1939

SAMUEL GOODMAN .....APPELLANT;

* Feb. 27, 28.
* Oct. 30.

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Champerty—Maintenance—Officious or improper interventions—Stirring up of strife—Elements necessary to constitute these crimes.

The appellant was convicted of maintenance and champerty and fined five hundred dollars; and the conviction was affirmed by a majority of the appellate court. The facts of the case are undisputed, the accused having called no evidence. One Lallemand was injured and incapacitated for a considerable period. He did not know the name of a single witness who could strengthen any claim he might make against the Montreal Tramways Company, the party he considered responsible for his injury; and for that reason, his attorneys could not advise action. Some time later, Lallemand's wife approached the appellant, who undertook to search for those who might have seen the accident. Lallemand and his wife having no money to pay the appellant for his services, it was agreed that the amount and settlement of his remuneration should await the conclusion of the litigation; but there was no bargain that he should receive a share of the proceeds. Then Lallemand himself chose and retained an attorney, who commenced and continued an action against the Montreal Tramways Company without any contribution from Lallemand or the appellant towards the expenses. In the meantime, however, the appellant had discovered certain witnesses whose testimony was made available to Lallemand's attorney. The action was finally settled upon payment of $6,000 by the company to the attorney. At Lallemand's direction, the expenses were paid out of that sum, including the amount at which the appellant's account was finally fixed.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Kerwin and Hudson JJ.

Held, that, under these circumstances, the appellant was not guilty of the criminal offence of maintenance. In order to make a person liable as a maintainer, either civilly or criminally, that person must have intervened officiously or improperly. There must exist officious interference, introduction of parties to enforce rights which others are not disposed to enforce and stirring up of strife. In this case, Lallemand was disposed to enforce his claim, and in fact had already consulted attorneys before his wife approached the appellant; and the appellant did not intervene on his own initiative and took no action that may be in any way described as stirring up strife and litigation.

Held, also, that the appellant could not be convicted of the crime of champerty, as he did not carry on the litigation at his own expense nor did he bargain for a share of the proceeds.

Review of cases and text books on "maintenance."

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming by a majority the judgment of the Court of Sessions of the Peace by which the appellant had been convicted of maintenance and champerty and fined five hundred dollars.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

Gustave Monette K.C. for the appellant.

Ivan Sabourin for the respondent.

The judgment of the Chief Justice and of Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—The appellant Goodman was convicted of maintenance and champerty by the Court of Sessions of the Peace and fined five hundred dollars. Upon appeal to the Court of King's Bench, the conviction was affirmed but, as appears from the formal judgment of the Court

Mr. Justice Bernier and Mr. Justice Hall dissent on the ground that the appellant, having been approached by the victim's wife and commissioned by her to discover the names and addresses of the witnesses required for the successsful prosecution of the proposed litigation, his participation therein was neither officious nor unlawful, and the fact that he consented to allow the payment for his services to await the outcome of the action does not amount to maintenance.

Based upon that dissent Goodman now appeals.

While a considerable part of the factum for the respondent deals with the submission that no question of law is involved, it also appears from the factum and we understood from counsel at bar that the contention really

1939

GOODMAN v. THE KING.

Kerwin J.

is that the appeal must be confined to the question as to whether the facts adduced in evidence by the Crown (and the inferences to be drawn therefrom) did amount to maintenance or champerty. Such a question is clearly one of law.

There is no dispute about the facts, which are few and which were testified to by witnesses on behalf of the Crown,—the accused calling no evidence; and there is likewise no dispute about the inferences. It appears that one Lallemand was injured and incapacitated for a considerable period. He did not know the name of a single witness who could strengthen any claim he might make against the Montreal Tramways Company,—the party he considered responsible for his injury. He consulted attorneys who, because of the lack of evidence, could not advise action. Some time later Lallemand's wife approached the appellant, who undertook to search for those who might have seen the accident. It was perfectly well known that Lallemand and his wife had no money to pay the appellant for his services and it was agreed that the amount and settlement of his remuneration should await the conclusion of the litigation. There was no bargain that he should receive a share of the proceeds.

Lallemand chose and retained an attorney, who commenced and continued an action against Montreal Tramways Company without any contribution from Lallemand or the appellant towards the expenses. In the meantime, however, the appellant had discovered certain witnesses whose testimony was made available to the attorney. The action was finally settled upon payment of six thousand dollars by the Tramways Company to the attorney. At Lallemand's direction, the expenses were paid out of this sum, including the amount at which the appellant's account was finally fixed.

Under these circumstances it is needless to refer to the various definitions of champerty since it is clear that the appellant did not carry on the litigation at his own expense nor did he bargain for a share of the proceeds. Champerty, although of greater atrocity, is an offence similar to that of maintenance and it is, therefore, necessary to determine what constitutes that crime.

A convenient starting point for that investigation is the first edition of Chitty's Criminal Law, 1816, vol. 2,

p. 234, where in a note to a precedent of an indictment for maintenance, the author, quoting Blackstone and Hawkins, states that,—

> Maintenance signifies a malicious, or at least officious, interference in a pursuit in which the party has no interest to assist either with money or advice to prosecute or defend the action.

Blackstone's statement had been based upon Hawkins' Pleas of the Crown, the first edition of which appeared about 1716. In the eighth edition the principle upon which the law against maintenance is based is thus stated (Vol. 1, cap. 27, s. 38):—

> It seemeth, that all maintenance is strictly prohibited by the common law, as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits, which perhaps they would not venture to go on in upon their own bottoms.

Shortly after the publication of the eighth edition of Hawkins appeared Chancellor Kent's Commentaries on American Law. Kent adopted Blackstone's definition (which, as we have seen, was founded upon Hawkins). At p. 447 of volume 4 of the 12th edition, it is stated that the statutes of Edward I and Edward III against champerty and maintenance

> were founded upon a principle common to the laws of all well governed countries, that no encouragement should be given to litigation, by the introduction of parties to enforce those rights which others are not disposed to enforce.

Story on Contract, the first edition of which appeared in 1844, is to the same effect:—

> Maintenance is the officious assistance, by money or otherwise, proposed by a third person to either party to a suit in which he himself has no legal interest to enable him to prosecute or defend it.

In *Prosser* v. *Edmonds* (1), Lord Abinger puts the matter in exactly the same way as it appears in Kent where he states:—

> All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.

Lord Abinger's statement is significant because of the classical expression used by him in the later case of *Findon* v. *Parker* (2):—

> 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 either to bring actions or to make defences which they have no right to make.

(1) (1835) 1 Y & C 481 at 497. (2) (1843) 11 M & W 675, at 682.

1939

GOODMAN v. THE KING.

Kerwin J.

This well-known passage assumes even greater importance in connection with the present appeal. In *Findon* v. *Parker* (1) action was brought by a solicitor for his costs, the defence being that the work was done pursuant to an agreement and in circumstances amounting to maintenance. In order to understand precisely the particular relevancy of the words quoted it is necessary to reproduce the whole of Lord Abinger's judgment in so far as it is pertinent. He said:—

> If any ground can be fairly suggested for making this contract legal, we ought to adopt it in favour of the party who makes the defence, in order to acquit him of the imputation that he casts upon himself. The contract does not necessarily imply anything that the law calls maintenance. 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 either to bring actions, or to make defences which they have no right to make. I do not like to give an opinion upon an abstract case, and therefore am not desirous to consider it; but if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnish him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance; I am not prepared to say, that, in modern times, Courts of Justice ought to come to that conclusion. However, I give no opinion upon that point.

From this it will be observed that Lord Abinger was discussing the crime of maintenance and while expressing no opinion, stated his view that one ingredient of the crime must be "a stirring up" of litigation and strife.

In *Bradlaugh* v. *Newdegate* (2), Lord Coleridge, while determining that the passage quoted above had no application to the case before him, stated that it was full of the strong sense characteristic of Lord Abinger and he was inclined to agree with and adopt every word of it. Lord Coleridge gives a number of definitions of maintenance, among which will be found those of Kent and Story:—

> There are many definitions of maintenance, all seeming to express the same idea. Blackstone calls it "an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it": Bl. Comm. book iv, c. 10, s. 12. "Maintenence," says Lord Coke, "signifieth in law a taking in hand, bearing up, or upholding of a quarrel, or side,

(1) (1843) 11 M & W 675 at 682. (2) (1883) 11 Q.B.D. 1.

to the disturbance or hindrance of common right": Co. Litt. 368 b. These definitions are repeated in substance in Bacon's abridgement, in Viner, and in Comyns, under the head of maintenance. To the same effect, though somewhat differing in words, is the language of Lord Coke in the 2nd Institute in his commentary on the Statute of Westminster the First, c. xxviii. There is, perhaps, the fullest and completest of all to be found in Termes de la Ley, "Maintenance is when any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do; then the party grieved shall have a writ against him called a writ of maintenance." Chancellor Kent, adopting Blackstone's definition, which definition itself is founded on a passage in Hawkins, says that it is "a principle common to the laws of all well governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce": part vi, lect. 67. I quote from the excellent edition of Kent's Commentaries, published by Mr. O. W. Holmes at Boston in 1873. To the same effect is another American authority, Mr. Story. "Maintenance is the officious assistance by money or otherwise, proferred by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it."

In 1894, the case of *Alabaster* v. *Harness* (1) was decided by Mr. Justice Hawkins. That was an action for damages for the maintenance of an action for libel, which latter action it was considered by the Court had not really been brought by the plaintiff or at any rate had been brought at the instigation of Harness and upon a promise of sustenance with respect to the costs of the action. Hawkins, J., at p. 899, quotes the statement of the principle upon which the law against maintenance is based, which appeared in Hawkins' Pleas of the Crown and which has already been set out, and also quotes Lord Abinger's statement of the principle in *Prosser* v. *Edmonds* (2). In the Court of Appeal (3), Lord Justice Lopes, at p. 344, expressed his entire agreement with the judgment of Mr. Justice Hawkins in the court below and repeated, with approval, Lord Abinger's definition in *Prosser* v. *Edmonds* (2).

In *British Cash and Parcel Conveyancors Limited* v. *Lamson Store Service Company Limited* (4), Cozens Hardy, Master of the Rolls, after agreeing that there had been a time when what the defendants in that action did would have been regarded as criminal, stated there was little use in citing ancient text-books on the law of main-

(1) (1894) 2 Q.B.D. 897.
(2) (1835) 1 Y & C 481.
(3) (1895) 1 Q.B.D. 339.
(4) (1908) 1 K.B. 1006.

1939
GOODMAN
v.
THE KING.
Kerwin J.

tenance. "The law," (he continues) "has been modified in accordance with modern ideas of propriety," and he then proceeds to quote the famous passage from *Findon* v. *Parker* (5). At page 1020, Lord Justice Buckley quotes the definitions of Kent and Story mentioned above and also extracts from the judgments of Lord Abinger in *Prosser* v. *Edmonds* (2) and *Findon* v. *Parker* (5).

In *Scott* v. *The National System for the Prevention of Cruelty to Children* (1), Mr. Justice Bray, in referring at page 791 to certain bastardy proceedings, considered the cases showed that it was immaterial what the result might be but that most careful judge expressed the grounds of his decision on the point in the following sentence: "It was the wanton intermeddling that was the cause of action."

In *Oram* v. *Hutt* (2), Lord Sumner at p. 107, in declining to agree with the contention that the prosecutor's defeat in a maintained action would be a defence to an indictment for the misdemeanour of maintenance, states that it may be as much against public interest to *stir up* an action which lies indeed but which never would have been brought if the tort sufferer had been left to himself as to maintain an action that does not lie at all.

Finally, the House of Lords considered the civil action for maintenance in several aspects in *Neville* v. *London Express Newspaper Limited* (3). It was there held by Lord Finlay, Lord Shaw of Dunfermline and Lord Phillimore that an action for damages for maintenance will not lie in the absence of proof of special damage, Viscount Haldane and Lord Atkinson dissenting. It was held by Lord Finlay, Viscount Haldane and Lord Atkinson that the success of the maintained litigation, whether an action or a defence, is not a bar to the right of action for maintenance, Lord Shaw of Dunfermlin eand Lord Phillimore dissenting. Lord Abinger's statement in *Findon* v. *Parker* (4) was expressly referred to by only two of the peers. Lord Atkinson set it out with the object of ascertaining the meaning to be ascribed to the words "they have no right to make." In his Lordship's opinion they applied

(1) [1909] 2 T.L.R. 789.
(2) (1914) 1 Ch. 98.
(3) [1919] A.C. 368.
(4) (1843) 11 M & W 675.
(5) (1843) 11 M & W 675.

not to the persons maintained but to the persons who maintained these latter. After quoting Lord Abinger's statement at page 419 (1), Lord Shaw of Dunfermline concludes: "In my opinion that is still the law of England"; although on the particular point with which he was then concerned, he was in disagreement with Lord Atkinson and in fact in the minority.

It is clear, however, from a perusal of all the speeches in that case that no doubt was cast upon the general proposition that to make a person liable as a maintainer, either civilly or criminally, he must have intervened officiously or improperly. Lord Finlay really puts the matter in that way by quoting the definition of maintenance in Hawkins' Pleas of the Crown. Viscount Haldane, at p. 390 (1), remarks:—

> For the broad rule remains unrepealed by any statute that it is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest for its prosecution or defence.

Before quoting Lord Abinger's statement, Lord Atkinson had, at p. 395 (1), stated:—

> If, however, the essence of the action of maintenance be the officious intermeddling in or supporting litigation in which the meddler has no legitimate interest * * * as I think it is.

Later (p. 397 (1) he quotes the extract from *Prosser* v. *Edmonds* (2) and also (p. 405) (1) the extract from the *Scott* case (3). There is really nothing inconsistent with this view in the speech of Lord Phillimore.

These references to the speeches in the House of Lords in the *Neville* case (1) indicate that the views previously expressed by various writers of standing and by a number of very able judges have not been departed from and that there must exist that officious interference, that introduction of parties to enforce rights which others are not disposed to enforce, that stirring up of strife, to constitute the crime of maintenance. In the present case Lallemand was disposed to enforce his claim, and in fact had already consulted attorneys before his wife approached

(1) [1919] A.C. 368. (2) (1855) 1 Y & C 481.
(3) [1909] 2 T.L.R. 789.

1939
GOODMAN
v.
THE KING.
Kerwin J.

the appellant. The appellant did not intervene on his own initiative and took no action that may be in any way described as stirring up strife and litigation.

The appeal must be allowed and the conviction quashed.

CANNON J.—I am of opinion that this appeal should be allowed and the conviction quashed.

Appeal allowed and conviction quashed.

1939
*May 9.
*Oct. 3.

MONTREAL TRAMWAYS COMPANY (DEFENDANT) ..... APPELLANT;

AND

ROSARIO GUÉRARD, ÈS-NOM AND ÈS-QUAL. (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Minority—Action for damages by minor represented by father as tutor—Minor attaining age of majority during proceedings—Petition en reprise d'instance not presented—Minor, then of age, declared interdicted—Father duly authorized to continue suit as curator—No notification of change of status—Nullity of proceedings, since date of majority, urged on appeal before this Court—Petition in revocation of judgment of this Court—Arts. 268, 269, 1177 (8) C.C.P.

An action for damages, brought by a father as tutor to his minor daughter, having been maintained upon a verdict by a jury, that judgment was affirmed by the appellate court and by this Court. Subsequently, a petition in revocation of judgment (*requête civile*) was presented by the appellant company. The daughter attained her age of majority before the date for proof and hearing on the merits of the petition; but the suit continued without any petition *en reprise d'instance* being presented, and judgment was rendered dismissing the *requête civile*. While the case was pending before the appellate court, the daughter having been interdicted, the father then presented a petition to continue the suit as curator, which petition was granted by the appellate court; and no appeal was taken. There has been no notification of the change of status of the daughter as to her age. As a preliminary ground of appeal before this Court, the appellant urged that all proceedings, subsequent to the date on which the daughter attained her majority, were null.

Held, that under the circumstances of this case, the proocedings should not be declared null and void. The judgment of the appellate court,