dealt with in this Court. Of course, if you are not satisfied that it has been made out that this certificate was issued knowing it to be false and for a serious purpose, then the panel will be entitled to your verdict. I ask you, gentlemen, to consider it now.

Dean of Faculty—I understand your Lordship does not differ from this view, that to constitute the crime it must be for the fraudulent purpose of cheating the person to whom the representations were made, and for the purpose and to the effect of obtaining a profit to the accused and a corresponding injury to the other party.

Lord Justice-Clerk—I accept that, except that I do not read the word profit as meaning pecuniary profit. It is exactly the same as I read a little while ago.

Dean of Faculty—That was a case of adulteration.

Lord Justice-Clerk—I know; it was putting sawdust into oatmeal; but the principles are the same. I quite accept what was laid down there except this, that you must not take the word profit as meaning profit in money only. It must be a serious purpose of gaining an advantage in some way—an advantage such as I have pointed out, of not losing the custom of a very valuable customer for the future.

The jury unanimously found the panel guilty as libelled and strongly recommended him to the utmost leniency of the Court.

In moving for sentence counsel for the complainers stated that the whole object of the prosecution had been satisfied by the verdict of the jury, and that there was no desire for punishment of the individual at fault. He therefore suggested that the ends of justice would be satisfied with an admonition.

The Lord Justice-Clerk formally reprimanded the panel, and he was dismissed from the bar.

Counsel for the Complainers — Clyde, K.C.—Macmillan. Agents—J. & J. Ross, W.S.

Counsel for the Panel—Dean of Faculty (Dickson, K.C.) — M'Clure. K.C. — Horne. Agents—Morton, Smart, Macdonald & Prosser, W.S.

COURT OF SESSION.

Friday, November 19.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MACKENZIE *v.* THE IRON TRADES EMPLOYERS' INSURANCE ASSOCIATION LIMITED.

Reparation—Master aud Servant—Inducing Employer to Dismiss or not to Employ Workman—Insurance—Lists of Workmen not to be Employed Issued to Employers—Specification of Illegal Means Employed—Averments—Relevancy.

A workman who had claimed and received compensation from a firm of employers under the Workmen's Compensation Act 1906, brought an action of damages against an insurance company with whom the said firm and other similar firms were insured, in which he, *inter alia*, averred—"The defenders are in the habit of issuing regularly from time to time, to parties insured with them as aforesaid, lists of workmen whom they insist shall not be employed by said parties. The workmen whose names are inserted by defenders in said lists are thereby represented to be persons who are unfit or ought not to be employed. The defenders illegally, unwarrantably, and without any justification or reason therefor, included pursuer's name in said lists of unemployable persons issued by them as aforesaid, and thereby wrongfully, illegally, and maliciously brought about the pursuer's dismissal and non-employment on each of the occasions hereinafter condescended on." On record he specified three occasions on which, after either being employed or having a chance of being employed on work for firms insured with the defenders, he either was dismissed or refused employment. He averred that but for the defenders' actings he would not have been dismissed or would have been given employment on the occasions mentioned, but he did not aver that there had been any breach of contract.

Held that as the pursuer had failed to give any descriptive condescendence of any illegal means employed, he had not relevantly averred any actionable wrong, and action *dismissed* as irrelevant.

Mogul Steamship Company v. *M'Gregor, Gow, & Company*, [1892] A.C. 25; *Allen* v. *Flood*, [1898] A.C. 1; and *Quinn* v. *Leathem*, [1901] A.C. 495, *considered and applied.*

Giblan v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600, *commented on.*

On 29th January 1909 David Mackenzie, plater's helper, 15 Wilkie Place, Leith, brought an action against the Iron Trades Employers' Insurance Association, Limited, 105 West George Street, Glasgow, for payment of £500 damages.

The defenders insured, amongst others, the firms of Hawthorns Limited, Menzies & Company, Limited, and Cran & Company, Limited, all of Leith. In March 1908 the pursuer, while at work on a sub-contract from Hawthorns Limited, had sustained injuries to his right hand, for which he had claimed and received compensation from Hawthorns Limited under the Workmen's Compensation Act 1906.

The pursuer averred—"(Cond. 3) The defenders are in the habit of issuing regularly from time to time, to parties insured with them as aforesaid, lists of workmen whom they insist shall not be employed by said parties. The workmen whose names are inserted by defenders in said lists are thereby represented to be persons who are unfit or ought not to be employed. The defenders issued their said lists to the said Hawthorns Limited, Menzies & Company, Limited, and Cran & Company, and to the whole other parties insured with defenders in Leith and elsewhere throughout the United Kingdom. The defenders illegally, unwarrantably, and without any justification or reason therefor, included pursuer's name in said lists of unemployable persons issued by them as aforesaid, and thereby wrongfully, illegally, and maliciously brought about the pursuer's dismissal and non-employment on each of the occasions hereinafter condescended on. (Cond. 4) On 17th June 1908 the pursuer obtained work from one John M'Swan, plater, Leith, who had got a sub-contract with said Hawthorns Limited for putting casing on a steam-drifter called 'The Morning Star.' The said John M'Swan, after the pursuer worked for him one day, was ordered by Hawthorns Limited, on the morning of 19th June, to dismiss the pursuer. M'Swan dismissed the pursuer accordingly. This order was given by Hawthorns Limited in consequence of the pursuer's name being included in said lists issued by the defenders as aforesaid, and of instructions given by the defenders to them to see that no person whose name was in said list was employed by them or by any sub-contractor with them. But for his name being included in said lists the said John M'Swan would have continued to employ the pursuer on said job, which lasted for four weeks. . . . The defenders are called on to state the reasons for the pursuer's dismissal connected with the management of Hawthorns Limited. (Cond. 5) In or about the month of July 1908 the pursuer was engaged by one John Hyndman, painter and contractor, Leith, to work at Granton on a sub-contract which the latter had from Hawthorns Limited. The pursuer, however, was not allowed to start on the said job, because intimation had been made by Hawthorns Limited to the said John Hyndman in the interval that the pursuer's name appeared on the said lists as aforesaid, and orders had been given in consequence to him that he was to cancel the employment of the pursuer. These orders were given by Hawthorns Limited in consequence of orders sent to them by the defenders to see that no persons whose name was on said lists was employed by them or by any sub-contractor with them. But for the defenders' actings the pursuer would have received work from the said John Hyndman, and would have had continuous employment from him during the subsistence of the job in question. (Cond. 6) Shortly after the incident above referred to, the pursuer applied for a job to Menzies & Company, Limited, but because his name appeared in defenders' said lists, and in consequence of orders issued by defenders to Menzies & Company, similar to the orders above condescended on, he was refused employment. The pursuer believes and avers that but for this fact he would have got employment from Menzies & Company, Limited, on the occasion in question. (Cond. 7) On 23rd November 1908 the pursuer received work from one John Laird, plater, Leith, who had a sub-contract from said Cran & Company, Limited, and was engaged working at said job till about four o'clock in the afternoon of the same day, when the said John Laird was ordered by Cran & Company, Limited, to dismiss the pursuer, because, as they informed him, and as was the fact, his name appeared in said list of unemployables issued by the defenders to Cran & Company, Limited, with orders similar to the orders above condescended on. Mr Laird thereupon dismissed pursuer. Said job is still unfinished, and is likely to occupy at least five months, during which time, but for the defenders having included the pursuer's name in said list, his employment would have continued. The pursuer was and is well known to the trade to be a thoroughly efficient workman in all branches of the plating trade, and prior to the inclusion of his name in the said list of unemployables issued by the defenders as aforesaid he had no difficulty in getting employment in Leith or elsewhere as a plater's assistant. (Cond. 8) The defenders enforce the dismissal or non-employment of parties whose names appear in their said lists by representing they are unfit to be employed, and by requiring the instant dismissal of any of them who have been employed. In the event of non-compliance with this latter order, the defenders refuse liability for accidents occurring to them during such employment, after said lists containing their names have been issued by the defenders as aforesaid, and it was by means of said lists, accompanied by said orders and threats, that the defenders wrongfully and illegally coerced the firms in question to procure the non-employment of the pursuer and the breaches of contracts of employment with him when he was employed. In acting in the manner above condescended on towards the pursuer, the said firms were acting as members of the defenders' association and upon the instructions of and on behalf of said association. The pursuer has suffered great worry and finan-

cial loss, and the sum sued for by him in name of damages is, under the circumstances, reasonable. . . ."

He pleaded—"(1) The defenders having wrongfully, illegally, and unwarrantably included pursuer's name in the list of persons not to be employed, issued by them, and having thereby brought about the pursuer's non-employment and dismissal, all as condescended on, are liable to him in damages. (2) The defenders having wrongfully and illegally coerced the firms condescended upon not to employ the pursuer, or to dismiss him when employed, all as condescended on, they are liable to him in reparation. (3) The defenders having wrongfully continued to prevent the pursuer from obtaining employment as condescended on, are liable in reparation."

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant.

On 22nd May 1909 the Lord Ordinary (MACKENZIE) dismissed the action as irrelevant.

Opinion.—"The pursuer is a workman, and the defenders are an insurance company who insure firms against claims under the Workmen's Compensation Act.

"The pursuer's complaint against the defenders is that they included his name in a list which they circulated among the firms insured with them of workmen whom they insisted should not be employed, and that the workmen whose names appeared on the list were represented to be persons who were unfit or ought not to be employed. The pursuer then avers—'The defenders illegally, unwarrantably, and without any justification or reason therefor, included pursuer's name in said lists of unemployable persons issued by them as aforesaid, and thereby wrongfully, illegally, and maliciously brought about the pursuer's dismissal and non-employment on each of' four occasions which are condescended on.

"In none of the cases is it alleged on record that there was any breach of contract for the pursuer on the part of his employer. The instance in cond. 5 comes nearest to breach of contract, but the terms of the contract are not set out, and it may be that the right of the sub-contractor to engage the pursuer was subject to the implied condition that Hawthorns Limited were to consent. The four occasions referred to on record are therefore cases in which the employment was legally terminated by the employer or employment was refused.

"The pursuer says the defenders have done him an actionable wrong; that it is for them to justify what they did; and if they fail to do so he is entitled to damages. He asks that an issue should be adjusted and the case sent to a jury.

"In my opinion the pursuer's argument halts at the first step. I do not find any averment that the firms whose names are mentioned were bound to comply with the intimation which it is alleged was made by the circulation of the list. There is no doubt in cond. 8 an averment that the firms in question were acting as members of the defenders' association and upon the instructions of and on behalf of the association. This, however, is not consistent with the earlier articles of the condescendence in which the firms in question are placed at arm's length with the defenders. If the firms were under no obligation to comply with the intimation from the defenders, the termination of the pursuer's employment was not a necessary consequence of anything the defenders did. In whatever language the pursuer's averments may be couched the situation is obvious. The defenders ensure the firm's risks at a certain rate. They intimate by the circulation of these lists that there are certain risks they will not undertake for the premiums charged. (This must be the meaning of it, because of course any workman could be insured if the premium were only high enough.) The employer then is put to his election. He may, if he likes to take the risk himself, continue the workman in his employment though his name is on the insurer's list. In this event he is his own insurer. Or if he does not choose to take the risk he may terminate the employment.

"The fallacy at the root of the pursuer's case lies in the contention that any interference with what was termed a man's right to work constitutes an actionable wrong. This is not the law. If it were, it is difficult to see how there could be free competition in business. There is no actionable wrong unless the interference is unjustifiable.

"The pursuer maintained that it is for the defenders to justify what they have done. The conclusive answer to this is contained in Lord Herschell's opinion in *Allen v. Flood*, 1898, A.C. 1, at p. 139—'A man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling, any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shown to be in its nature wrongful, and thus to require justification.'

"How can it be said that it is wrongful interference for an insurance company to say they will not undertake a particular risk at a particular figure? And how can the Court inquire into and decide the question whether the insurance company were justified in what they did, which would involve fixing the rates at which the company are to transact their business? The pursuer has the right to earn his own living in his own way, and the correlative of this is the general duty of everyone not to prevent the free exercise of this liberty, subject always to this important exception, which the pursuer's argument in the present case overlooks, that anyone may interfere in so far as his own liberty of action may justify him in doing so. This is pointed out by Lord Lindley in *Quinn* v. *Leathem*, 1901 A.C. 495 at p. 534, which is one of the cases the pursuer founds on.

"It is not for the defenders to allege and prove justification. The pursuer must relevantly aver that the defenders' actings

were unjustifiable. This in my opinion he has failed to do. The use of the words in cond. 3, 'illegally, unwarrantably, and without any justification,' is not enough. It would be necessary to set forth facts and circumstances to support this statement.

"Reference was made to the averment in cond. 2 that the pursuer had previously made a claim for compensation and been paid £4, 1s. for an injury which had rendered him unfit for work for about six weeks. It was suggested in argument that the placing of the pursuer's name on the list was in some way connected with his having made a claim for compensation, but there is nothing about this on record.

"I have said nothing as to what the result would have been if the defenders had employed illegal means to procure the termination of the pursuer's employment. This, as was pointed out by Lord Watson in *Allen* v. *Flood* at p. 96, would make the case entirely different.

"In cond. 8 the pursuer says the defenders used threats and coerced the firms. They likened this case to the one figured by Romer, L.J., in *Giblan* v. *National Amalgamated Labourers' Union*, 1903, 2 K.B. 600, of an individual interfering with a man's employment by threats or special influence with the design to carry out some spite or compel payment of a debt. I can find nothing on record to justify the use of the terms threats or coercion, nor is there anything averred which would make the dictum above referred to applicable.

"In the view I take it does not appear to me necessary to go further into the authorities which were fully discussed in argument. I am of opinion that the pursuer's averments are irrelevant, and that the action should be dismissed with expenses."

The pursuer reclaimed, and argued—The pursuer's averments were sufficiently relevant to entitle him to inquiry. He was entitled to know what was contained in the lists issued by the defenders. He had no means of ascertaining what was contained in these lists, as the defenders had refused to inform him. If, as he averred, the issue of these lists resulted in his ceasing to be employed, he was entitled to know whether or not the defenders' actings were justifiable, for if they were not he was clearly entitled to damages. It was not for the pursuer to aver non-justification, but for the defenders to justify their interference. *Esto* that the defenders were entitled to demand a higher rate of insurance, they were not entitled to injure the plaintiff by any illegal act—*Mogul Steamship Company* v. *M'Gregor, Gow, & Company*, [1892] A.C. 25, *per* Lord Watson at p. 42; *Allen* v. *Flood*, [1898] A.C. 1; *Quinn* v. *Leatham*, [1901] A.C. 495, *per* Lord Macnaghten at p. 510; *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600, *per* Romer, L.J., at 620; *Conway* v. *Wade*, [1909] 25 T.L.R. 779, *per* Loreburn, L.C., at p. 781. *Esto* that the *modus* of the injury had not been specified, the pursuer had no means of doing so, and he had made his averments as specific as possible. Reference was also made to *Macintosh* v. *Dun*, [1908] A.C. 390, and *Keith* v. *Lauder*, December 23, 1905, 8 F. 356, 43 S.L.R. 230.

Argued for respondent—The Lord Ordinary was right in holding the pursuer's averments irrelevant. No contractual relation existed between the pursuer and his employers, and therefore the pursuer was unable to found on any conduct inducing breach of contract. To make his action relevant he must aver either (1) something inducing breach of contract, or (2) the use of illegal means to induce another to commit a legal act to the pursuer's detriment—*Allen* v. *Flood* (*cit. supra*), *per* Lord Watson at p. 96, and Lord Herschell at pp. 139-40. Neither was averred here. There was no averment of conspiracy, or threats, or violence, or the use of illegal means, as in *Quinn* v. *Leathem*, *Conway* v. *Wade*, and the other cases cited by the pursuer. The *modus* of the alleged illegality was not specified, and that would have been easy had the facts supported it. In *Giblan* (*cit. supra*) there was an actionable wrong *in initio.*, *e.g.*, unjustifiable combination. The respondents did nothing illegal in furnishing the lists in question, unless the statements made therein were unjustifiable, and that was not averred. The pursuers had failed to show any *nexus* between his ceasing to be employed and the act complained of. In the cases which he cited there was such a *nexus* between the act complained of and the inducing cause. Assuming, however, that the pursuer was entitled to inquiry, then proof and not issues should be ordered.

At advising—

LORD PRESIDENT—In this case the pursuer David Mackenzie sues the Iron Trades Employers' Insurance Association (Limited) and asks that they should pay him £500 of damages.

I shall presently consider the wrong of which he complains, but I pause here to say—because I look upon the case as an important one—that it is one of those cases where, according to our practice, we are bound to scrutinise exactly what the pursuer says. I say this because in this matter our practice differs from that of the sister kingdom. I have no doubt that if this case was in England it would, using a common phrase, go to trial. But then it would be the duty of the judge at the trial, in certain eventualities, to withdraw the case from the jury altogether. Our practice here is not that. We are bound by the practice which was imposed upon us when jury trial was introduced by Act of Parliament; and if we find statements which, even if proved exactly up to the letter of what is averred, would leave the judge in a position where he would be bound to tell the jury that only one result could follow, namely, a verdict for the defenders, in that case we are bound not to grant an issue. An issue must be rested upon facts which,

if proved, would entitle the pursuer to a verdict, and if no such facts are averred then an issue should not be granted.

Now, the facts upon which the pursuer's case is based are these—He sets forth that he is a plater's helper, his duty being to assist platers in preparing and boring plates and placing them in position for the rivetters. The defenders are an insurance company and do business with various employers of labour, amongst other firms with Messrs Hawthorns Limited, Menzies & Company, Limited, and Cran & Company, all of Leith. The pursuer then sets forth that upon a certain date, at a certain time, he was engaged with one M'Swan, a plater, who had a contract from Hawthorns; that he was injured, and claimed compensation; and he avers that the compensation which he claimed and which he was paid by the employer was recovered by the employer from the insurance company. He then continues—and this is the point on which the case turns—"The defenders are in the habit of issuing regularly, from time to time, to the parties insured with them as aforesaid, lists of workmen whom they insist shall not be employed by said parties. The workmen whose names are inserted by defenders in said lists, are thereby represented to be persons who are unfit or ought not to be employed. The defenders issued their said lists to the said Hawthorns Limited, Menzies & Company, Limited, and Cran & Company, and to the whole other parties insured with the defenders in Leith and elsewhere throughout the United Kingdom. The defenders illegally, unwarrantably, and without any justification or reason therefor, included pursuer's name in said lists of unemployable persons issued by them as aforesaid, and thereby wrongfully, illegally, and maliciously brought about the pursuer's dismissal and non-employment on each of the occasions hereinafter condescended on." He then goes on to give three occasions on which, after either being employed or having a chance of being employed by the three firms he mentions, he either was dismissed or was told that he was not wanted. Now upon that he asks that the defenders, the Insurance Company, should be held liable in damages.

Now the first point that I wish to make clear is that the action as laid is not an action of slander. Whether there are facts here out of which it would be possible to make an action of slander I do not know. But if I may, so to speak, figure facts, I of course can understand that there might be an action of slander for including the name of a person in a list, there being a proper averment that that list was headed by a statement—or by long practice practically included the statement—that the names in the list were in some way unworthy of trust, and that consequently the inclusion in such a list of the name of a person in circumstances which made the statement that was thereby brought against him a false statement was slanderous. I need only remind your Lordships of the many cases we have had as to the inclusion of the names of persons in what are commonly known as black lists. But that is not this case. It is no doubt said that these lists represent that the persons whose names are mentioned therein are unfit for employment or ought not to be employed. But, as averred, I take that to be a mere make-weight of what has been said before, and counsel for the pursuer quite frankly did not attempt to deal with the case as one of slander. I do not think the case could be pleaded as one of slander upon such averments, because I think the pursuer would have to make much more specific averments as to what the lists purported to be and as to what statements they contained. We are therefore really dealing with the first averment that they issue lists of workmen whom they insist shall not be employed, coupled of course with the averment that they included the pursuer's name in such a list.

Now that raises a delicate and perhaps a difficult question. I have come to be of opinion that the statement as made is not a relevant statement. There is a great deal of authority and law upon this subject. I cannot say that the subject can be called an easy one, and when the subject is not an easy one, the application of the law to the particular circumstances is always difficult. But I think the three leading cases upon the subject without any doubt are the well-known cases of the *Mogul Steamship Company* v. *M'Gregor, Gow, & Company*, [1892] A.C. 25; of *Allen* v. *Flood*, [1898] A.C. 1; and of *Quinn* v. *Leathem*, [1901] A.C. 495. Now the result of those cases to my mind is this—In the first place everyone has a right to conduct his own business upon his own lines and as suits himself best, even although the result may be that he interferes with other people's business in so doing. That general proposition, I think, may be gathered from the *Mogul* case. Secondly, an act that is legal in itself will not be made illegal because the motive of the act may be bad. That is the result, I think, of *Allen* v. *Flood*. Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy, where they would not have been illegal if done by a single individual. I think that is the result of *Quinn* v. *Leathem*.

Of course these cases do not stand alone. *Quinn* v. *Leathem* particularly went greatly upon *Lumley* v. *Gye*, 2 E. & B. 216, and *Temperton* v. *Russell*, [1893] 1 Q.B. 715. But *Quinn* v. *Leathem* is after all the last and most authoritative exposition of the doctrine and was in the House of Lords. It is quite clear that when you come to conspiracy you have a different element from that which you have when you are dealing with the action of one person. Probably the best (because it is the shortest) defini-

tion of conspiracy was given by Justice Willes in the case of *Mulcahy* v. *The Queen*, (1868) L.R., 3 (H.L.) 306, at p. 317, in which he defined conspiracy as consisting of an "agreement of two or more to do an unlawful act or to do a lawful act by unlawful means"; and the essence of conspiracy is the conspiracy itself; and when you are dealing with conspiracy criminally that is enough. It does not matter whether damage has been done or not, although when you come to the civil action for conspiracy, then there is no civil action unless damage has resulted. There is of course underlying all this a basis of commonsense, which was well put by Justice Fitzgerald (afterwards Lord Fitzgerald) in one of the Irish cases—*Reg.* v. *Parnell and Others*, (1881) 14 Cox C.C. 508, at p. 514—when he said that although a man might well resist the action of one individual, how could he resist when all persons were banded against him? And a very easy illustration is this—It is certainly quite legal for any person to say to another, "I will not deal with you or trade with you;" but if a set of people combine in order to prevent every one trading with a certain person, then that is a conspiracy, and is illegal, because it seeks to deprive that man against whom it is directed of the right of living.

It is clear that from the averments that I have read conspiracy is not in this case. It is the action of one insurance company, and one insurance company alone. I think, therefore, that the next step is, in order to make this averment relevant, that there must needs have been some descriptive condescendence of illegal means employed, and it is there that I find the averment insufficient. They issue, says the pursuer, lists of workmen whom they insist shall not be employed. What is the meaning of the word "insist"? or how is it hinted that the Insurance Company can insist? It is just there that the pursuer's case seems to me to fail, and fail for this very good reason, that if he had gone on he would have been able either to condescend on some means which in themselves denoted illegality, or he would have had to condescend on means which at once would have vindicated themselves by showing they were lawful. What I mean by that is this—I am taking the answer here of the defenders, and, of course, I am not taking the answer as being in any sense proved—for this matter of competency and irrelevancy must be taken on the averments of the pursuer alone—I am merely taking it by way of illustration in order to figure what would have happened if the pursuer had gone on, for the purpose of explaining what he meant by "insist," if he had gone on to specify the thing which the defenders say was the thing actually done. What they say is that they do issue lists containing the names of persons whose insurance the defenders decline to undertake. Now, supposing the pursuer had said in so many words in his condescendence, they issue these lists of persons whose insurance they decline to undertake, and the result of that is that the various employing firms, in order to accommodate themselves to the demands of the Insurance Company, refuse to employ persons whom the Insurance Company decline to insure. I cannot doubt, if that had been said, it would have been held that it fell short of relevancy, because it is quite clear that an insurance company is not bound to insure everyone. They are entitled to say "Well, I do not wish to insure so-and-so and so-and-so." That is part of their own freedom in conducting their own trade. Although, there again, if you had not been dealing with the action of a single person, but had been dealing with a conspiracy to prevent a person being insured, then there might be a perfectly actionable wrong

Accordingly, I think that the Lord Ordinary is right here, and that the case falls short of such an averment as entitles the pursuer to have an issue or to go to proof. But I ought to say one thing. Our attention was called, very properly, by the pursuer's counsel to a dictum of Lord Justice Romer in *Giblan* v. *The National Amalgamated Labourers' Union*, [1903] 2 K.B. 600, which he conceived covered this. In *Giblan's* case there was combination and conspiracy and therefore the judgment is not touched—I mean that there is ample to support the judgment. Lord Justice Romer said this (p. 619)—"I should be sorry to leave this case without observing that, in my opinion, it was not essential in order for the plaintiff to succeed that he should establish a combination of two or more persons to do the acts complained of. In my judgment, if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would-be employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered." I wish humbly to say in one single word that I think that is too widely put "by reason of threats to or special influence upon the man's employers." Threats, I quite agree; but special influence seems to me to put the matter too broadly, because special influence may be of a perfectly proper character. If the learned Lord Justice had used the word "undue" influence then I could have assented to the doctrine, but I think when he said "special influence" he went too far, because *Allen* v. *Flood* prevents us from colouring an act otherwise innocuous by the motive with which it is done.

Accordingly, I am of opinion that the Lord Ordinary here has come to the right decision.

LORD KINNEAR—I have considered this case with great anxiety, because I think the pursuer's case discloses a position of some hardship so far as he is concerned.

But it does not follow that he has averred any actionable wrong suffered by him at the hands of these particular defenders. I agree entirely with what your Lordship said both as to the general law by which the question of relevancy must be determined, and as to the practice of our Court which requires us to determine it before the case is sent to a jury, and does not allow of a judge withdrawing from a jury an issue which the Court has sent for trial.

I agree, therefore, that the question we have to consider is whether, if the pursuer's averments were proved according to his statements, and nothing more were proved, there would be a case upon which a jury could reasonably find a verdict for the pursuer. I do not desire to repeat what your Lordship has said, because I entirely agree, and I think it enough to express my concurrence on both these points.

LORD JOHNSTON — [*Read by the Lord President*]—It appears to me that this case falls to be decided on the application of the principle that the exercise of a legal right does not create an actionable wrong. The pursuer's third condescendence, upon the consideration of which the relevancy of his case must be judged, goes directly in the teeth of that principle.

The pursuer commences by referring to lists of workmen whom he alleges that the defenders "insist shall not be employed" by parties insuring with them. But what is the sanction? None is expressed. But having regard to the nature of the contract assumed between the defenders and those insuring with them, only one can be implied, and I think it is matter of necessary implication. It is, if you decline our condition, and hold yourself free to employ those listed persons, we decline to insure you, or at least we decline to insure you against the particular listed risks. In such condition I see nothing illegal or unreasonable. The defenders are free to contract or not to contract, and they are equally free to decline to contract except on their own conditions. By holding themselves out as insurers they are not, like the hotel-keeper, bound to receive or to insure all comers. I can also see that in the concern of self interest it may be even necessary for the defenders to make such condition. But I do not think that it would be competent to inquire into the justification for their action. Even if the defenders' action were capricious—and I do not for a moment suggest that in this case it is—I do not think that any particular subject of insurance has right to complain. The refusal to insure a man's life may, if the fact gets abroad, affect his position with his employers. The refusal to insure a man's warehouse against fire may, if it gets abroad, affect his custom; yet neither would have an action of damages against the insurance company who refused the risk. And I cannot see that the workman is in any different position, or has any right to compel an insurance company to show cause—for that is what it comes to—why they should not insure an employer against his individual risk. To do so would be to undermine the right of freedom of contract to which the company as much as the individual is entitled. Any workman or collection of workmen are entitled to decline employment or a continuance of employment so long as other workmen, whom they may place upon a list if they please, continue in the employer's service, and these listed workmen have no redress either by damages or otherwise against them. What is law for the workman or collection of workmen in that case is, as it seems to me, law for the insurance company in this.

But having subsumed the issue by the defenders of their list of workmen whom "they insist shall not be employed," the pursuer proceeds to say that they thereby represented the persons listed to be unfit for employment or that they ought not to be employed. That is the first *non sequitur*. On his own showing the defenders have not represented that the persons listed are unfit or ought not to be employed; that is left to the employer's judgment, and to his discretion. All *ex hypothesi* which the insurers have done is to insist that they shall not be employed if the employer desires to insure with them, that is, to decline to insure him against risk in the case of these particular parties. That is a totally different thing.

He then proceeds to say that the defenders included his name in said lists of "unemployable persons" issued by them. The use of the term "unemployable" is another *non sequitur*. What he has subsumed does not lead up to his being unemployable, but rather to his being uninsurable, to the effect at least that the particular company who are defenders decline his particular risk.

Finally, by these steps he leads up to the conclusion that by including his name in their lists the defenders have wrongfully, illegally, and maliciously brought about his dismissal and non-employment. For this conclusion of legal responsibility a subsumption which contains two *non sequiturs* in the chain of reasoning is no warrant.

I therefore entirely concur with the Lord Ordinary, and would add nothing more to the reasons which his Lordship has given for his judgment.

LORD DUNDAS, who was sitting in the Division at the advising, gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer) — Blackburn, K.C. — Morton. Agent — Malcolm Graham Yooll, S.S.C.

Counsel for Defenders (Respondents) — Hunter, K.C.—Macmillan—Hossell Henderson. Agents—Morton, Smart, Macdonald & Prosser, W.S.