KENTUCKY COURT OF APPEALS.

Jan. 13, 1891.

CHAMBERS v. BALDWIN.

Action—Procuring Breach of Contract.

A party to a contract for the sale of goods cannot maintain an action against one who maliciously, and with design to injure him, and to benefit himself by becoming a purchaser in his stead, advises and procures the other party to break the contract.

Appeal from Circuit Court, Mason County.

LEWIS, J.—The cause of action stated in the petition of appellants is, in substance: That, as partners doing business under the firm name of Chambers & Marshall, they made a contract with one Wise, whereby he sold, and agreed to deliver to them in good order during delivery season of 1877, his half of a crop of tobacco, then undivided, which he had raised on shares upon the farm of appellee; in consideration whereof they promised to pay on delivery at the rate of five cents per pound. That they were ready, able and willing to receive and pay for the tobacco as and at the time agreed on, and demanded of him compliance with the contract; but he had already delivered it to appellee and Newton Cooper, tobacco dealers, and then notified appellants he would not deliver it to them, and they might treat the contract as broken and at an end. That appellee knew of the existence of said contract, but maliciously, on account of his personal ill-will to Chambers, one of appellants, and with design to injure by depriving them of profit on their purchase, and to benefit himself by becoming purchaser in their stead, advised and procured Wise, who would else have kept and performed, to break the contract, whereby they have been damaged $———. That he (Wise) was at the time known by appellee to be, and now is, insolvent; so, being without other redress, they bring this action. Appellee is alleged to have been actuated to do the act complained of by ill-will to one of appellants only, which however to avoid confusion we will treat as a malicious intent to injure both; and also by a design to benefit himself by becoming purchaser of the tobacco for the firm of which he was a member. And thus two questions of law arise on demurrer to the petition: First, whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it; second, whether an act lawful in itself can become actionable solely because it was done maliciously.

As appellee, being no party to the contract, did not, nor could, himself break it, his wrong, if any, was in advising and procuring the equivalent of cancelling, and inducing Wise to do so. Consequently, while the remedy of appellants against him (Wise) was by action *ex contractu*, recovery being limited to actual damage sustained, their action against appellee is, and could be, in no other than in form *ex delicto;* recovery, if any at all, not being so limited. Nevertheless, in Addison on Torts (vol. 1, p. 37) it is said: "Maliciously inducing a party to a contract to break his contract, to the injury of the person with whom the contract was made, creates that conjunction of wrong and damage which supports an action." The authority cited in support of the proposition thus stated, without qualification, is the English case of *Lumley* v. *Gye*, 2 El. and Bl. 228, decided in 1853, followed by *Bowen* v. *Hall*, decided in 1881, and reported in 20 Am. Law Reg. (N. S.) 578, though it is proper to say there was a dissenting opinion in each case. The action of *Lumley* v. *Gye* was in tort, the complaint being that the defendant maliciously enticed and procured a person, under a binding contract to perform at plaintiff's theatre, to refuse to perform, and abandon the contract. The majority of judges held, and the case was decided upon the theory, that remedies given by the common law in such cases are not in terms limited to any description of servants or service; and the action could be maintained upon the principle, laid down in Comyn's Digest, that "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." The position of Justice Coleridge was to the contrary—that, as between master and servant, there was an admitted exception to the general rule of the common