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*Oct. 18, 21.
*Nov. 5.

SAMUEL NEWSWANDER (PLAINTIFF) ..... } APPELLANT;

AND

HENRY GIEGERICH (DEFENDANT) ... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Champerty—Maintenance—Malicious motive—Cause of action—Costs of unsuccessful defence—Damages.

A defendant against whom a lawsuit has been successfully prosecuted cannot recover the costs incurred for his defence as damages for the unlawful maintenance of the suit by a third party who has not thereby been guilty of maliciously prosecuting unnecessary litigation. *Bradlaugh* v. *Newdegate* (11 Q.B.D. 1) distinguished; *Giegerich* v. *Fleutot* (35 Can. S.C.R. 327) referred to. Judgment appealed from (12 B.C. Rep. 272) affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia(1) reversing the judgment of His Lordship Mr. Justice Duff, at the trial(2) and dismissing the plaintiff's action with costs.

The plaintiff, appellant, was the defendant in the case of *Briggs* v. *Newswander*(3), in which, by the judgment of the Supreme Court of Canada, on an appeal from the Supreme Court of British Columbia, the plaintiff's action was maintained with costs in all the courts. Subsequently the appellant, Newswander,

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 12 B.C. Rep. 272. (2) 12 B.C. Rep., at p. 274.
(3) 32 Can. S.C.R. 405.

brought an action against the respondent, Giegerich, to recover from him the cost of his unsuccessful defence, as damages, on the ground that the respondent had unlawfully, for champertous considerations, maintained and assisted Briggs in the prosecution of the above mentioned suit.

At the trial of the appellant's action questions were submitted to the jury and, upon the answers given, the trial judge ordered that judgment should be entered in favour of the appellant for the amount so claimed, with costs. This judgment was reversed on an appeal to the Supreme Court of British Columbia by the judgment from which the present appeal is asserted.

The material circumstances of the case and questions at issue on this appeal sufficiently appear from the judgments now reported.

Davis K.C. for the appellant.

Lewis (*Smellie* with him) for the respondent.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I concur in the opinion stated by His Lordship Mr. Justice Davies.

GIROUARD J. agreed that the appeal should be dismissed with costs.

DAVIES J.—This is an appeal from a judgment of the Supreme Court of British Columbia dismissing an action of maintenance brought by appellant against respondent for having assisted one Briggs, a

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poor and improvident man, in bringing and maintaining an action against him (appellant) for the recovery of a fourth interest in a mining claim. Briggs's action was ultimately successful, this court having held him entitled to the one-fourth interest and awarded him the costs in all the courts(1).

The present respondent after the successful termination of the proceedings in Briggs's suit against Newswander, attempted to enforce an agreement he had made with Briggs for an interest in the fruits of the litigation but, the claim being resisted, it was properly held that such an agreement was champertous and that the courts would not lend their aid to enforce it. That case came also by way of appeal to this court *sub nom. Giegerich* v. *Fleutot*(2), and, in delivering the judgment, Mr. Justice Killam said that

> Newswander had a right of action against Giegerich for maintenance. The transaction was wrongful towards him.

Afterwards Newswander brought his action and claimed as damages all the costs he had been made liable for between party and party of the suit he had wrongfully and unsuccessfully defended and also those between solicitor and client in the same suit.

The jury found in answer to questions put to them that respondent did supply funds to enable Briggs to carry on his action against Newswander and also his appeal to this court; that Briggs agreed to give him a share in the property recovered, and that Giegerich supplied funds to Briggs in accordance with the agreement. In answer to the further question,

> Was Briggs *induced* to carry on the action by his agreement with Giegerich and the assistance supplied by him?

(1) 32 Can. S.C.R. 405. (2) 35 Can. S.C.R. 327.

the jury ignored the question of inducement and answered:

Briggs was enabled to bring action through the financial assistance of Giegerich.

They further answered that Giegerich *did not enter into the litigation for the purpose of stirring up strife and litigation;* and that he did not solicit Briggs to enter into any agreement to commence or carry on the action and appeals; and that Briggs would not have sued Newswander or prosecuted the appeals but for the agreement and assistance referred to *unless he was able to obtain financial assistance from other sources.*

The last answer as I construe it simply means that Briggs was too poor a man financially to have been able successfully to maintain his legal rights against Newswander in the courts unless Giegerich or some other rich person had aided him.

The result of the other answers to my mind is to negative malice or officious interference or desire to stir up strife or litigation.

The question arises right on the threshold of the argument whether under such findings of fact an unsuccessful litigant who has improperly withheld property, moneys or rights of any kind from a person entitled to them, but who was unable without extrinsic assistance to vindicate his legal rights in the courts can if the necessary financial assistance is rendered to enable a suit to be prosecuted with effect after judgment in the highest court of the land compelling him to do what the law said was his duty and obligation to have done without suit, turn round and recover from the person assisting the successful liti-

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gant as damages not only the costs of the suit which the courts have ordered him to pay because of his own wrong but also all other costs he may have incurred in connection with the litigation.

It does seem to me that there can be only one answer to such a question, and that a negative one.

Much reliance was placed upon the general statement of Killam J. before referred to, but apart from the statement being obiter only it will be observed that nothing was said about the damages recoverable and the whole assumed that which I think has been negatived by the findings of the jury in the case before us now. The only question argued in that appeal was whether the agreement was a champertous one and the court held that it was. Nothing was ever suggested on the argument as to the right of the present appellant who was not a party to that appeal, to recover back from Giegerich the costs he had been condemned to pay as a consequence of the wrongful withholding by him of Briggs's interest in the mining claims, and the judgment was not intended to determine the point.

The law on the subject is formulated in Pollock on Torts (6 ed.) pages 321-2, and Addison on Torts (8 ed.) page 30, as follows:

Mr. Pollock says, page 321:

> The wrong of maintenance or aiding a party in litigation without either interest in the suit or lawful cause of kindred affection or charity for aiding him *is likewise akin to malicious prosecutions* and other abuses of legal process * * *. Actions for maintenance are in modern times rare though possible, and the decision of the Court of Appeal that mere charity with or without reasonable ground is an excuse for maintaining the suit of a stranger does not tend to encourage them.

And Addison states the law to be that:

If one person from motives which the law does not approve induces and assists another, who is to his knowledge insolvent and unable to pay costs, to prosecute an action without reasonable or probable cause against a third person, that person, if he gets an award of costs *in his favour* and cannot recover them from the insolvent plaintiff in the action, may recover them against the promoter in an action of maintenance * * * . But the notice must be *malicious* or the action does not lie. A man may maintain a suit of his near kinsman, servant or poor neighbour out of charity and compassion, *with impunity*, and a common interest in the matter of the suit *negatives malice.*

But neither text book or decision can be found supporting the proposition contended for by appellant that without malice, and without any desire to stir up strife or litigation, or officiously to interfere in the business of others, a man who assists another to recover his legal rights and is successful in doing so can be punished by being compelled to pay back as damages to the unsuccessful litigant the very costs the courts compelled him to pay for the wrongful withholding of his neighbour's rights.

That costs of defending a suit which has been *improperly* maintained may be recovered in an action of maintenance is true; *Alabaster* v. *Harness*(1); but that the costs of such a suit as has been *properly* maintained can be so recovered is without authority.

So far back as the year 1843, Lord Abinger C.B., in the case of *Findon* v. *Parker*(2), at page 682, in delivering judgment said:

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 litigation and strife* encourages others to bring actions or to make defences which they have no right to make.

(1) [1895] 1 Q.B. 339. (2) 11 M. & W. 675.

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In 1860 the Judicial Committee of the Privy Council in delivering judgment in the case of *Fischer* v. *Kamala Naicher*(1), said, at page 187, with reference to the qualities attributed to champerty or maintenance by the English law:

> it must be something against good policy and justice, *something tending to promote unnecessary litigation*, something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary.

In the later case of *The Metropolitan Bank* v. *Pooley*(2), Lord Chancellor Selborne says, at page 218:

> I apprehend it to be clear that the civil action for maintenance would not lie except against a person who was guilty of the criminal act.

Surely in the "criminal act," the *mens rea* must be found before the accused is adjudged guilty. In the face of the facts of this case and the findings of the jury is it conceivable that the appellant could be found guilty of the criminal Act? I think not.

It may well be that so far as the agreement in the case at bar to share in the fruits of the litigation, if successful, was concerned, that was against *good policy*, and our courts so held and refused to enforce it. But where was the "something tending to promote *unnecessary* litigation" and as I understand the judgment of the Privy Council, the something that in a legal sense was immoral, and to the constitution of which a bad motive was necessary.

There can be but one answer. The litigation complained of was held by this court to have been *just*,

(1) 8 Moo. Ind. App. 170. (2) 10 App. Cas. 210.

proper and necessary, and the jury's answers in the present case which I have before quoted remove any doubt as to the existence of malice or the desire to stir up litigation or strife on the part of the respondent.

The only authority outside the dictum of Killam J. before referred to relied upon by the appellant was the judgment of Lord Coleridge sitting as trial judge in *Bradlaugh* v. *Newdegate*(1). That judgment is not when examined a controlling authority in support of this appeal. It is the judgment of a single judge only. Before that judgment was delivered the House of Lords had on appeal dismissed with costs the several actions brought in the name of Clarke and maintained by Newdegate, and the judgment of Lord Coleridge awarding as damages to Bradlaugh practically the costs of the suits for penalties he had been improperly compelled to defend as well between party and party as between solicitor and client may be defensible on the ground that the House of Lords having finally disposed of the maintained suits and dismissed them, the action before Lord Coleridge could be disposed of and the damages awarded as if such final disposition had been made before the suit began against Newdegate instead of before judgment was delivered. The judge seems to have taken judicial notice of the House of Lords judgment and acted upon it. Inasmuch as he explicitly says on page 12 in referring to the judgment of Abinger C.B., in *Findon* v. *Parker*(2), that:

> It is full of the strong sense characteristic of Lord Abinger, and I venture to adopt the language of Lord Blackburn in *Hubley* v. *Hubley*(3) and say that I incline to agree with and to adopt every word of it.

(1) 11 Q.B.D. 1. (2) 11 M. & W. 675.
(3) L.R. 8 Q.B. 112.

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And with reference to the judgment of the Privy Council which I have quoted that

> he, at least, was not prepared to say that he should hold the conduct or the *motives of Mr. Newdegate as proved before him* to be such as within the words of that judgment taken even in the sense contended for to relieve him from the character of a maintainer,

it seems to me his judgment must be based on the conclusion at least that the maintainor's motives in bringing the action were bad within the meaning of the phrase as used in the judgment of the Privy Council, even if it was not upon the conclusion that the litigation complained of had been finally disposed of adversely to the maintainor.

The case is entirely different from the present and the above quotation shews that Lord Coleridge was not prepared to dissent from the statements of the Judicial Committee as to the essential elements of maintenance while he explicitly stood by every word of Lord Abinger's judgment on the point. Clarke was a mere puppet put forward by Newdegate to bring the action for statutory penalties and indemnified by him for doing so. The latter's motives were bad within the meaning of the rule.

It would indeed at the present day be a startling proposition to put forward that every one was guilty of the crime of maintenance who assisted another in bringing or maintaining an action, irrespective of the results or merits of such action and whether the courts sustained it or not. Many grasping, rich men and soulless corporations would greedily welcome such a determination of the law, because it would enable them successfully to ignore and refuse the claims of every poor man who had not sufficient means

himself to prosecute his case in the courts, conscious that if any third person except from charity gave the necessary financial assistance to have justice enforced, as soon as it was enforced the denier of justice could turn round and compel the good Samaritan to pay him all the costs he had incurred in attempting to defeat justice.

Such a condition of things is repugnant to our common sense and the courts have from time to time found it necessary to engraft exceptions upon the law of maintenance making such things and relations as kindred affection or charity, with or without reasonable ground, a lawful excuse for maintaining an action and confining the law to cases where a man *improperly* and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they had no right to bring or make.

Under these circumstances I have no hesitation in dismissing the appeal with costs, basing my judgment upon both grounds, the absence of essential ingredients necessary to maintain the action, and the absence of any evidence of damage necessarily sustained by plaintiff as a result of the maintenance found.

IDINGTON J.—The appellant sued in the Supreme Court of British Columbia to recover damages alleged to have been suffered by him by reason of the respondent having (wrongfully moved by champertous considerations) maintained an action brought by one Briggs against him, the appellant. Briggs succeeded in his action and the appellant was adjudged to pay costs.

Assuming the offences of champerty and mainten-

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ance rightly charged against the respondent, I am unable to see how he can be held liable in a form of action in which damages, in law, must, as an essential element for success, be shewn to have been wrongfully suffered by him who brings the action.

The damages he complains of flowed, not from the wrongful act of the respondent but from what must be assumed to have been the righteous judgment of this court.

We cannot assume, even if that would help the appellant, that, if the respondent had not intermeddled, the man Briggs would have failed to get that justice with costs. Nor does the answer of the jury to a question bearing on this point help much.

I think the appeal must be dismissed with costs.

MACLENNAN J. agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Davis, Marshall & Macneill.*

Solicitors for the respondent: *Taylor & O'Shea.*