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ECHOES OF ANTIQUITY THE DOCTRINE OF CHAMPERTY AND MAINTENANCE AND THE RULE OF CANON 42

An agreement to support a lawsuit is champertous, according to the classical definition, when three elements are present. These are (1) the absence of any interest in the suit other than that arising from the contract, (2) the assumption of all expenses of conducting the litigation, and (3) an agreement for remuneration out of the proceeds of the suit.[1]

Although there has been another North Dakota case skirting the edge of the question,[2] the North Dakota Supreme Court has spoken directly to the problem of an attorney agreeing to bear the expense of litigation on only two occasions, the last one occurring nearly fifty years ago.[3] In the first of these two cases,[4] the plaintiff's attorney was alleged to have agreed to undertake the suit at his own expense in return for one-half of the recovery, if any were had. The defendant urged this agreement as grounds for dismissal of the suit, but the court, following the traditional rule,[5] held that champerty may not be raised as a defense by one not a party to the allegedly champertous agreement. In its discussion of the agreement, the court expressed doubt that the furnishing of costs of litigation by an attorney was champertous in North Dakota, pointing out that the execution of the agreement was not a misdemeanor under the relevant North Dakota statutes,[6] and that "in some states it is held that the common law relating to champerty no longer exists, and that such an agreement is valid unless it

1. 2 THORNTON, ATTORNEYS AT LAW 653 (1914), 14 C.J.S. *Champerty & Maintenance* § 1 (1939).

2. See Rohn v. Johnson, 33 N.D. 179, 156 N.W 936 (1916).

3. Stark County v. Mischell, 42 N.D. 332, 173 N.W. 817 (1919), Woods v. Walsh, 7 N.D. 376, 75 N.W 767 (1898).

4. Woods v. Walsh, *supra.*

5. *E.g.,* Hadley v. Platte Valley Cattle Co., 143 Neb. 482, 10 N.W.2d 249 (1943), Omaha & R. V Ry. v. Brady, 39 Neb. 27, 57 N.W 767 (1894). *But see,* Kelley v. Kelley, 86 Wis. 170, 56 N.W 637 (1893), where the defendant won a dismissal on the basis of a champertous agreement between th plaintiff and the plaintiff's attorney.

6. REV. CODES OF N. D. §§ 7008, 7013 (1895), which declared that an attorney who purchased a chose in action or procured a loan to purchase a chose in action was a misdemeanor. The language is similar to and the probable import exactly the same as §§ 12-17-19, 12-17-21 N.D. CENT. CODE (1960).

contravenes some statute."[7] The court, however, restricted its holding to a refusal to allow the defendant to show as a defense a champertous agreement between the plaintiff and the plaintiff's attorney

The second case, *Stark County v Mischell*,[8] was an action by Stark County to recover attorney's fees paid to a former State's Attorney who had resigned his position as State's Attorney to handle a claim of the county on a 50 per cent contingent fee basis, with the costs to be born by the attorney The county sued to recover the fees paid to the attorney under this agreement. The North Dakota court decided in favor of Stark County because of the agreement that the attorney was to bear the costs, saying:

> Under the doctrine of champerty, long has been recognized the impropriety of an attorney's speculating in lawsuits, and becoming a gambler in litigation at his own cost.[9]

Two judges disagreed with the majority's decision that the contract was champertous. One of these judges, concurring, argued that no real difference exists between a contingent fee contract and one under which the attorney will pay the costs and that "[w]ithout such arrangements there would often be a failure of justice."[10]

This note will examine the history of the rule forbidding attorneys to bear the costs of litigation and the reasoning behind it in an effort to determine whether the majority or the minority opinions in *Stark County v Mischell*[11] reached the more reasonable result.

DEVELOPMENT OF THE DOCTRINE OF CHAMPERTY AND MAINTENANCE

Some difference in opinion exists as to the exact origin of the doctrine of champerty and maintenance.[12] Blackstone traced the doctrine to Roman law, which he said joined him in declaring champertors to be "pests of civil society."[13] Another commentator

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7. Woods v. Walsh, *supra* note 3, 7 N.D. at 376.
8. *Supra* note 3.
9. Stark County v. Mischell, *supra* note 3, 173 N.W at 820.
10. Stark County v. Mischell, *supra* note 3, 173 N.W at 821. For the opinion of the other disagreeing judge, who relied on *Woods v. Walsh, supra* note 3, see 173 N.W. at 822.
11. *Supra* note 3.
12. Maintenance differs from champerty only in that there is no agreement to share in the proceeds of the suit. 4 BLACKSTONE 135 (Lewis' ed. 1897).
13. *Ibid.*
14. 2 THORNTON, *supra* note 1, at 557, 558.
15. Opinion of Tindall, C. J., in Stanley v. Jones, 7 Bing. 369, 377, 131 All Eng. Rep. 143, 146 (1831).
16. Reece v. Kyle, 49 Ohio St. 475, 31 N.E. 747, 749 (1892).
17. Stanley v. Jones, *supra* note 15, 4 BLACKSTONE, *supra* note 12. See also 1 COKE'S FIRST INSTITUTES 265 a. & n. 1 (Butler ed. 1817).
18. 2 THORNTON, *supra* note 1, at 658, Stanley v. Jones, *supra* note 15.
19. 4 BLACKSTONE, *supra* note 12. But see Newman v. Kentucky-West Virginia Gas Co., 372 S.W.2d 410 (Ky.App. 1963).

claimed that the doctrine was invented in order to protect the newly-arrived Norman conquerors in their acquisition of Saxon property, and was strengthened during the reign of Henry VIII when the king began to escheat the monastery estates in 1538 and to dispossess the Knights of Malta in 1540.[14] Another authority claimed that champerty "was considered in earlier times, and in all countries, an offense pregnant with great mischief to the public."[15] It has also been suggested that the doctrine arose in an effort to prevent powerful nobles from taking transfers of pretended rights in property and prosecuting them before juries made up of their own tenants, thus oppressing the weaker landowners.[16]

In any event, the doctrine of champerty and maintenance was closely tied to the now-defunct common law rule against the assignment of a chose in action,[17] and at one time had a considerably broader impact than it has today The doctrine prohibited all gratuitous aid in the litigation of a claim. For example, a witness who testified without being supoenaed was guilty of maintenance[18] and subject to fine and imprisonment at common law [19] An exception to the operation of this rule was allowed, according to Blackstone, for a man who maintained the suit of a poor kinsman or near neighbor out of compassion.[20] The doctrine was firmly entrenched in the law courts, but the equity courts may have refused to adopt it.[21]

By the end of the Eighteenth Century, the doctrine was so well entrenched that an English court could declare that maintenance was such a great evil that it was not merely *malum prohibitum*, some courts began to inquire into the motivation and circumstances but was *malum in se*.[22] The restrictions on champerty and maintenance began to loosen in the first part of the next century as surrounding an agreement by which someone other than the plaintiff was to supply the costs of litigation,[23] although this was by no means a uniform attitude.[24] In relaxing the doctrine, the courts occasionally distinguished between the conduct allowed on the part

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20. 4 BLACKSTONE, *supra* note 12.

21. *Compare* the opinion of Wilde, J., in Stanley v. Jones, *supra* note 15 *with* Hughes v. Eisner, 8 N.J. Super. 351, 72 A.2d 901, 902 (1950) "[C]ourts of equity from the earliest times regarded the doctrine as 'absurd' and declined to adopt it."

22. Wallis v. Duke of Portland, 3 Ves. 494, 30 Eng. Rep. 1123 (1797).

23. "The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up strife, encourages others either to bring actions, or make defenses which they have no right to make if a man were to see a poor person in the street oppressed and abused, and without means of obtaining redress for his wrongs, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a stronge argument to convince me that that man could be said to be stirring up litigation and strife. " Findon v. Parker, 11 M. & W 676, 682, 152 Eng. Rep. 977, 979 (1843).

24. See, *e.g.*, Bradlaugh v. Newgate, 11 Q.B.D. 1 (1883), in which Lord Coleridge struggled with the suggestion from an Indian case that the existance of maintenance depended on immorality of conduct. He resolved the dilemma by deciding that what was meant was immorality in a legal sense, which existed whenever the conduct violated a legal rule.

of attorneys and that expected of other persons, and exhibited a tendency to apply the traditional rules more strictly to attorneys.[25] Although the obsolescence of the rule against aiding a litigant by paying the costs of the litigation began to be recognized over fifty years ago,[26] some English courts feel bound by the traditional rule and the weight of precedent behind it, regardless of their disagreement with the validity of applying the rule in the modern context.[27]

The American courts generally recognized the doctrine of champerty and maintenance as a part of the common law, but normally accompanied their recognition with a statement to the effect that the conditions in this country differ from those which gave rise to the doctrine in England.[28] The theoretical relaxation of the rule against champertous contracts in the United States included the acceptance of the proposition that such agreements are not *malum in se*, but merely *malum prohibitum*,[29] with the practical result that an attorney who sued on a champertous contract was allowed to recover on a *quantum meruit* basis for his services, even though he was denied enforcement of the contract itself.[30] At least one early decision, however, declared champertous agreements to be "so odious in the eyes of the law" that the court would not aid a party to such an agreement to recover money paid out under it.[31]

New Jersey has consistently refused to apply the doctrine of champerty and maintenance,[32] with the result that the New Jersey courts are free to weigh the reasonableness of an agreement which would otherwise be champertous,[33] while other states, although realizing that they are applying an antiquated rule which is not particularly promotive of justice, do not feel free to examine the context of an individual agreement.[34] West Virginia has reached es-

25. See A Solicitor *Ex parte* The Law Society, 1 K.B. 302, [1911-13] All E.R. 202, 206 (1911), Wood v. Downes, 18 Ves. Jun. 120 34 Eng. Rep. 263, 266 (1811).

26. See British Cash & Parcel Conveyors v. Lamson Service Co., 1908(1) K.B. 1006, 1013.

27. "I wish that we could have held that to maintain a party in litigation is only wrongful where there is something in the nature of a conspiracy between the maintained party and the maintainer to defeat, rather than to further, the ends of justice." The judge writing these words felt constrained to hold otherwise by the weight of precedent. Martell v. Consett Iron Co., Ltd., [1955] All E.R. 481.

28. *E.g.*, Gilman v. Jones, 87 Ala. 691, 5 So. 785 (1889), Boardman & Brown v. Thompson, 25 Iowa 787 (1868), Rohan v. Johnson, 33 N.D. 179, 156 N.W. 936 (1916).

29. Watkins v. Sedberry, 261 U.S. 571 (1922).

30. Watkins v. Sedberry, *supra* note 29, Dombey v. Detroit, T. & I. R., 351 F.2d 121 (6th Cir. 1965), Application of Kamerman, 278 F.2d 411 (2d Cir. 1960), J.B.P Holding Corp. v. United States, 166 F.Supp. 324 (S.D.N.Y. 1958). But see RESTATEMENT, CONTRACTS § 545 (1932).

31. Wheeler v. Pounds, 24 Ala. 472, 473 (1854).

32. Sweeney v. Venziano, 70 N.J.Super. 185, 175 A.2d 241 (1961), Hughes v. Eisner, *supra* note 21. See also Bouvier v. Baltimore & N.Y. Ry., 67 N.J. 281, 51 A. 781 (1902).

33. Hughes v. Eisner, *supra* note 21, at 903, 904.
Mo.Avp. 246, 157 S.W. 122 (1914).

34. Boardman v. Brown & Thompson, *supra* note 28 at 506, 507, Taylor v. Perkins, 171 MO. APP. 246, 157 S.W. 122 (1914).

sentially the same result as New Jersey through a little different formulation. The Supreme Court of that state has declared that since the doctrine of champerty is ordinarily not consonant with modern statutes and decisions, it will invoke the doctrine only when it is equitable to do so.[35] New York apparently allows an attorney to defend a suit at his own expense,[36] but not to represent a plaintiff under such an agreement.[37] In Oregon, two laymen may make an agreement whereby one will assist the other in the prosecution of a suit.[38] The court did indicate that such agreements would be carefully scrutinized to avoid speculation in lawsuits, and that a different result might be reached if an attorney were a party to the contract.[39] An Alabama court recently decided to uphold an allegedly champertous contract, reasoning that no public policy should require the court to allow the avoidance of the terms of a fair and reasonable agreement.[40]

Reece v Kyle,[41] involved an agreement by an attorney to pay half the cost of litigation of a claim in return for half the recovery if the suit was successful. The client was financially unable to carry on the suit by himself and no charge of fraud or undue advantage was made. The Ohio court held that the contract was not invalid for champerty The court said that it violated no public policy to represent a client, knowing that he will be unable to pay the costs of the suit unless it is successful and "[t]hat contracts similar to the one at bar were regarded as dangerous three or four hundred years ago is not a powerful reason for so regarding them now "[42] Ohio may have retreated from the *Reece* case not long ago when an Ohio attorney was suspended from the practice of law for, among other things, advancing money for living expenses to indigent clients. The court held this to be the purchase of an interest in litigation.[43] Both the concurring and the dissenting opinions relied on *Reece v Kyle*. The Supreme Court of Illinois, however, in *People v McCallum*,[44] refused to disbar an attorney because he had advanced money for living expenses to indigent clients. The court said:

> The practice of advancing money to the injured client with which to pay hospital bills during the pendency of the case may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we are aware of no

35. Work v. Rogerson, 149 W Va. 493, 142 S.E.2d 188 (1965).
36. Fowler v. Callon, 102 N.Y. 395, 7 N.E. 169 (1886).
37. *In re* Gilman, 251 N.Y. 265, 167 N.E. 434 (1929).
38. Brown v. Bigue, 21 Ore. 260, 28 Pac. 11 (1891).
39. See Dahms v. Sears, 13 Ore. 47, 11 Pac. 891 (1886).
40. Lott v. Kees, 276 Ala. 556, 165 So.2d 106 (1964).
41. 49 Ohio St. 475, 31 N.E. 747 (1892).
42. *Supra*, 31 N.E. at 750.

> authority holding that it is against public policy or of any sound reason why it should be so considered.[45]

The attitude of a court toward the doctrine of champerty and maintenance may be reflected in reluctance to construe an ambiguous contract as containing a champertous provision. In *Clancy v Kelly*,[46] an agreement whereby the attorney was to advance the costs of the suit, but was to be repaid was held not to be champertous even though no provision was included as to when or how the repayment was to be made. The court's construction contradicted a jury verdict adverse to the attorney.[47] An even more obvious case is *Gray v Bemis*,[48] a Minnesota case in which the agreement to be construed called for the attorney to receive a thirty per cent share of any recovery, and, if no recovery was had "then we [clients] .are to be at no expense whatever "[49] The court construed the quoted language to mean that in the event that no recovery was had, the attorney would charge no fee, but the clients would still be responsible for the costs of the suit.

The the doctrine of champerty and maintenance, although still recognized in a formal sense, is being eroded in the United States in its practical significance.

CANON 42

Despite the evidence that the doctrine of champerty in general, and the rule against allowing the attorney to furnish the costs of suit in particular, has lost a great deal of favor, Canon 42 of the Canons of Professional Ethics still reads:

> A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.[50]

The constructions and opinions of Association of the Bar of the City of New York based on Canon 42, however, may reflect a trend toward a more realistic approach to the issue. In 1939, that body declared:

> The fact that some lawyers assume not only taxable

43. Mahoning County Bar v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396 (1964).
44. 341 Ill. 578, 173 N.E. 827 (1930).
45. *Supra*, 173 N.E. at 831.
46. 182 Iowa 1207, 166 N.W 583 (1918).
47. See *supra*, 166 N.W at 583-85.
48. 128 Minn. 392, 151 N.W 135 (1915).
49. *Supra*, 151 N.W at 136.
50. CROMWELL FOUNDATION, OPINIONS ON PROFESSIONAL ETHICS 849 (1956).

> costs but also the expense of retaining expert witnesses, such as doctors, accountants, and appraisers, with no intent to seek reimbursement from their clients and will continue to do so, irrespective of the opinions of Committees on Professional Ethics, does not deter this Committee from strongly condemning the practice.[51]

Five years later, an opinion allowed an attorney to furnish the costs of appeal when his client was unable to do so,[52] although the Committee still ruled otherwise when the client refused to pay the costs of an appeal without a statement of financial inability.[53]

In 1946, the New York Association was required to referee a collision between the antiquated rule embodied in Canon 42 and a regulation developed to meet a more contemporaneous problem. The Secretary of Interior, who was required to approve all contracts between attorneys and Indian tribes, refused to approve an arrangement for representation before the Indian Claims Commission unless the attorney's reimbursement for expenses was contingent upon recovery. The Committee decided that they would approve this arrangement, since to do otherwise would deprive the Indians of representation.[54] Although their decision was called a "construction" of Canon 42, it seems apparent that the Committee realized that Canon 42 did not offer a valid contemporary solution to the problem.

The Canons of Ethics have been characterized as "generalizations designed for an earlier era."[55] Canon 42 certainly fits this description. It is derived from a doctrine which was designed primarily to meet one of the socio-economic problems of medieval England. It is a generalization, the application of which is not well suited to achieving desirable results in a systematic manner. One of the prime responsibilities of the legal profession is to make the law available to the common man.[56] As the technological base of our culture expands and the knowledge of the individual becomes more compartmentalized, the cost of successfully litigating a claim greatly increases because of the need for expert testimony.[57] This change alone requires a re-evaluation of Canon 42 to prevent placing the courts entirely out of reach of the ordinary litigant, who is

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51. *Id.* at 259.
52. *Id.* at 374.
53. *Id.* at 379.
54. *Id.* at 401.
55. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934).
56. *Id.* at 8.
57. For example, how could a plaintiff prove that "chronologically and etiologically [the plaintiff's] condition is traced directly to the Quadrigen administered to him October 1st, 1959," without procuring expensive expert testimony. See Stromsodt v. Park-Davis and Co., 257 F.Supp. 991, 994 (D.N.D. 1966).

oppressed enough by the slowness and costliness of our judicial system.[58]

Certainly, the attorney should not advance the costs of litigation to all clients, and some validity remains to the policy of restraining speculation in lawsuits. It would seem, however, that a more ingenious method of articulating that policy might be found than that utilized in Canon 42. A rule forbidding speculation in lawsuits would have some merit; a blanket formulation against an attorney supplying the costs of litigation is, at best, obtuse, and, at worst, obstructionist.

"Facts are stubborn but revealing things, and the first step toward any form of social improvement is a frank recognition of them."[59] As now expressed, Canon 42 gives three choices to an attorney whose client's case requires expenses beyond the client's means. He may refuse to represent the client. He may agree to represent the client, but prepare the case in a less than adequate fashion, with the result that the client's grievance is not adequately presented and the court is required to make a decision without being fully informed. Thirdly, the attorney may decide to ignore Canon 42. None of the alternatives are promotive of either justice or ethics.

CONCLUSION

Congress, by authorizing the federal courts to provide *in forma pauperis* procedures whereby a party may escape prepayment of fees and costs by making an affidavit that he is unable to give security for such costs, has impliedly recognized the obsolescence of the rule requiring a litigant to be able to pay his costs independent of a judgment.[60] Under the Fair Labor Standards Act, the Secretary of Labor is authorized to bring suit on behalf of an employee against his employer for underpayment of wages.[61] Not only may the Secretary conduct the suit on behalf of the employees, he may also take the initial step of advising the employee that he "had not been paid the wages required by the Act and that on written request from the employee the Secretary could file a suit."[62] Thus Congress has determined that the facts of modern society may demand actions which, if undertaken by an attorney, would amount to "the barratrous stirring up of litigation" at common law[63]

58. See generally, BRENNAN, THE COST OF THE AMERICAN JUDICIAL SYSTEM (1966).
59. Stone, *supra* note 55, at 7.
60. 28 U.S.C. § 1915 (1964), § 1825 (1965 Supp.). A person need not be completely *unable* to support himself before this procedure is available to him. Sejeck v. Singer, 113 F.Supp. 281 (1953). See also Adkins v. DuPont Co., 335 U.S. 331 (1948).
61. 28 U.S.C. § 216 (a) (1964).
62. Mitchell v. Mitchell, 286 F.2d 721, 727 (1961).
63. *Ibid.*

Another indication of the obsolescence of the doctrine of champerty and maintenance is the context in which it was last used with a deliberate social purpose. After the Supreme Court announced its decision that racially segregated schools were unconstitutional,[64] Virginia and six other states[65] enacted statutes strengthening the doctrine of champerty and maintenance in an effort to prevent the National Association for the Advancement of Colored People from advising and financially aiding Negroes in getting legal assistance. The Supreme Court declared the Virginia statute to be unconstitutional in 1963,[66] and appeared to support an inquiry into the intent factor before the doctrine of champerty and maintenance should be invoked.[67]

The effectiveness of the doctrine as a guard against groundless suits has been surpassed since its invention by the development of statutes for the limitation of actions, a cause of action for malicious prosecution and the assessment of costs against losing parties,[68] especially since, by the majority rule, the party sued cannot invoke a champertous agreement between the plaintiff and the plaintiff's attorney as a defense.[69] The effect of the rule is that a party may keep a judgment won through the agreement of his attorney to pay the costs of litigation, and then refuse to pay the attorney his agreed-upon fee. It seems plain that the doctrine of champerty and maintenance, at least insofar as it forbids the payment of costs of litigation by the attorney, has outlived the conditions which it was designed to meet and should be abandoned.

DONALD H. LEONARD

64. Brown v. Board of Education, 347 U.S. 483 (1954).
65. Arkansas, Florida, Georgia, Mississippi, South Carolina and Tennessee.
66. N.A.A.C.P. v. Button, 371 U.S. 415 (1963). See also N.A.A.C.P v. Harrison, 102 Va. 142, 116 S.E.2d 55 (1960).
67. The Court indulged in an uninhibited interpretation of history, saying: "Malicious intent was of the essence of the common-law offenses of maintaining or stirring up litigation." N.A.A.C.P. v. Button, *supra*, at 439.
68. Hovey v. Hobson, 51 Me. 62 (1863).
69. Hadley v. Platte Valley Cattle Co., 143 Neb. 482, 10 N.W.2d 249 (1943) Lanz v. Naddy, 82 N.W.2d 809 (N.D. 1957), Work v. Rogerson, 149 W Va. 493, 142 S.E.2d 188 (1965). But see Kelley v. Kelley, 86 Wis. 170, 56 N.W. 637 (1893).