill will is considered material with respect

17. Professor Prosser labels the cause of action as "interference with prospective advantage." Prosser, *supra* note 2, at 973. The Restatement, *supra* note 4, describes it as interference with "reasonable expectancies of trade." It has also been called "interference with reasonable economic expectancies." 1 F. Harper & F. James, The Law of Torts § 6.11, at 510 (1956). In *Clark v. Figge*, 181 N.W.2d 211 (Iowa 1970) the Supreme Court of Iowa evidenced a preference for Professor Prosser's designation of the tort.

18. *See, e.g.*, National Gas Appliance Corp. v. Mantitowoc Co., 311 F.2d 896 (7th Cir. 1962); John B. Reid & Associates, Inc. v. Jiminez, 181 So. 2d 575 (Fla. 1966); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1, (N.Y. App. 1956); County of Spokane v. A.H. Farmer, 5 Wash. App. 25, 486 P.2d 296 (1971).

19. Elliot v. Elliot, 482 S.W.2d 123 (Ark. 1972); Steffan v. Zernes, 124 So. 2d 495 (Fla. App. 1960); O'Connor v. Harmes, 111 N.J. Super. 22, 266 A.2d 605 (N.J. App. 1970).

20. Louis Schlesinger Co. v. Rice, 4 N.J. 169, 72 A.2d 197 (1950).

21. Middlesex Concrete Prod. & Excavating Corp. v. Carteret Ind. Ass'n, 37 N.J. 507, 181 A.2d 774 (1962).

22. It appears that the term "malice" has now merged and blended with the knowledge and intent requirements of tortious interference. Although a desire to injure or to harm for its own sake was originally a requisite for tortious interference to lie, it is now sufficient if the interferer, with knowledge of plaintiff's interests, intends to do an act which has the effect of interfering with those interests. Prosser, *supra* note 2, § 123 at 951; Restatement, *supra* note 4.

23. *E.g.*, A.S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 144 N.E.2d 371 (N.Y. App. 1957).

to whether a dfeense of justification or privilege will prevail.[24]

Some courts have defined tortious interference as an intentional interference, without justification, with plaintiff's known contracts or business prospects.[25] This definition implies that plaintiff has the burden of anticipating purported justifications and negating them from the outset. The reasoning set forth in the preceding paragraph would apply with equal force to such a rule. The better view would appear to be that the matter of justification or privilege is an affirmative defense and that it is up to the interferer to justify his conduct.[26]

B. *Existence and Validity of Contractual Business Relations or Business Expectancy*

It has been elementary that an action for inducing breach of contract could only be instituted where a contract was in existence at the time of the interference.[27] Since tortious interference has now evolved to include an action for disrupting future economic prospects, the existence of an actual contract would seem to be of little significance.[28] If it is reasonably probable that a contract would have been entered if there had it not been for interference, the injured party should not be deprived of his rem-

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24. Calbom v. Knudtzon, 65 Wash. 2d 157, 396 P.2d 148 (1964); RESTATEMENT, *supra* note 4, § 766, comment *m*. The defense of privilege and the impact of actual malice upon that defense will be explored in more detail, *infra*.

25. Neff v. World Publishing Co., 349 F.2d 235 (8th Cir. 1965); McDonough v. Kellogg, 295 F. Supp. 594 (W.D. Va. 1969); Cady v. Hartford Accident & Indemn. Co., 439 S.W.2d 483 (Mo. 1969); Padden v. Local 90 United Ass'n of Journeymen Plumbers, 168 Pa. Super. 611, 82 A.2d 327 (1951).

26. Herron v. State Farm Mut. Ins. Co., 56 Cal. 2d 202, 363 P.2d 310, 14 Cal. Rptr. 294 (1961); Girard v. Auto Specialities Athletic Ass'n, 300 Mich. 272, 1 N.W.2d 538 (1942); Mitchell v. Aldrich, 122 Vt. 19, 163 A.2d 833 (1960).

27. In *Shannon v. Gaar*, 233 Iowa 38, 6 N.W.2d 304 (1942) an action was brought to recover a real estate commission from defendants based upon an alleged conspiracy to breach plaintiff's real estate contract with defendant purchasers. The court held that the first essential of the cause of action asserted was the existence of a valid contract. *See also* Alice v. Robett Mfg. Co., 328 F. Supp. 1377 (N.D. Ga. 1970), *aff'd*, 445 F.2d 316 (5th Cir. 1971); Upton v. Parkway Motors, Inc., 90 Ill. App. 2d 426, 232 N.E.2d 513 (1967); Royal Realty Co. v. Levin, 244 Minn. 288, 69 N.W.2d 667 (1955); Warner Bros. Pictures, Inc. v. Simon, 21 App. Div. 2d 863, 251 N.Y.S.2d 70 (1964).

28. While a definite contract is desirable from a proof standpoint, it has been said that it is not essential to maintenance of the action. RESTATEMENT, *supra* note 4. *But see* Martins Ferreira v. Jayess Corp., 226 F. Supp. 433 (D.N.J. 1964) (negotiations without agreement insufficient to support action). Where the contract has been fully performed, cancelled or expired, the lack of a contract is of crucial importance. Western Oil & Fuel Co. v. Kemp, 245 F.2d 633 (8th Cir. 1957) (contract cancelled); Upton v. Parkway Motors, Inc., 90 Ill. App. 2d 426, 232 N.E.2d 513 (1968) (contract fully performed); Winer v. Glaser, 3 App. Div. 2d 656, 158 N.Y.S.2d 1016 (1957) (expired contract). In such cases, expectations of future profits are eliminated.

29. Under one line of authorities, the courts have expressed the view that a person is entitled to the protection of his reasonable expectations of profit, and the corollary, that a contract is not requisite to enforcing such rights. Mitchell v. Aldrich, 122 Vt. 19, 163 A.2d 833 (1960). Under this reasoning, the result reached in the case of *Iowa Securities Co. v. Schaefer*, 256 Iowa 219, 126 N.W.2d 922 (1964) might well have been different. In *Schaefer*, plaintiff brought action for interference with his real estate listing agreement claiming he was entitled to a real estate commission. The court held that the listing agreement had expired and the burden was upon plaintiff to show it had been extended. It is submitted that the court should have made a deeper inquiry and determined whether the contract would have been extended but for the interference.

edy.[29] Similarly, if a contract is in existence but its terms are somewhat vague or uncertain, the tortfeasor should not be able to capitalize thereon if there is reasonable assurance that the contract would have been performed, particularly when the missing or uncertain terms may be implied by law or supplied by the probable intent of the contracting parties.[30]

Once a contract has been shown to sufficiently exist, a controversy has arisen in some cases as to whether or not the underlying contract must be valid in order to maintain the action. It is reasonably well established that when the contract is void no recovery will be permitted.[31] However, there is a split of authority where the question of validity relates merely to the enforceability of the contract between the plaintiff and the third person.[32]

Where a contract is void there are generally sound public policy reasons which dictate that the contract should be stricken down. In such instances, recovery for tortious interference should be denied because the plaintiff has lost property rights that he never really had. In an exceptional instance where public policy does not militate strongly against lending the dignity of the law to the recovery of damages for interference with such a contract and the parties would have performed the contract but for the interference, the action should be permitted. A person knowingly interfering with contractual rights should not be permitted to escape the consequences of his act because the law arbitrarily labels the contract to be void.

In the case where one of the parties to a contract has an option to avoid legal responsibility for reasons such as the Statute of Frauds, there is no logical reason to exonerate a tortfeasor from damages for interference if it is adequately proven that the contract would have been performed had it not been for the interference. There are many instances in which parties to a contract are perfectly content with it even though there would be legal difficulties with its enforcement. The law should not condone the termination of a person's

30. In *Noah v. L. Daitch & Co.*, 22 Misc. 2d 649, 192 N.Y.S.2d 380 (1959), it was held that a contract must have a definite duration in order to serve as the foundation for an interference action. It would seem that this result is hypertechnical and that the test should be whether plaintiff has produced a degree of proof necessary to establish the probable duration of the contract.

31. *See, e.g.*, Morse & Co. v. Texas Elec. Serv. Co., 63 F.2d 702 (5th Cir.), *cert. denied*, 290 U.S. 655 (1933) (contract monopolistic and in restraint of trade); M. Farbman & Sons, Inc. v. Continental Cas. Co., 62 Misc. 2d 236, 308 N.Y.S.2d 493 (1970) (contract requiring witnesses to testify against public policy); Paramount Pad Co. v. Baumrind, 4 N.Y. 2d 393, 151 N.E.2d 609, 175 N.Y.S.2d 809 (N.Y. App. 1958) (contract containing invalid restrictive covenant).

32. The weight of authority is that the unenforceability of a contract between plaintiff and a third person is no defense to an interference action against defendant. Clements v. Withers, 437 S.W.2d 818 (Tex. 1969); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 6.7, at 495 (1956). *See also* Zimmerman v. Bank of America Nat'l Trust & Savings Ass'n, 191 Cal. App. 2d 55, 12 Cal. Rptr. 319 (1961) (statute of frauds no defense); Jackson v. O'Neill, 117 Kan. 930, 317 P.2d 440 (1957) (lack of mutuality no defense); Daugherty v. Kessler, 264 Md. 281, 286 A.2d 95 (Md. App. 1972) (statute of frauds no defense); *But see* Hepworth v. Geary, 35 App. Div. 2d 659, 314 N.Y.S.2d 298 (1970) (contract at will); Rothschild v. World-Wide Automobiles Corp., 24 App. Div. 2d 861, 264 N.Y.S.2d 705 (1965) (lack of mutuality a defense); MacDonald v. Trammell, 351 S.W.2d 89 (Tex. Civ. App. 1961) (statute of frauds a defense).

expectancies with regard to such a contract and the disruption of an otherwise harmonious relationship. Certainly, where there has been part performance of a voidable contract, acts of tortious interference should be rectified at the behest of the injured person.[33]

Where the interference is with future business relations or economic expectancies, the proof need not be absolutely certain that such relations would have been entered or profit realized.[34] However, there must be a reasonable assurance or probability that but for the defendant's tortious act the relations would have been entered or the expectancy realized.[35]

C. *Knowledge and Intent*

Tortious interference is an intentional tort.[36] Negligent invasion of another's contractual relations or economic expectancies is not generally regarded to provide sufficient foundation for a viable tortious interference action.[37]

It is always desirable to show that the interferer intended to harm the plaintiff by his interference and such intent will more than satisfy the intent requirements for tortious interference.[38] Motivation can frequently be a determining factor in the action.[39] However, to establish a prima facie case of tortious interference, it is merely necessary to show an intention to effect the result, i.e., a breach of contract or the foreclosure of future business relations or expectancies.[40] In other words, at minimum it must be shown that the defendant had knowledge of plaintiff's interests and intentionally interfered with such interests.[41]

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33. Bender v. Hearst Corp., 152 F. Supp. 569 (D. Conn. 1957), *aff'd*, 263 F.2d 360 (2d Cir. 1959) (performance of oral contract in accordance with its terms).

34. Cooper v. Steen, 318 S.W.2d 750 (Tex. Civ. App. 1958).

35. Goldman v. Feinberg, 130 Conn. 671, 37 A.2d 355 (1944); Owen v. Williams, 322 Mass. 356, 77 N.E.2d 318 (1948); Leibovitz v. Central Nat'l Bank, 75 Ohio App. 25, 60 N.E.2d 727 (1944).

36. In the case of *Wissmath Packing Co. v. Mississippi River Power Co.*, 179 Iowa 1309, 162 N.W. 846 (1917), defendant flooded plaintiff's packing plant by building a dam on the Mississippi River. The court held, *inter alia*, that the interference had to be intentional and that this element was not established in the case before it.

37. Donovan Constr. Co. v. General Elec. Co., 133 F. Supp. 870 (D. Minn. 1955); PROSSER, *supra* note 2, § 123 at 960. *Cf.* Wissmath Packing Co. v. Mississippi River Power Co., 179 Iowa 1309, 162 N.W. 846 (1917).

38. Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1910); RESTATEMENT, *supra* note 4, comment m. Where the defendant is motivated by actual malice, there is understandably no difficulty in finding the interference to be intentional. Where the interference is the result of mixed motives, the courts generally look to the predominant purpose of the defendant's conduct. PROSSER, *supra* note 2, § 123 at 967.

39. PROSSER, *supra* note 2, § 123 at 951.

40. RESTATEMENT, *supra* note 4, comment d; Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728 (1928). In *Shannon v. Gaar*, 233 Iowa 38, 6 N.W.2d 304 (1942) the defendant real estate purchasers urged they had a legal right to discharge plaintiff, a real estate agent, at any time before he fully earned his real estate commission. The court agreed with the argument as an abstract principle. It held, however, that they were not entitled to do so as a bad faith device to escape a commission.

41. *See, e.g.*, Donovan Constr. Co. v. General Elec. Co., 133 F. Supp. 870 (D. Minn. 1955); Reid & Associates v. Jiminez, 181 So. 2d 575 (Fla. App. 1965); Tenta v. Guraly, 140 Ind. App. 160, 221 N.E.2d 577 (1966); Calborm v. Knudtzon, 65 Wash. 2d 157, 396 P.2d 148 (1964). PROSSER, *supra* note 2, § 123 at 965 states: "Once such knowledge

The difficult question arises where the defendant has merely pursued his own ends, with some awareness of plaintiff's interest, but without any primary object of obstructing those interests.[42] There is no uniformity in the decisions as to whether the intent requirement is satisfied in such instances.[43] A line of demarcation seems to be emerging based upon whether the interferer is acting to protect direct financial interests of his own which might otherwise be detrimentally harmed or whether he is selfishly acting to advance some future goal.[44] This appears to be a wise accommodation between the societal interests in essential freedom of action on one side and the preservation of the existing contractual or business prospects on the other.

D. *Manner of Interference*

1. *Generally*

It has been suggested that the means of interference are of minimal importance.[45] This generalization would not seem to be sound either in theory or in practicality. Use of predatory means gives rise to a presumption of intent in some jurisdictions.[46] In those jurisdictions adhering to this rule, difficult obstacles to proof of intent can be eliminated or lessened.[47] In addition, if the defendant asserts that the interference was privileged, the means used are often crucial to the question of whether the privilege will prevail in the case.[48] When

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is established, there is of course no difficulty in finding liability where the defendant has acted with the desire and purpose of interfering with the contract, or of appropriating its benefits to himself."

42. PROSSER, *supra* note 2, § 123 at 966.

43. *Id.*

44. RESTATEMENT, *supra* note 4, § 766, comment d and § 769, comment a; PROSSER, *supra* note 2, § 123 at 969-70.

45. PROSSER, *supra* note 2, § 123 at 960.

46. Piedmont Cotton Mills, Inc. v. H.W. Ivey Constr. Co., 109 Ga. App. 876, 137 S.E. 2d 528 (1964). It is believed that Iowa has adopted this rule. In *Boggs v. Duncan-Schell Furniture Co.*, 163 Iowa 106, 143 N.W. 482 (1913), the defendant unlawfully carried on simulated competition with plaintiff. The court aptly held that a presumption of intent arose from the means used. It is worthwhile to quote that holding:

> Is he within his legal right when he simulated honest competition, not to advance himself or his own interests, but for the sole purpose of inflicting injury upon his neighbors? It is said the law deals only with externals; but the law ought not to be blinded by the lion's skin. It may be that expressed malice in the doing does not, of itself, make the wrong; but malice is implied in the very act of doing, and therefore the act itself is wrong. 163 Iowa at 115, 143 N.W. at 486.

Cf. Bishop v. Baird & Baird, 238 Iowa 871, 29 N.W.2d 201 (1947).

47. There is an interesting but unresolved sidelight upon the burden of proof of tortious interference in cases involving the use of fraudulent means. Plaintiff, as in any other ordinary civil action, has the burden of proving tortious intereference by a preponderance of evidence. North Cent. Co. v. Phelps Aero, Inc., 272 Minn. 413, 139 N.W.2d 258 (1965). However, in Iowa as well as many other jurisdictions fraud must be established by clear, convincing and satisfactory evidence, and a mere preponderance is not sufficient. Dallas Real Estate Co. v. Groves, 228 Iowa 1232, 292 N.W. 152 (1940). It would not seem that the standard of proof for fraud would control in an action sounding in tortious interference. Tortious interference does not directly involve fraud though it may be charged that fraudulent means were used. Tortious interference arises because of the invasion of plaintiff's property rights.

48. RESTATEMENT, *supra* note 4, § 767.

the defendant's actions are predatory or illegal, it is almost certain that the claimed privilege will fail.[49] Any interest advanced as justification will be outweighed by the policy of deterring use of abhorrent means to gain an end.[50]

The means employed in interfering range from use of predatory tactics to mere persuasion.[51] Predatory means have been found to consist of varying shades of fraud, deceit or deception.[52] Libel or slander are also considered to be reprehensible enough to fall within the category of predatory means.[53] Threats of physical violence or of economic reprisal and coercion are wrongful means.[54]

The question of whether the classic and well defined elements of such torts as fraud or libel must be established in an action for interference has been virtually ignored by the courts and writers. It would seem that the theoretical underpinnings of tortious interference should not require proof of all the elemments of those causes of action in addition to the elements of tortious interference.[55] Tortious interference is deeply rooted in the concept that the invasion is to plaintiff's property rights.[56] Thus, the invasion of property

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49. *Id.*

50. RESTATEMENT, *supra* note 4, § 767, comments to clauses (b) and (d). Professor Prosser does recognize that the means used may "affect" privilege. *Id.* § 123 at 960.

51. Alpha Distributing Co. v. Jack Daniel Distillery, 454 F.2d 442 (9th Cir. 1972); RESTATEMENT, *supra* note 4, comment f.

52. In *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N.W. 371 (1910), *second appeal*, 165 Iowa 625, 146 N.W. 830 (1911), the plaintiff's assignee, Crystal Oil Company, was an oil dealer. Defendant's agents stopped at oil stations where there was a green card to indicate to Crystal Oil that the customer needed oil, permitted the customer to believe he was buying from Crystal Oil and appropriated the green cards. In *Boggs v. Duncan-Scheil Furniture Co.*, 163 Iowa 106, 143 N.W. 482 (1913), defendant falsely advertised new sewing machines of the same brand as plaintiff's for less than plaintiff's retail price. In *Kock v. Burgess*, 167 Iowa 727, 149 N.W. 858 (1914), *rehearing denied*, 176 Iowa 493, 158 N.W. 534 (1916), the court held a cause of action for tortious interference was stated where defendant allegedly made false statements to a third person to induce him to breach a contract to redeem property for plaintiff. *See also* Shell Oil Co. v. State Tire & Oil Co., 126 F.2d 971 (6th Cir. 1942); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Walters v. Clairmont Sterilized Egg Co., 242 N.Y. 521, 152 N.E. 410 (1926).

53. Credit Investment & Loan Co. v. Guaranty Bank & Trust Co., 143 Colo. 393, 353 P.2d 1098 (1960); Brown v. American Freehold Land Mtg. Co. of London, 97 Tex. 599, 80 S.W. 985 (1904).

54. In the case of *Smythe Neon Signs Co. v. Local Union No. 405*, 226 Iowa 191, 284 N.W. 126 (1939), the court held that the plaintiff had not established the elements of intimidation or coercion in an action involving a secondary boycott against plaintiff. The court discerned that for these elements to exist there must be threats intended to overcome the free will of another. In *Ellis v. Journeymen Barbers' Int'l Union of America, Local Union No. 405*, 194 Iowa 1179, 191 N.W. 111 (1922), the court found duress in union picketing of plaintiff's nonunion barber shop. There was also interference with the ingress and egress to plaintiff's shop which was the equivalent of intimidation and disturbance of the peace. *See* RESTATEMENT, *supra* note 4, §§ 762, 765 with respect to concerted activity. *See also* Sparks v. McCrary, 156 Ala. 382, 47 So. 332 (1908) (forbidding sale of goods and threat of prosecution to customers); American Oil Co. v. Towler, 56 Ga. App. 886, 194 S.E. 223 (1937) (blacklisting plaintiff); Taylor v. Pratt, 135 Me. 282, 195 A. 205 (1937) (threats to withdraw business unless plaintiff fired).

55. *See* Clark v. Figge, 181 N.W.2d 211 (Iowa 1970).

56. For example, the elements of fraud are representation, falsity, materiality, scienter, intent to deceive, reliance and resulting injury and damage. Ford v. Barcus, 261 Iowa 616, 155 N.W.2d 507 (1968). It is perfectly clear that plaintiff cannot prove reliance in a tortious interference case because the false representation is normally made to a third

rights is the gravamen of the action, not the infringement upon plaintiff's person or reputation. General definitions of such matters as fraud[57] should suffice in a tortious interference action to determine whether predatory or unlawful means have been used, whether there is a presumption of intent, and whether defendant's claim of privilege should control. At least one court has noted the distinction between tortious interference and defamation.[58] Moreover, if an action for tortious interference were declared to be synonymous with an action such as fraud, there would be complex difficulties as to whether the defenses applicable to such an action would be available in the tortious interference suit.

In the majority of jurisdictions, there can be liability for tortious interference even if predatory or unlawful means are not present. Various types of persuasion can be enough.[59] Although the means used are somewhat innocuous, when the interferer knows of plaintiff's rights and interferes with the intent of destroying or impairing those rights he should be made to compensate plaintiff for accomplishing what he intended. Finally, as societal values become more sophisticated more types of conduct will become encompassed within the predatory means classification.[60]

2. *Types of Interference*

It should be apparent at this point that the full range of conduct which may constitute tortious interference has barely been tested. To use an old cliché, "only the top of the iceberg is visible." However, there are several areas in which tortious interference is now noticeably discovered. In addition to types of conduct previously mentioned in this article, the theory has been effectively advanced in a number of cases where one person breaches a contract as part of a design to drive another out of business or to appropriate the benefits of such business to himself.[61] The theory of tortious interference

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person. Other elements such as scienter and intent to deceive do not seem particularly relevant to a tortious interference case. A false representation with the intent to interfere would seem to be the nub of a tortious interference action involving fraud.

57. For instance, fraud generally involves any act, omission or concealment by which there is a breach of legal duty, trust or confidence and is injurious to another and generally consists of either misrepresentation or concealment of material facts. Popejoy v. Eastburn, 241 Iowa 747, 41 N.W.2d 764 (1950).

58. In *Ledwith v. International Paper Co.*, 64 N.Y.S.2d 810 (1946), *aff'd*, 271 App. Div. 864, 66 N.Y.S.2d 625 (N.Y. App. 1946), the court differentiated between tortious interference and defamation and held that words used do not have to be false to establish tortious interference.

59. *See, e.g.*, Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941); Strollo v. Jersey Cent. Power & Light Co., 20 N.J. Misc. 217, 26 A.2d 559 (1942); RESTATEMENT, *supra* note 4, at § 766. *But see* Wilkinson v. Powe, 300 Mich. 275, 1 N.W.2d 539 (1942).

60. In *Bishop v. Baird & Baird*, 238 Iowa 871, 29 N.W.2d 201 (1947) the court drew an inference of malice from the conduct in question. Defendant had caused plaintiff's wages to be withheld where the obligation upon which an assignment of wages had long since been satisifed. *See also* W.P. Iverson & Co. v. Dunham Mfg. Co., 18 Ill. App. 2d 404, 152 N.E.2d 615 (1958) where it was held to be improper for defendants to dissolve a corporation to avoid plaintiff's contact with the corporation.

61. *See* Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 143 N.W. 482 (1913),

has also been successfully advanced where the defendant solicits the dealers, customers, or business contacts of another by unfair means or for the purpose of satiating some malicious motive.[62]

3. *Interference During Performance of a Contract with Another*

Thus far, the discussion with regard to interference with contractual relations has been confined to situations in which the defendant interferes with the performance of a contract between plaintiff and a third person. There is another type of interference with contract relations which has received little scholarly attention—the situation in which one party to a contract interferes with the other's performance. The natural reaction is to conclude that such interference would be a breach of contract if it is of a serious nature and to go no further.[63] Much closer scrutiny is warranted. The conduct may go beyond a mere breach of contract and may be designed to appropriate the benefits of the injured party's dealers, customers, business relations, business information, trade secrets or his entire business or livelihood. If the defendant has succeeded in any of these objectives, there may be a vast difference in the damages which are awardable.[64] Further, unjust enrichment is available for tortious interference but probably is not available for breach of contract.[65] In the above instances, the defendant's gain through his wrongful act may far exceed the plaintiff's loss. Finally, considerations of trial strategy may strongly sug-

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and Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1910), *second appeal*, 165 Iowa 625, 146 N.W. 830 (1911). *See also* Barber v. Stephenson, 260 Ala. 151, 69 So. 2d 251 (1953) (conspiracy to formally sell trucking business to plaintiff but in reality transfer to co-defendant); Peebler v. Olds, 71 Cal. App. 2d 382, 162 P.2d 953 (1945) (corporation formed to appropriate plaintiff's business and to harass and gain financial advantage over him); Frank H. Gibson v. Omaha Coffee Co., 179 Neb. 169, 137 N.W.2d 701 (1965) (negotiations for purchase of business used to obtain customer lists and employees).

62. Martin v. American Home Prod. Corp., 94 F. Supp. 57 (S.D.N.Y. 1950) (imitation of plaintiff's product and sale to his dealers to entice them away); Wear-Ever Aluminum Inc. v. Towncraft Ind., Inc., 75 N.J. Super. 135, 182 A.2d 837 (1962) (property right in small, closely knit sales organization which defendant actively recruited).

63. It is undeniable that a party cannot induce breach of his own contract. Wilson & Co. v. United Packinghouse Workers of America, 181 F. Supp. 809 (N.D. Iowa 1960). However, he can interfere with its performance.

There is an implied obligation in every contract of good faith and fair dealing and an obligation for both parties to cooperate in the performance of the contract. *E.g.*, Earle R. Hanson & Associates v. Farmers Cooperative Creamery, 403 F.2d 65 (8th Cir. 1968); Deering Milliken Research Corp. v. Tex-Elastic Corp., 320 F. Supp. 806 (D.S.C. 1970); Voege v. American Sumatra Tobacco Corp., 241 F. Supp. 369 (D. Del. 1965). Conversely, the law imposes an implied covenant in every contract that neither party will do anything that will have the effect of destroying the rights of the other party to receive the fruits of the contract. *E.g.*, Peter Kiewit Sons' Co. v. Sumit Constr. Co., 422 F.2d 242 (8th Cir. 1969); Uproar Co. v. National Broadcasting Co., 81 F.2d 373 (1st Cir.), *cert. denied*, 298 U.S. 670 (1936); Daniel B. Campen Corp. v. Building & Constr. Trade Council, 202 Pa. Super. 118, 195 A.2d 134 (1963). As a consequence neither party to an agreement can prevent, hinder or delay the performance of the other party. *E.g.*, Hardin v. Eska Co., 256 Iowa 371, 127 N.W.2d 595 (1964); Kaltoff v. Nidsen, 252 Iowa 249, 106 N.W.2d 597 (1960); 4 A. CORBIN, CONTRACTS § 947 (1960); 5 S. WILLISTON, CONTRACTS § 677 (1961).

64. See note 93, *infra*.

65. See note 111, *infra*.

gest a suit in tortious interference alone or in combination with a claim of breach of contract.[66]

It is axiomatic that a breach of contract can also be a tort.[67] There are cases in which recovery for tortious interference has been allowed where the defendant has merely prevented plaintiff from performing the contract between them or has made its performance more burdensome.[68] Such interference may be accomplished through third persons[69] or may be directly between the parties.[70] In such cases, there always appears to be an ulterior motive in breaching the contract such as the appropriation of some or all of the injured party's property rights. The term "bad faith" has been applied to such situations but this generic description seems to beg the question.[71] It would seem that the true distinction is drawn between cases where the defendant is purposely seeking to take advantage of the plaintiff in some fashion and those in which he is merely making a business judgment that it is not economically feasible to continue performance of a contract. In the former situation, the breach of contract is incidental to a primary objective which the law deems to be distasteful.

Tortious interference between parties to a contract need not necessarily involve a breach or breaches of contract. There is tortious interference where the performance of a contract is no more than a guise by which to take unconscionable advantage of the other party to a contract, to acquire his business information, trade secrets, dealers or employees, or to destroy him.[72]

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66. The words "tortious interference" have a stark psychological impact as to the gravity of defendant's conduct. Breach of conduct has a less offensive ring and the layman is probably conditioned to accept breaches of contract as a fact of life. Also, a wider range of evidence is admissible in a tortious interference suit, particularly if a conspiracy is alleged. Proof of motivation and intent have a tendency to strengthen the chances of liability. Time does not permit exploration of numerous other strategic considerations.

67. Rice v. Sioux City Mem. Park Cem., 245 Iowa 147, 60 N.W.2d 110 (1953), *aff'd*, 348 U.S. 880 (1954), *vacated*, 349 U.S. 70 (1955).

68. PROSSER, *supra* note 2, § 123 at 959.

69. *See, e.g.*, Berono Sales, Inc. v. Chrysler Motors, 363 F.2d 43 (3d Cir. 1966) (solicitation of business of defendant's DeSoto dealers for its Dodge dealers when DeSoto line discontinued); Motley, Green & Co. v. Detroit Steel & Spring Co., 161 Fed. 389 (S.D.N.Y. 1908) (purchase of defendant corporation's assets by corporation created to avoid plaintiff's contract with defendant); Sammons v. Schwarz, 55 F. Supp. 714 S.D.N.Y. 1944) (avoidance of covenant not to compete by use of "front men"). A classic example would be where the interferer induces plaintiff's supplier to refuse to supply materials necessary for performance of a contract with him.

70. *See, e.g.*, Guardamondo v. Langhurst, 125 Colo. 373, 243 P.2d 1039 (1952) (avoidance of contracts to raise popcorn for plaintiff thereby rendering plaintiff's performance impossible); Corder v. O'Neill, 176 Mo. 401, 75 S.W. 764 (1903) (delay of preparation of lease to deprive agent of commission); Masini v. Quilici, 67 Nev. 333, 218 P.2d 946 (1950) (failure of contract seller to secure court approval for sale of land to sabotage agreement); Mevohrah v. Goodman, 65 N.W.2d 278 (N.D. 1954) (breach of covenant not to compete in business sold to plaintiff).

71. Shannon v. Gaar, 233 Iowa 38, 6 N.W.2d 304 (1942).

72. National Gas Appliance Corp. v. Mainitowoc Co., 311 F.2d 896 (7th Cir. 1962) (conspiracy to drive plaintiff out of business formed between plaintiff's supplier under contract and party negotiating to purchase plaintiff's product); Shell Oil Co. v. State Tire & Oil Co., 126 F.2d 971 (6th Cir. 1942) (bulk oil contract entered between parties so that defendant could learn name of plaintiff's customers and surreptitiously solicit them); Cook-Master, Inc. v. Nicro Steel Products, Inc., 339 Ill. App. 519, 90 N.E.2d 657 (1950) (conspiracy to exclusive manufacturer and others to acquire the benefits of plaintiff's busi-

In the situation where business information does not rise to the level of a trade secret and receive the protection of the trade secret law, tortious interference is of obvious merit. Also, where a trade secret is voluntarily divulged in the performance of a contract, the law of trade secrets may not afford a remedy.

Finally, the law of tortious interference provides a remedy for what might otherwise be the lawful termination or cancellation of a contract where such cancellation or termination is merely a means to acquire the business or property of the other or to harm him.[73] Again, the common thread appears to be use of lawful means for the devious or unlawful purpose of taking undue advantage of the other party to the contract.

E. *Causation*

The issue of whether a contract, business relation or expectancy is shown with sufficient clarity to warrant protection is closely interrelated to the issue of whether the tortious act has caused the termination of the contract or obviated the business relation or expectancy. Under each, the issue is generally whether or not it was probable that the contract would have been entered or performed, the business relation formed or the expectancy realized but for defendant's interference.[74]

F. *Damages*

1. *Actual Damages*

In actions for tortious interference, other than those involving inducing breach of contract, plaintiff is entitled to recovery of all damages caused by the wrongful act[75] or to those directly and proximately resulting from such act.[76] However, the courts have applied differing measures where the action is based upon inducing breach of contract.[77]

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ness and its unique cooking utensils by gaining plaintiff's dependence on it, refusing to fill orders, involving it in financial difficulties and then producing plaintiff's utensils through "dummy" corporation); Janisch v. Smith, 255 Wis. 140, 38 N.W.2d 529 (1949) (contract to manufacture minnow bucket used to get details of plaintiff's minnow bucket then defendants manufactured defective buckets and belittled product in order to terminate agreement and appropriate market benefits and idea).

73. *See, e.g.*, Falstaff Brewing Corp. v. Iowa Fruit & Produce Co., 112 F.2d 101 (8th Cir. 1940) (cancellation of distributorship to hire plaintiff's employees and destroy him); Buxbom v. Smith, 23 Cal. 2d 535, 145 P.2d 305 (1944) (termination used to hire plaintiff's employees); Miller v. Ortman, 235 Ind. 641, 136 N.E.2d 17 (1956) (refusal to fill further orders for distributor to take over distributor's business); Wilkinson v. Powe, 300 Mich. 275, 1 N.W.2d 539 (1942) (refusal to deal to destroy plaintiff); Duane Jones Co. v. Burke, 306 N.Y. 172, 172 N.E.2d 237 (1954) (conspiracy to quit plaintiff and usurp accounts and personnel).

74. *See* authorities cited in notes 28-29, 32, and 35 *supra*.

75. ABC-Paramount Records, Inc. v. Topps Record Distributing Co., 374 F.2d 455 (5th Cir. 1967); Mays v. Stratton, 183 So. 2d 43 (Fla. App. 1966). *Cf.* Tye v. Finkelstern, 160 F. Supp. 666 (D. Mass. 1958).

76. Shell Oil Co. v. State Tire & Oil Co., 126 F.2d 971 (6th Cir. 1942); Gentile Bros., Corp. v. Rowena Homes, Inc., 352 Mass. 584, 227 N.E.2d 334 (1967).

77. *Damages Recoverable in an Action for Inducing Breach of Contract*, 30 COLUM. L. REV. 232 (1930).

One line of authorities holds that a contract measure should be used; other courts have stated that the wrongdoer should be liable for all damage caused because the tort is intentional in nature; and, still other courts assume an intermediate position and hold that the negligent tort measure applies, i.e., that the interferer is liable for damages proximately caused by his act.[78] The difference in the three measures is important as to the extent that the defendant will be held liable for consequential damages in an action for inducing breach of contract and the extent to which the plaintiff is obligated to mitigate damages in such an action.[79] The importance of the measure applied in inducing breach of contract cases is also noteworthy because of the quantum of proof required as to damages. In tort cases, there is a well known liberality in proof of damages. Where the fact of damage has been established, a wrongdoer cannot escape liability for the consequences by uncertainty in the amount.[80]

Under the venerable English decision of *Hadley v. Baxendale*,[81] damages in contract actions are limited to such damages as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract. On the other extreme, under an intentional tort measure, the defendant is held liable for all damages to which his act contributes.[82] Under a negligent tort measure, damages are confined to those proximately caused by the defendant's act of inducement,[83] whether contemplated or not. The importance of whether the contract measure or the intentional tort measure is utilized is obvious. The difference between the intentional tort measure and the negligent tort measure is less significant as the distinction between those damages to which defendant's act "contributes" and those "proximately resulting" would seem to be elusive and of little import.

Iowa is not committed as to what measure it would apply in inducement cases.[84] It is apparent that the reasons for applying a contract measure are not present where the action is against a stranger to the contract for inducing

78. *Id.* Recent cases evince a clear trend away from the contract measure. *See, e.g.*, Bender v. Hearst Corp., 263 F.2d 360 (2d Cir. 1959); Voss v. Becko, 192 F.2d 827 (8th Cir. 1951); Seaboard Music Co. v. Germano, 24 Cal. App. 3d 618, 101 Cal. Rptr. 255 (1972); Mills v. Murray, 472 S.W.2d 6 (Mo. App. 1971).

79. *Id.*

80. Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Orkin Exterminating Co., Inc. v. Burnett, 160 N.W.2d 427 (Iowa 1968).

81. 9 Exch. 341, 156 Eng. Reprint 145, 5 Eng. Rul. Cas. 502 (1854).

82. *Damages Recoverable in an Action for Inducing Breach of Contract*, 30 COLUM. L. REV. 232 (1930).

83. *Id. See also* Voss v. Becko, 192 F.2d 827 (8th Cir. 1951); International Harvestor Co. v. Chicago, M. & St. P. Ry. Co., 186 Iowa 86, 172 N.W. 471 (1919); Cowan v. Western Union Tel. Co., 122 Iowa 379, 98 N.W. 281 (1904).

84. In the case of *Wilson & Co. v. United Packinghouse Workers of America*, 181 F. Supp. 809 (N.D. Iowa 1960), the Honorable Henry N. Graven observed by way of dictum that while the Supreme Court of Iowa had not yet passed upon the issue, it appeared likely that it would follow the contract measure of damages. However, this statement was made before the recent case of *Clark v. Figge*, 181 N.W.2d 211 (Iowa 1970).

its breach. The crux of tortious interference is the intentional invasion of property rights which is of a more reprehensible nature than a mere breach of contract. In addition, a person inducing a breach of contract would generally have little or no conception of the extent of the damages his act might cause. The courts should not hesitate to find him liable for all damages to which his act contributes as he has assumed the risk of such damage. By contrast, the theory of limiting contract damages is that there is a consensual agreement and the breaching party would not have entered the agreement if his liability had been unlimited.[85] Probably the singularly most important reason for rejecting the contract measure, however, is that inducing breach of contract is now but one form of interference. A contract measure cannot be implemented where there is interference to future business relations or prospects as there is no existing contract associated with such cases.[86] Thus, there would appear to be no sound basis for application of a contract measure in any tortious interference case, including inducing breach of contract.

It has been advocated that a negligent tort measure should be utilized in an inducement case.[87] Liability for inducing breach of contract is not premised upon negligence but rather upon an intentional, unjustified act of defendant.[88] There is no reason for sympathy for such a person such as there might be in a negligence case where it is realized that human beings sometimes unconsciously make mistakes.[89] Inducing breach of contract presupposes a knowing, calculated act on defendant's part. Moreover, it would be rationally inconsistent to apply a negligent tort measure in an intentional tort action. As stated previously, however, it would not seem to make much practical difference which tort measure is used.

2. *Punitive Damages*

Punitive or exemplary damages can be recovered in an action for tortious interference just as in any other intentional tort situation.[90] This is true whether

85. *Damages Recoverable in an Action for Inducing Breach of Contract*, 30 COLUM. L. REV. 232 (1930).

86. *See* authorities cited in notes 75 and 76, *supra.*

87. In the Comment, *Damages Recoverable in an Action for Inducing Breach of Contract*, 30 COLUM. L. REV. 232 (1930), the author concluded that a negligent tort measure should be applied and invasion of contractual rights was not recognized to be as great a wrong as an invasion of tangible rights. With the passage of forty-three years since then, inducing breach of contract has become recognized as a grave offense against another's property rights. But the most important reason advanced by the author was that "the courts realize that often one is justified in inducing another to breach his contract and it is at times difficult to be certain whether or not the action is wrongful." *Id.* at 241. It is submitted that this statement was, and is, erroneous. If the act was justified, there is no liability. *See* authorities cited in notes 130, *infra.*

88. *See* authorities in note 36, *supra.*

89. *Damages Recoverable in an Action for Inducing Breach of Contract*, 30 COLUM. L. REV. 232 (1930).

90. *See, e.g.*, Sparks v. McCrary, 156 Ala. 382, 47 So. 332 (1908); Guillory v. Godfrey, 134 Cal. App. 2d 628, 286 P.2d 474 (1955); Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1910); Stroud v. Smith & Sons, 194 Pa. 502, 45 A. 329 (1900).

the action involves conduct other than inducing breach of contract[91] or inducing breach of contract.[92]

G. *Unjust Enrichment*

Since the actual damage to the plaintiff may be far less than the defendant's gain from acts of tortious interference,[93] the availability of unjust enrichment based upon tortious interference will be discussed. Restitution and unjust enrichment are outgrowths of the older doctrine of quasi-contract.[94] Unjust enrichment is a legal doctrine partaking of equitable principles.[95] It is grounded upon the philosophy that the defendant has received a benefit which in justice he should not be allowed to keep.[96] The benefit unjustly received is not limited to money;[97] it can be anything of value.[98] It should be observed that the law does not favor a person who has unjustly enriched himself at the expense of another.[99]

The use of unjust enrichment as an alternative remedy to recovery of plaintiff's loss by virtue of tortious interference seems to have had its inception in the case of *Federal Sugar Refining Co. v. United States Equalization Board, Inc.*[100] That case,[101] and subsequent cases, have crystalized the

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91. Wade v. Calp, 107 Ind. App. 503, 23 N.E.2d 615 (1939); Inman v. Ball, 65 Iowa 543, 22 N.W. 666 (1885).

92. Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962); Voss v. Becko, 192 F.2d 827 (8th Cir. 1951); Patton v. United Mine Workers, 114 F. Supp. 596 (W.D. Va. 1953).

93. *Plaintiff's Measure of Recovery for Tortious Inducement of Breach of Contract*, 19 HASTINGS L.J. 1119, 1120 (1968).

94. Bill v. Cattavara, 34 Wash. 2d 645, 209 P.2d 457 (1949). There is a fascinating history behind the doctrine of unjust enrichment. The doctrine probably resulted from the jealousy between the common law courts of England and the Court of Chancery. RESTATEMENT OF RESTITUTION, Introductory Note (1939). Common law judges, conscious of their past inadequacies and jealous of the blossoming power of the Court of Chancery, invented the common law doctrine of assumpsit to provide necessary justice in situations where there was no express written contract, i.e., quantum meruit and actions for money had and received. *Id.* The term "quasi-contract" was later substituted to describe actions in such situations. *Id.*

95. *Restitution as a Substitute for an Action for Damages for Tortious Interference with Contract*, 16 U. CINN. L. REV. 247, 249 (1942).

96. One of the earliest definitions of the doctrine was made by Lord Mansfield in the case of *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (1760). In that case, the rule was enunciated as follows:

> If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of plaintiff's case, as it were upon a contract . . . . This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial and therefore much encouraged. It is for money which, *ex aequo et bono*, the defendant ought to refund.

For the modern articulation of the doctrine, *see* Gard v. Razankas, 284 Iowa 1333, 85 N.W.2d 614 (1957). *See also* Lawrence Warehouse Co. v. Tworhig, 224 F.2d 493, 498 (8th Cir. 1955).

97. *Quasi-Contracts—Torts—Quasi-Contract as an Alternative Remedy for Interference with Contract Relations*, 33 MICH. L. REV., 420-21 (1935).

98. *Id. See also* Angle v. Chicago, St. P. Minn. & Omaha Ry., 151 U.S. 1 (1894); Lawrence Warehouse Co. v. Tworhig, 224 F.2d 493, 498 (8th Cir. 1955).

99. Richland Co. v. State, 180 N.W.2d 649 (N.D. 1970); Thompson v. Fish, 152 F. Supp. 779 (S.D. Cal. 1957).

100. 268 F. 575 (S.D.N.Y. 1920). In that case, the petition alleged plaintiff and a foreign government had made a contract under which plaintiff was to sell sugar to that

rule that in order for there to be recovery for unjust enrichment, the money, property or other benefit retained does not have to come from the plaintiff.[102] The question is instead whether or not the defendant's wrong has resulted in enrichment which in equity and good conscience he should not be permitted to retain, whatever the form or source of the benefit.[103]

As previously mentioned, the doctrine of unjust enrichment is extremely flexible and can be successfully adapted to almost anything of value which the defendant has received as a result of his tortious interference. The interference may result in defendant's acquisition of a valuable contract with a third person.[104] It can also result in defendant's acquisition and enhancement of plaintiff's dealers, customers, trade secrets or business information.[105] In such instances, plaintiff may not be able to show the loss to himself because his business is new or because the business information or other thing of value has not yet been exploited by him. However, he can show the value from defendant's experience with the benefit received under unjust enrichment and may be entitled to the value as enhanced by the defendant.[106] The same is true as to future business relations or prospects. Where the defendant has taken such business relations or prospects by his interference, unjust enrichment would provide the appropriate remedy.[107]

Equitable forms of relief can also be sought in proper cases. These actions are based upon substantially the same principles as a monetary award for

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country. The Exports Administrative Board, acting through one Rolfe, refused to grant plaintiff a license to export the sugar. Rolfe was also the president of defendant company which ended up with a sugar contract with the foreign government as a result of the refusal to grant an export license. Plaintiff sought recovery of defendant's net profits from the sale. The Court held that plaintiff had stated a cause of action for unjust enrichment based upon tortious interference.

101. *Id.*

102. *See, e.g.*, R.H. Schmoling's Sons v. Dunlap, 30 Ga. App. 162, 117 S.E. 96 (1923).

103. Several cases have held that the benefit does not even have to be directly received by defendant. Second Nat'l Bank of Toledo v. M. Samuel & Sons, Inc., 12 F.2d 963 (2d Cir. 1926); Strutzel v. Williams, 109 Cal. App. 2d 512, 240 P.2d 988 (1952).

104. *See, e.g.*, Hallmark Prod., Inc. v. Mosley, 190 F.2d 904 (8th Cir. 1951); Schechter v. Friedman, 141 N.J. Eq. 318, 57 A.2d 251 (1948).

105. *E.g.*, Wear-Ever Aluminum v. Towncraft Indus., 75 N.J. Super. 135, 182 A.2d 387 (1962); Schechter v. Friedman, 141 N.J. Eq. 318, 57 A.2d 251 (1948).

106. RESTATEMENT OF RESTITUTION, §§ 151, 157 (1939). A conscious wrongdoer is generally deprived of any profit from use of property wrongfully acquired. *Id.* *See also* Nielsen v. Ferrenburg, 247 Ore. 605, 431 P.2d 841 (1967); Preenan v. Ernst, 408 Pa. 495, 102 A.2d 570 (1962); Downing v. Finn, 328 Ill. App. 397, 66 N.E.2d 323 (1946); Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (1946). The harshness of the law upon the conscious wrongdoer is illustrated by the case of *McGaffee v. McGaffee*, 244 Iowa 879, 56 N.W.2d 36 (1952), *rev'd*, 244 Iowa 879, 58 N.W.2d 357 (1953), where the plaintiff was defrauded out of his plumbing business in 1946. A money judgment was directed to be entered for the enhanced value of the assets and for profits since 1946. For other cases holding that plaintiff is entitled to value of asset as improved, *see* United States v. Ute Coal & Coke Co., 158 F. 20 (8th Cir. 1907); Stuart v. Phelps, 39 Iowa 14 (1874); MacDonald v. Page Co., 264 Mass. 199, 162 N.E. 364 (1928).

107. Under the new business rule, plaintiff may not be able to establish loss of profits with reasonable certainty. *E.g.*, City of Corning v. Iowa-Nebraska Light & Power Co., 225 Iowa 1380, 282 N.W. 791 (1938).

unjust enrichment. For instance, a constructive trust may be imposed upon the ill-begotten property,[108] an accounting may be granted,[109] or an injunction against the interference may be granted.[110]

Where the interference is committed in connection with a contract previously entered between the plaintiff and defendant, it is not clear whether the doctrine of unjust enrichment can find legal application. The doctrine has been held to apply only where no contract has been entered between the parties.[111] Technically speaking, this holding is correct.[112] However, in many cases the performance of a contract is only the means used by the defendant to aggrandize himself at plaintiff's expense and to gain control of plaintiff's business or other property.[113] When this is true, defendant will probably have gained considerably more than plaintiff will have lost by defendant's breach of contract, if any. In these circumstances, it would be terribly unfair and inequitable to restrict plaintiff to a contract remedy.

V. Defenses

A. *Generally*

Although the defenses to an action are in a state of infancy, some concrete rules have been enunciated. There is a dearth of case law as to refinements of some of the matters which have been declared in a general way to constitute defenses.

It is no defense to an action for inducing breach of contract that the plaintiff could have sued the person who actually breached the contract for its breach.[114] One of the reasons for the rule is that the person who defaulted on the contract may be insolvent and plaintiff might be left without a remedy if he were forced to institute suit against such person as a condition precedent to suing the tortfeasor.[115] The rule would also seem to result in part from the general disdain which the courts hold for the perpetrator of an intentional tort.

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108. Gribble v. Ditto, 119 F.2d 278 (2d Cir. 1941). *Cf.* Loschen v. Clark, 256 Iowa 413, 127 N.W.2d 600 (1964); Homolka v. Drahors, 247 Iowa 525, 74 N.W.2d 589 (1956).

109. Wear-Ever Aluminum v. Towncraft Indus., 75 N.J. Super. 135, 182 A.2d 837 (Super. Ct. 1962). *Cf.* McGaffee v. McGaffee, 244 Iowa 879, 56 N.W.2d 36 (1952), *rev'd*, 244 Iowa 879, 58 N.W.2d 357 (1953).

110. *See, e.g.*, Hallmark Prod. v. Mosely, 190 F.2d 904 (8th Cir. 1951); Bobbs-Merrill Co. v. Straus, 147 F. 15 (2d Cir. 1906), *aff'd*, 210 U.S. 339 (1907); L.H. Henry & Sons v. Rinesmith, 219 Iowa 1088, 160 N.W. 9 (1935).

111. Matarese v. Moore-McCormack Lines, Inc., 158 F.2d 631 (2d Cir. 1946).

112. *See* authorities cited in note 94, *supra*.

113. Recovery of defendant's profits has been permitted in what appears to be interference cases where courts have determined that justice should not permit him to retain such gains. MacDonald v. Winfield Corp., 93 F. Supp. 153 (E.D. Pa. 1950); Ritz Cycle Car Co. v. Driggs-Seabury Ordinance Corp., 237 F. 125 (S.D.N.Y. 1916); Automatic Laundry Serv., Inc. v. Demas, 216 Md. 544, 141 A.2d 497 (1958); Ingram v. Bigelow, 138 N.Y.S.2d 217 (Sup. Ct. 1954).

114. Wilson & Co. v. United Packinghouse Workers of Am., 181 F. Supp. 809 (N.D. Iowa 1960); Kock v. Burgess, 167 Iowa 727, 149 N.W. 858 (1914).

115. Wilson & Co. v. United Packinghouse Workers of Am., 181 F. Supp. 809 (N.D. Iowa 1960); Kock v. Burgess, 167 Iowa 727, 149 N.W. 858 (1914), *rehearing denied*, 176 Iowa 493, 158 N.W. 534 (1916).

The credulity of the person induced to breach his contract with the plaintiff cannot in and of itself be used by the defendant to defeat liability for tortious interference.[116] The fact that no reasonable man would have believed the overtures of the defendant goes merely to whether such person was in fact influenced by defendant to breach the contract.[117] Further, the negligence of the party injured by tortious interference would not appear to be a defense.[118]

During the continuance of a breach of contract by the person alleging tortious interference, no action can be brought by him.[119] It goes without saying that in such situations the plaintiff cannot show that anything defendant did was the cause of the contractual breakdown.

B. *Privilege*

Justification or privilege constitutes the primary defense to an action for interference.[120] At the outset, however, there is a divergence of approaches taken as to whether the court or jury makes the determination of the types of conduct which should be privileged. Under what can be called the Minnesota rule, the jury is called upon to determine whether the defendant's conduct is reasonable under all of the circumstances.[121] Other courts appear to adopt a diametrically opposite stance and state that the privilege must be one which the law will recognize[122] which, in turn, depends upon policy.[123] Under this rule, the courts seem to take it upon themselves to decide the issue as a matter of law, even where mixed questions of law and fact are present. Vermont appears to have adopted a middle course between these two approaches. There, it is only when the defendant is found by the court to have been in the exercise of an equal or superior right as a matter of law to that of plaintiff that the issue is withheld from the jury.[124] With the exception of Minnesota, most courts agree that the theoretical determination of what is privileged depends heavily upon policy.[125]

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116. RESTATEMENT, *supra* note 4, comment j.
117. *Id.*
118. The negligence of another is not usually a defense to a wilful tort. Sutton v. Greiner, 177 Iowa 532, 159 N.W. 268 (1916); Bauer, *Contributory Negligence As A Defense to An Action for Fraud*, 18 NOTRE DAME LAW. 331, 335 (1943).
119. Johnson v. Holt, 173 Cal. App. 2d 107, 342 P.2d 398 (Cal. App. 1959).
120. Johnson v. Raddke, 293 Minn. 409, 196 N.W.2d 478 (1972).
121. Williams v. Storz Broadcasting Co., 270 Minn. 525, 134 N.W.2d 892 (1965); Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 205 N.W. 630 (1925). *See also* Hope Basket Co. v. Prod. Advancement Corp., 187 F.2d 1008 (6th Cir. 1951); Wilkenson v. Powe, 300 Mich. 275, 1 N.W.2d 539 (1942).
122. Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946).
123. House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962); Green v. Victor Talking Mach. Co., 24 F.2d 378 (2d Cir. 1928), *cert. denied*, 278 U.S. 602 (1928).
124. Mitchell v. Aldrich, 122 Vt. 19. 163 A.2d 833 (1960).
125. *E.g.*, Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941); Wampler v. Palmerton, 250 Ore. 65, 439 P.2d 601 (1968). Under the RESTATEMENT, *supra* note 4, § 767, a nonexclusive list of five important factors are enumerated. They include the

The better rule would appear to be that the courts should decide what can constitute privileged conduct and then to submit the issue of whether defendant's conduct was privileged under the particular factual setting to the jury under proper instructions.[126] On the one hand, the jury should not be left to flounder in the realm of what conduct should be privileged as it is in Minnesota, because complicated and competing policy values must enter such a determination. Juries are simply not capable of sifting and weighing societal values and such an approach is too haphazard and nebulous. On the other hand, it does not seem appropriate for the courts to decide as a matter of law what is privileged and whether the privilege exists in a given case where there are factual controversies. Traditionally, it is wisest to trust the composite judgment of the jury to resolve factual disputes.

It is safe to say that under any approach, a colorable privilege will be overcome by the means used if they are predatory.[127] Similarly, malevolent motives prompting the interference will destroy claim of privilege.[128]

C. *Types of Privileges*

The most commonly raised privilege is the privilege of competition. The privilege comes into play when a competitor interferes in his rival's business relations or expectancies[129] but does not shield interferences with existing contract relations.[130] The privilege emanates from the great value placed upon the free enterprise system in this country.[131] However, the preservation of the security of contract relations prevents operation of the privilege when existing contract relations are disturbed.[132]

Various qualifications and restrictions have developed in relation to the privilege of competition. The privilege gives no comfort to an interferer

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nature of the actor's conduct, the nature of the expectancy with which his conduct interferes, the relations between the parties, the interest sought to be advanced by the actor and the societal interests in protecting the expectancy on the one hand and the actor's freedom of action on the other. Policy questions are intermixed with factual considerations in the Restatement list. Comment a to Section 767. *See* Middlesex Concrete Prod. & Excavating Corp. v. Caberet Indus. Ass'n, 37 N.J. 507, 181 A.2d 774 (1962) (adopting RESTATEMENT factors).

126. Under this approach, the facts would have some bearing upon the determination of what should be privileged. However, the major factual issues as to whether the defendant was in fact in the exercise of the privilege would be submitted to the jury. Collins v. Vickter Manor, 47 Cal. 2d 875, 306 P.2d 783 (1957).

127. Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 143 N.W. 483 (1913); Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1910); RESTATEMENT, *supra* note 4, § 767, comment a.

128. Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1910); RESTATEMENT, *supra* note 4, § 766, comment m; Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 755 (1928).

129. RESTATEMENT, *supra* note 4, § 768.

130. *Id. See also* Northeast Airlines, Inc. v. World Airways, Inc., 262 F. Supp. 316 (D. Mass. 1966). However, one court has held that there is no prohibition against advising a third person to exercise legal rights to terminate if there is no malicious intent or use of improper means. Engine Specialities, Inc. v. Bombardier Ltd., 330 F. Supp. 762 (D. Mass. 1971).

131. RESTATEMENT, *supra* note 4, § 762, comment a.

132. *Id.*, comment on Subsection (2).

who acts from actual malice or uses predatory means.[133] Also, the privilege only protects one who is actually in competition with the injured person.[134] If the defendant has granted plaintiff a distributorship, the right to compete is removed within the geographical area of the distributorship.[135]

A simple refusal to deal is a perfectly justifiable act since it involves the right to select the persons with whom one does business except that such refusal cannot be part of an effort to create a monopoly.[136] By the same token, the refusal to deal cannot violate legislation against discrimination.[137]

One having a financial interest in a business has a privilege to cause the business not to enter business relations with another.[138] It appears that to qualify as a financial interest, the interest must be a present, direct interest such as that possessed by a partner or a stockholder,[139] particularly in a close corporation.[140] Also, the interference must originate from a desire to protect the defendant's financial interest in the business.[141] The protection accorded does not include interference with an existing contract.[142] And here again, actual malice or improper means negate the privilege.[143]

Closely akin to the financial interest privilege is the privilege accorded to one for the protection of his own contractual relations or business.[144] It appears that this privilege arises out of necessity and applies when there are reasonable grounds for the interferer to believe his own financial interests are in jeopardy.[145] It does not appear that this privilege bestows a cloak of immu-

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133. Kelite Prod., Inc. v. Binzel, 224 F.2d 131 (5th Cir. 1955); Buxbom v. Smith, 23 Cal. Sup. Ct. Rpts. 2d 535, 145 P.2d 305 (1944); RESTATEMENT, *supra* note 4, § 768.

134. Buxbom v. Smith, 23 Cal. 2d 535, 145 P.2d 305 (1944); RESTATEMENT, *supra* note 4, § 768.

135. Shell Oil Co. v. State Tire & Rubber Co., 126 F.2d 971 (6th Cir. 1942); Buckley & Scott Util., Inc. v. Petroleum Heat & Power Co., 313 Mass. 498, 48 N.E.2d 154 (1943).

136. Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946); RESTATEMENT, *supra* note 4, § 768, comment a.

137. RESTATEMENT, *supra* note 4, § 762.

138. Williams v. Ashcraft, 72 N.M. 120, 381 P.2d 55 (1963); Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964); RESTATEMENT, *supra* note 4, § 769. *See* Zoby v. American Fidelity Co., 143 F. Supp. 763 (E.D. Va. 1956), *aff'd*, 242 F.2d 76 (4th Cir. 1957) (holding surety responsible for cost of project privileged to recommend acceptance of lower bid after contract entered with plaintiff).

139. *Id.* Business dependency will not satisfy the requirement of a direct financial interest. Bank of Utah v. Commercial Sec. Bank, 369 F.2d 19 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967).

140. Avins, *Liability for Inducing a Corporation to Breach its Contract*, 43 CORNELL L.Q. 55, 63 (1957) [hereinafter cited as Avins].

141. Morrison v. Frank, 81 N.Y.S.2d 743 (Sup. Ct. 1948); RESTATEMENT, *supra* note 4, § 769.

142. Silva v. Bankers Commercial Corp., 163 F.2d 602 (2d Cir. 1947); RESTATEMENT, *supra* note 4, comment d.

143. Lazar v. Merchants' Nat'l Properties, Inc., 45 Misc. 2d 514 (Sup. Ct. 1964), *aff'd mem.*, 256 N.Y.S.2d 242 (App. Div. 1965); RESTATEMENT, *supra* note 4, § 769.

144. Hendler v. Cuneo Eastern Press, Inc., 279 F.2d 181 (2d Cir. 1960); Gronemeyer v. Hunter Mfg. Corp., 34 Del. Ch. 222, 101 A.2d 489 (Ct. Chanc. 1954).

145. *See* Wolf Studebaker, Inc. v. Studebaker-Packard Corp., 50 Misc. 2d 226, 270 N.Y.S.2d 158 (Sup. Ct. 1966) (privilege for automobile manufacturer to transfer operations to avert economic disaster though plaintiff dealer adversely affected). Where there is no legitimate interest in need of protection, there is no privilege. Sloan v. Journal Publishing Co., 213 Ore. 324, 324 P.2d 449 (1958).

nity upon one who acts to advance future business prospects.[146] A threat to protect a legally protected interest is similarly privileged[147] but the threat must be justifiable and in good faith.[148]

A person who is responsible for the welfare of another has a privilege to advise that person not to enter or continue business relations with another.[149] This is one of the few instances in which a privilege extends to include advice to breach a contract.[150] To qualify for this privilege, the advice must be sought and officious giving of advice is not covered.[151] The nature and types of the persons entitled to the benefit of this privilege remain to be adjudicated. The *Restatement*[152] suggests that the requisite relationship exists between parent and child, a minister and his congregation, a teacher and student and an employer and employee.

It would seem that the privilege should be accorded to one in such a capacity that persons would normally seek his advice on their personal affairs. Otherwise, almost any type of relationship would qualify. It is clear that parents would come within this classification. Also, a minister would usually be expected to be closely connected with the personal lives of his parishioners. However, it would be strained to say that a teacher or employer would be entitled to automatic protection of the privilege if the above premise is correct. Their relationships are formed on more of an occupational plane and involvement with personal lives of the employee or student is not a necessary or expected incident of such relationships. In these or similar instances, perhaps the question of whether the privilege will be given should turn on facts established as to the closeness of the particular relationship.

A privilege related to the privilege granted to one responsible for the welfare of another is the privilege of the adviser.[153] This privilege extends as well to advice to breach an existing contract.[154] Also, the advice must be requested rather than solicited by the adviser.[155] In both cases, the advice must be honestly given.[156] It is somewhat obscure as to who is entitled to be declared

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146. *Id.*

147. Kemart Corp. v. Printing Arts Research Laboratories, Inc., 146 F. Supp. 21 (S.D. Cal. 1956), *aff'd*, 269 F.2d 375 (9th Cir. 1959); Western Elec. Co. v. Hammond, 44 F. Supp. 717 (D. Mass. 1942); RESTATEMENT, *supra* note 4, § 773.

148. Blum v. William Goldman Theatres, Inc., 60 F. Supp. 468 (E.D. Pa. 1946), *modified*, 164 F.2d 192 (3rd Cir. 1947); Leek v. Brasfield, 226 Ark. 316, 290 S.W.2d 632 (1956); Ramondo v. Pure Oil Co., 159 Pa. Super. 217, 48 A.2d 156 (1946).

149. RESTATEMENT, *supra* note 4, § 770.

150. *Id.*

151. *Id.*, comment a.

152. *Id.* In Hopper v. Lennen & Mitchell, Inc., 52 F. Supp. 319 (S.D. Cal. 1943), a sponsor of a radio program who was in a confidential relationship with an agent was held to be privileged to influence the agent to repudiate a contract with a third person for services on a radio program.

153. RESTATEMENT, *supra* note 4, § 772. In both instances, the privileges would seem to be granted because of the societal value of encouraging freedom of communication. *Id.*, comment a.

154. RESTATEMENT, *supra* note 4, § 772.

155. RESTATEMENT, *supra* note 4, § 772, comment a.

156. *Id. See also* RESTATEMENT, *supra* note 4, § 770.

an adviser.[157] It is apparent that attorneys, bankers and investment counselors are persons that would normally be expected to render advice upon business affairs.[158] It has been suggested that doctors[159] be accorded the privilege but that profession would not seem to have any rightful connection with a person's business activities.

The privilege of a corporate officer is analogous to the privilege of an adviser. Corporate officers or directors are privileged to interfere with or induce breach of the corporation's contracts or business relations[160] with others as long as their actions are in good faith and for the best interests of the corporation.[161] However, where an officer or director acts against the best interests of the corporation,[162] acts for his own pecuniary benefit[163] or with the intent to harm the plaintiff,[164] he is personally liable. He is also liable if he commits an independent tort such as fraud in connection with the interference.[165]

Other privileges have received judicial recognition but little is yet evident as to their limits or restrictions. There is a privilege to use proper means to interfere with a contract or business expectancy which is in violation of a defined public policy[166] or to interfere upon reasonable grounds for the public

157. The Restatement states that the privilege also applies to "amateur" advisers. RESTATEMENT, *supra* note 4, § 772, comment a.

158. *Id. See also* Walsh v. O'Neill, 350 Mass. 586, 215 N.E.2d 915 (1966); Calbom v. Knudtzon, 65 Wash. 2d 157, 396 P.2d 142 (1964).

159. RESTATEMENT, *supra* note 4, § 772, comment a.

160. There is a societal value in allowing directors and officers wide latitude to make corporate policy decisions without fear of personal repercussions. Avins, *supra* note 140. Such decisions include business judgments to breach an existing contract which is burdensome to the corporation and does not serve its best interests. Application of Brookside Mills, Inc., 276 App. Div. 357, 94 N.Y.S.2d 509 (1950); FEUER, PERSONAL LIABILITY OF CORPORATE OFFICERS AND DIRECTORS, ch. 20 (Prentice Hall 1961) [hereinafter cited as FEUER].

161. Allison v. American Airlines, Inc., 112 F. Supp. 37 (N.D. Okla. 1953); Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964); FEUER, *supra* note 160.

162. 3 FLETCHER, CYCLOPEDIA OF CORPORATIONS, ch. 11, § 1001 (1965) [hereinafter cited as FLETCHER]. It is easier to say an officer or director is acting against the best interest of the corporation and for his own benefit when he controls a large block of the corporation's stock. Pennington Trap Rock v. Pennington Quarry Co., 22 N.J. Misc. 318, 38 A.2d 869 (1944).

163. Ehrlich v. Alper, 145 N.Y.S.2d 252 (1955), *aff'd*, 1 App. Div. 2d 875, 149 N.Y.S.2d 562 (1956); A.S. Rampell, Inc. v. Hyster, 3 N.Y.2d 369, 165 N.Y.S.2d 475, 144 N.E.2d 371 (1957); FLETCHER, *supra* note 162, Avins, *supra* note 160. In a case in which the officer or director's act is for some ulterior motive of his own but happens to be consistent with corporate interests, there is a split of authority as to whether there is personal liability. Under one view, officers or directors are nearly always financially interested to some degree in any corporate transaction and there should be no liability. Tye v. Finkelstein, 160 F. Supp. 666 (D. Mass. 1958); Wampler v. Palmerton, 439 P.2d 601 (Ore. 1968). *But see* Cerverno v. Fellows, 300 Mass. 331, 15 N.E.2d 483 (1938); Remy Beverages, Inc. v. Myer, 56 N.Y.S.2d 828 (1945), *aff'd*, 269 App. Div. 1013, 59 N.Y.S.2d 371 (N.Y. App. 1945), basing liability upon the "dominant reason" motivating the officer or director.

164. Avins, *supra* note 160, at 60; W.P. Iverson & Co. v. Dunham Mfg. Co., 18 Ill. App. 2d 404, 152 N.E.2d 615 (1958); Snell Mfg. Corp. v. Century Indus., Inc., 15 App. Div. 187, 221 N.Y.S.2d 528 (1961).

165. *See, e.g.*, Wilson & Co. v. United Packinghouse Workers of Am., 181 F. Supp. 809 (N.D. Iowa 1960); Schulenburg v. Signatrol, Inc., 33 Ill. 2d 379, 212 N.E.2d 865 (1965); Elrich v. Alper, 145 N.Y.S.2d 252, *aff'd.* 1 App. Div. 2d 875, 149 N.Y.S.2d 562 (1956).

166. *See* authorities cited in note 125, *supra.*

good.[167] Public officials are shrouded by privilege when their acts are in pursuit of their public duties.[168] Finally, there is a privilege covering testimony at a judicial or quasi-judicial proceeding which interferes with a contract or business opportunity.[169]

VI. Conclusion

The law of tortious interference is currently in a developmental state comparable to the law of products liability. In both, whole new areas of law have been opened. It is hoped that this article has been enlightening as to the destiny of tortious interference. It is ordained to become the most predominant business tort—the new watchdog of morality in the market place.

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167. Blank v. Palo Alto-Stanford Hosp. Center, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965); Hughes v. Superior Court, 186 P.2d 756 (Cal. App. 1947); Middlesex Concrete Prod. and Excavating Corp. v. Carteret Indus. Ass'n, 37 N.J. 507, 181 A.2d 774 (Sup. Ct. 1962).

168. Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1958); Bullock v. Joint Class "A" School Dist. No. 241, 75 Idaho 304, 272 P.2d 292 (1954); Mefford v. City of Dupontonia, 49 Tenn. App. 349, 354 S.W.2d 823 (1961).

169. This privilege has been declared to be absolute by some courts. J.D. Construction Corp. v. Isaacs, 95 N.J. Super. 122, 230 A.2d 168 (1967). *But see* Arlington Heights Nat'l Bank v. Arlington Heights Fed. Sav. and Loan Ass'n, 37 Ill. 2d 546, 229 N.E.2d 514 (1967) (holding privilege qualified).

MUTUALITY IN CONFLICT—FLEXIBILITY AND FULL FAITH AND CREDIT

Jeffrey E. Lewis†

The intrastate preclusive effect of a constitutionally valid judgment is governed by the judgment state's[1] law of res judicata.[2] The interstate preclusive effect of such a judgment is governed by the national policy of full faith and credit. When interstate judgment preclusion is sought, the enforcement state[3] has traditionally imported and utilized F-1's law of res judicata when deciding the question of enforcement vis-a-vis non-enforcement, and the question of range of effect. To some extent this importation and utilization is mandated by the full faith and credit clause,[4] but to what extent this mandate is inexorable is still not clear. May F-2 engage in a reasoned choice of law decision rather than a mechanistic application of the law of F-1, at least as to some facets of judgment preclusion? To what extent is F-1's law of res judicata incorporated into the judgment for purposes of full faith and credit, and thereby made binding upon the enforcement state? If F-1 requires mutuality for the assertion of collateral estoppel,[5] must F-2 also require mutuality, or may F-2 allow the assertion of collateral estoppel in the absence of mutuality according to its own local law of res judicata? And how should the converse situation be treated? These problems center on the broader question of flexibility within the mandate of the full faith and credit clause.[6]

I. Full Faith and Credit: Has the Supreme Court Left Room For Flexibility?

The traditional rule is well represented by the *Restatement (Second)*

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1. The state where the judgment in question was rendered; Forum-1 or F-1.

2. *Res judicata* is used here in its broadest sense to include all aspects of preclusion by judgment.

3. The state where preclusive effect is sought for a sister state judgment; Forum-2 or F-2.

4. "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.

5. Collateral estoppel is one branch of *res judicata* and refers to the preclusive effect that a judgment may have with respect to issues actually and necessarily litigated in a prior proceeding when drawn into a question in a subsequent suit upon a different cause of action. The rule of mutuality requires that the party asserting collateral estoppel be bound by the judgment equally with the person against whom the estoppel is asserted.

6. The general question was considered in Carrington, *Collateral Estoppel and Foreign Judgments*, 24 Ohio St. L.J. 381 (1963). *See also* Note, 68 Colum. L. Rev. 1590 (1968).