University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $2.50 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES.

CARRIERS—JURISDICTION—DISCRIMINATION IN THE SUPPLY OF CARS—The United States Supreme Court has recently handed down two opinions relating to the subject of discrimination by a carrier in its distribution of cars.[1] In the light of previous decisions and the doctrine of the Abilene case,[2] giving the Interstate Commerce Commission jurisdiction in case of alleged unreasonableness of rates, these opinions are of interest at least to the student and of possible regret to those who have been following with satisfaction the tending of the Supreme Court to extend rather than to limit the powers of the Commission in dealing with railroad problems generally.

In 1902, at the time of the anthracite coal strike, there came a sudden demand for cars for the bituminous mines along the Pennsylvania Railroad.[3] At this time the railroad governed its car dis-

[1] Penna. R. R. v. Puritan Coal Mining Co., 35 S. C. R. 484 (April, 1915); Eastern Ry. Co. of New Mexico v. Littlefield, 35 S. C. R. 489 (April, 1915).

[2] Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 (1901).

[3] Discussion deals with the Puritan Coal Co. case only. The Eastern Ry.

tribution by a schedule predicated upon the output of the various mines. When this great demand for cars came the railroad ceased to abide by this schedule and, according to the allegations of the Puritan Coal Mining Company, failed to supply it with the number of cars that according to the railroad's own schedule it should have had. Moreover, it was alleged that other mines received a greater number than they were entitled to under the schedule. The Puritan Coal Mining Company sued in the county court for damages for unlawful discrimination extending over a period of several years. Recovery was allowed and this was affirmed by the Supreme Court of Pennsylvania.[4] This judgment the Supreme Court of the United States has now sustained. In substance the court holds "that the Puritan Company was entitled to recover because of the fact that the carrier failed to comply with its common law liability to furnish it with a proper number of cars". What was the proper number was a question of fact and the determination of this, the court said, came properly within the jurisdiction of the State court. In support of the alleged discrimination the plaintiff relied on the railroad's own schedule as evidence.

Section Three of the Interstate Commerce Act makes it unlawful for a carrier to give undue preference to one shipper over another.[5] Section Eight gives a right of action against the carrier for the doing of anything prohibited by the Act.[6] Section Nine then provides that any person alleging damage by a carrier subject to the Act may make complaint before the Commission or may bring suit for damages in any federal court of competent jurisdiction.[7] This last section would appear to restrict all complaints relative to

---

of New Mexico case was decided directly on the authority of the Puritan case and on substantially the same facts.

[4] 237 Pa. 420 (1912).

[5] Sect. 3: "It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[6] Sect. 8: "That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured for the full amount of damages sustained in consequence of any such violation of the provisions of this act. . . ."

[7] Sect. 9: "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; . . ."

interstate commerce to adjudication before the Commission or in the federal courts. To avoid this, Section Twenty-two provides that "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies". Relying on this common law obligation and also on the statute of Pennsylvania [8] forbidding unreasonable discrimination, both of which were reserved to the shipper by Section Twenty-two, the Puritan Company sued in the State court and recovered.

The leading case to affirmatively establish the extensive powers of the Interstate Commerce Commission is the Abilene Oil Company case.[9] In that case the railroad had filed its rates with the Commission. The plaintiff, relying on Section Twenty-two of the Act, sought the State court's jurisdiction to declare certain rates unreasonable. But the Supreme Court of the United States held that notwithstanding this section no State court could declare unreasonable rates which had been filed with the Commission and which had not been declared unreasonable by that body. The same principle was applied in *Robinson* v. *Baltimore & Ohio Railroad*,[10] the only difference being that in that case discrimination rather than unreasonableness was alleged. In both cases the carriers had strictly observed the filed and published tariffs and were held exempt from the common law liability which appeared to exist under Section Twenty-two of the Act. The court said that a strict observance of that section would defeat the very purpose of the Act which had provided for an expert commission to decide upon discrimination and unreasonableness. Following the principle of the Abilene case it was held in the Pitcairn case [11] that the United States Circuit Court could not issue a writ of mandamus, as provided for by Section Twenty-three of the Act, compelling a railroad to put into effect a schedule of car distribution which it, the Circuit Court, thought proper and non-discriminatory.[12] What was a proper method was for the Commission and complaint must be made there and the Commission must have found it discriminatory or unreasonable before any court could act.

In *Morrisdale Coal Company* v. *Pennsylvania Railroad* [13] it would appear that the Supreme Court had even extended this previous doctrine of the Abilene and Pitcairn case, and it is with this case that we find it difficult to reconcile our two principal cases. Here the railroad had its own schedule for car distribution but this schedule was not filed with the Commission. Suit was brought in

---

[8] Act June 4, 1883, P. L. 72.

[9] *Supra*, note 2.

[10] 223 U. S. 506 (1912).

[11] B. & O. R. R. v. Pitcairn Coal Co., 215 U. S. 481 (1910).

[12] See also I. C. C. v. Ill. Central R. R., 215 U. S. 452 (1910).

[13] 230 U. S. 304 (1913).

the Circuit Court under Section Nine [14] of the Act to recover damages for violation of Section Three.[15] The railroad in this case had observed its schedule but the plaintiff contended that the schedule was discriminatory. As in the Pitcairn case, the Supreme Court held that the Circuit Court could not put into effect for future conduct such rules of car distribution as it, the Circuit Court, thought non-discriminatory, so in the Morrisdale case the court said that the Circuit Court could not award damages which had resulted from the enforcement of a rule that the Circuit Court considered discriminatory. Again the court said that it was for the Interstate Commerce Commission to say whether or not such rule was discriminatory or not. But now come our principal cases and with these leading decisions to go by, each apparently increasing the power of the Commission in the matter of determining what is discriminatory, the Supreme Court holds flatly that the State court had jurisdiction under Section Twenty-two of the Act. In the Puritan case, as in the Morrisdale case, the railroad had a schedule for car distribution, and as in that case also such schedule was not filed with the Commission. "But," said the court, ". . . there are two forms of discrimination—one in the rule and the other in the manner of its enforcement." In the Morrisdale case the schedule itself was attacked as unreasonable and the court said that that question was for the Commission to decide. In the Puritan case the schedule was not attacked as unreasonable; rather it was alleged and proven that the railroad had distributed according to its schedule. This is what was meant by the two kinds of discrimination. This distinction is made the basis of the court's opinion. Is it a real distinction? After stating how the two cases differ the court says: "The plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled." The court held that this allegation gave rise to a good cause of action in the State court and that the coal company was there entitled to prove the facts alleged. But to what number of cars was the plaintiff entitled? How can it be said that "on the trial there was no administrative question as to the reasonableness of the rule but only a claim for damages occasioned by its violation in failing to furnish cars"? Did the fact that the railroad itself had fixed the rule (schedule) make that such a rule that any deviation therefrom would amount to discrimination? So the court seemed to say. Yet as a matter of fact the Interstate Commerce Commission later declared this very schedule discriminatory.[16] In spite of this the State court was allowed to award damages for failure to abide by this rule—later declared discriminatory.[17]

---

[14] *Supra,* note 7.

[15] *Supra,* note 5.

[16] Hillsdale Coal & Coke Co. v. Penna. R. R., 19 I. C. C. Rep. 356 (1910).

[17] It is admitted that the question raised in our principal case was reserved in the Morrisdale Case (*supra,* note 13), at page 314.

Through all these cases it has been said that "the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission". Is it less administrative in its character when damages are being sought for a failure to abide by a purely railroad-made rule which had not been filed? Allowing such recovery is doing one of two things. It is either allowing a State court to determine what is a proper rule without the previous judgment of the Commission, or it is saying that the mere fact that a railroad has a schedule is proof that such schedule is non-discriminatory. The former is certainly against the principle laid down in the Abilene, Robinson and Pitcairn cases. The latter, in view of the later finding by the Commission that the rule was of itself discriminatory, seems unwise to say the least.

One is tempted to believe that the court may have been influenced by Mr. Justice Pitney's dissent in the Morrisdale case [18] and in two other cases decided at that same time.[19] His idea was that these three decisions were unnecessarily eliminating the force of Section Nine of the Act which allowed the United States courts jurisdiction. He argued that the opinion in the Abilene case is logical: That where it is a question of laying out schedules for *future* observance it is entirely proper to make the ruling of the Commission supreme and to deny to any court the right to say that such is unreasonable or discriminatory. "But to so apply that reasoning as to make it support the contention that discriminations by the carrier in the *past,* amounting to a *departure by the carrier from the established schedule* . . . and where the conduct of the carrier has no *prima facie* sanction under the law by reason of the filing and publishing of a schedule or otherwise, shall not be actionable in the ordinary course of law without previous investigation or determination by the Commission is not only to ignore the essential differences between the facts in this case [20] and those in the Abilene case, but is to *virtually eliminate Section Nine of the Interstate Commerce Act.* . . ."[21] It is suggested that this language may have had some bearing on the present decisions.

H. I.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—WEBB-KENYON ACT—The history of the development, both by judicial decision and by legislation, of the States' power to control the sale of liquor

---

[18] 230 U. S. at page 267.

[19] Penna. R. R. Co. v. International Coal Co., 230 U. S. 184 (1913); Mitchell Coal & Coke Co. v. Penna. R. R. Co., 230 U. S. 247 (1913).

[20] Mitchell Coal Co. Case, *supra,* note 19; Morrisdale Coal Co. Case, *supra,* note 13.

[21] 230 U. S. at page 296.

within their own borders, is of particular interest at present owing to the almost universal agitation of the prohibition question.

In the License Cases [1] the Supreme Court of the United States held that the sale of intoxicating liquor which was a part of interstate commerce might be prohibited by a State even in the absence of a federal law. But this decision was overruled in *Leisy* v. *Hardin*,[2] which decided that the interstate shipment of liquor was a matter of national concern and that the States could not regulate it. In this decision the Supreme Court invoked the doctrine of *Cooley* v. *Port Wardens of Philadelphia*,[3] and also the doctrine of the silence of Congress, saying that as Congress had not broken its silence this showed clearly that the will of Congress was that the subject should be left unregulated by the States in this, a matter of national concern. The next step was the passage of the Wilson Act,[4] which provided in substance that the States might forbid the sale of liquor imported from other States in the original package, thus doing away with the result of *Leisy* v. *Hardin*. This act was held constitutional in *In re Rahrer* [5] on the ground that Congress had broken its silence, thereby giving the States power to pass laws forbidding the sale in the original package. There are also passages in the opinion which seem to stand for the proposition that Congress may determine when interstate commerce shall begin and end, or in other words to define interstate commerce. Mr. Chief Justice Fuller said:[5a] "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." The latest step was the passage of the Webb-Kenyon Act,[6] which substantially prohibits the shipment or transportation of liquor from one State to another when it is to be received or possessed or in any manner used in violation of State laws. This apparently removes the last obstacle to absolute State control of the liquor question as there is now no difference, as far as State regulation goes, between liquor manufactured within the State and that brought in in interstate commerce; it has always been admitted that a State under its police power could forbid the manufacture or sale of liquor made within its borders.[7]

---

[1] 5 How. 504 (1847).

[2] 135 U. S. 100 (1889).

[3] 12 How. 299 (1851): "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

[4] Act Aug. 8, 1890, c. 728; 26 Stat. 313; U. S. Comp. St. 1901, page 3177.

[5] 140 U. S. 545 (1891).

[5a] At page 562.

[6] Act March 1, 1913, c. 90; 37 Stat. 699; U. S. Comp. St. 1913, §8739.

[7] Mugler v. Kansas, 123 U. S. 623 (1887).

Although there is no decision of the Supreme Court on the constitutionality of this act there have been several decisions of lower courts advancing different theories to support it. In this connection the recent case of *State of West Virginia* v. *Adams Express Company*[8] is of interest in that the Circuit Court of Appeals of the Fourth Circuit decided in favor of the constitutionality of the act. The attack made on it was that it was an attempt by Congress to confer on the States the power to regulate interstate commerce and therefore unconstitutional. The Circuit Court, however, took the position that since Congress has power to outlaw and exclude absolutely from interstate commerce liquor or any other deleterious substance, it also has the power to exclude them conditionally, the condition being that if the particular State has prohibited the sale of liquor within its borders the Act of Congress will operate. From analogy to the lottery, white slave and pure food laws[9] it is a fair inference that Congress could pass an act absolutely prohibiting the interstate shipment of liquor, but it is submitted that to prohibit such shipment on the condition stated is in fact a delegation by Congress of the right to regulate interstate commerce.

Another interesting argument is that advanced by the court of last resort of Delaware,[10] which is based on the presumption that *In re Rahrer* decided that Congress had the power to define interstate commerce, as was undoubtedly intimated in that case. The Delaware court holds that if Congress can allow the States to forbid the sale of liquor in the original package why should it not take the extra step and declare, as it did in the Webb-Kenyon Act, that no liquor may be shipped into a State contrary to the laws of that State? In other words, the sale of liquor in the original package is just as much a part of interstate commerce as its transportation, and if Congress can divest the former of its interstate commerce character, why should it not be able to do the same with respect to the latter? This argument is striking, but the fallacy is that the power of Congress to regulate does not include the power to define. What interstate commerce is, is not a question for Congress but for the Supreme Court of the United States, to decide. If it is true that Congress can decide the question it is hard to perceive what, if any, limitations there are on Congress as far as the power to regulate interstate commerce is concerned.

It is clear that if Congress should pass an act providing that a railroad running from New York City to Trenton, New Jersey, should not be construed as an interstate carrier, this would be unconstitutional because it is not a question which Congress is competent

---

[8] 219 Fed. Rep. 794 (1915).

[9] The constitutionality of these acts are discussed in: Lottery Cases, 188 U. S. 321 (1902); Hoke v. U. S., 227 U. S. 308 (1912); Hipolete Egg Co. v. U. S., 220 U. S. 45 (1910).

[10] State v. Grier, 88 Atl. Rep. 579 (Del. 1913).

to decide. But the Supreme Court would have to decide whether or not, under the Commerce Clause this is constitutional. Thus when the Supreme Court has decided as it did in *Brown* v. *Maryland*[11] that interstate commerce does not end till after the sale in the original package, how can Congress override this express exposition of the Constitution by defining that interstate commerce shall end at an earlier period, or in other words, say what is and what is not interstate commerce? If this be true what is the function of the judiciary?

Therefore it would seem that the doctrine of the silence of Congress, which has been severely criticized as an unjustifiable rule with no real basis in fact, is the only ground on which the Webb-Kenyon Act can be upheld: That as the matter is one of national concern the silence of Congress before the passage of the Wilson Act meant that Congress wanted the subject left unregulated. The Wilson Act broke the silence of Congress and allowed the States a certain amount of regulation. By the Webb-Kenyon Act Congress has again broken its silence and allowed the States absolute control. The reason why this is not a delegation of power is that the silence of Congress placed a bar on State action and therefore, although the States always had the innate power to act they could not do so till Congress lifted the bar. In other words, this is not a delegation of new power to the States but a lifting of the barrier which prevented the exercise of a power which the States always had.

But if the doctrine of the silence of Congress be sound, the prohibition on a State's power to regulate interstate commerce in a matter of national concern does not reside in the Constitution *ipso facto,* but only when Congress by its silence shows that it wants the subject left unregulated. It is difficult to believe that the framers of the Constitution could have intended that the right of the States to so regulate could be dependent on the action or non-action of Congress. However this is a well recognized doctrine.

In any event it will be of the greatest interest to see how the Supreme Court will decide this question, because its decision will go a long way toward determining whether the power to regulate interstate commerce is exclusively in Congress, or concurrent between that body and the States,—a question which has been agitated since the adoption of the Constitution.

J. W. L.

DEEDS—RELEASE OR COVENANT NOT TO SUE—Those whose delight is in giving effect to what they would persons had said, rather than to what persons actually found it convenient to say, will herald as the attainment of their ideal the decision of *Dwy* v. *Connecticut Company,* in which the words "remise, release and dis-

---

[11] 12 Wheat. 419 (1827).

charge" were held, by reason of a subsequent reservation of rights against another joint tortfeasor, to mean "covenant not to sue".[1] To date, this is the boldest application of a doctrine of interpretation of sealed instruments, which has been steadily gaining ground[2] and which will probably, save perhaps in the most conservative jurisdictions, eventually destroy the concept of a release under seal with a reservation (valid or void) of the right to proceed against other joint tortfeasors. This is the peculiarity of the Dwy case and its predecessors, that, while the effect of a release is recognized, yet, by rules of interpretation, the effect is negatived. The rule of interpretation is thus: A release under seal of one joint tortfeasor will release all, although right of action against the others is specifically reserved, and despite the intention of the parties that it shall not have that effect, but this instrument has not that effect because it is not a release; it is not a release, because there is a reservation of rights against the other joint tortfeasors. Since the rule of law is too solidly imbedded to be overthrown by the intention of the parties, it was the intention of the parties to create a situation to which the rule of law does not apply.

The justification for a court to declare that one word means another is somewhat dependent upon the relation between the two words or phrases. It is well, then, in the first place to find what is the theoretical and what the practical difference between a release of a tortfeasor and a covenant not to sue a tortfeasor. A release is a discharge from liability, a denial that the releasee is under further obligation to the releasor.[3] Since it goes to the root of the injury sustained it is pleadable in bar of an action for the tort.[4] The releasee being liable for the entire injury, release of his liability is release of all liability, so a release under seal of one joint tortfeasor is a release of all.[5] The release having, by operation of law, this

[1] 92 Atl. Rep. 883 (Conn. 1915). The words of the one instrument were, "I have remised, released and forever discharge and do hereby, *etc.*, remise, release and forever discharge to the said Fred T. Ley & Co., of and from all debts, *etc.*, especially on account of injuries received on May 6, 1913, I hereby reserving my right to sue any other party or parties". The other also under seal: "I, for $100 and other valuable consideration, do hereby release and discharge Fred T. Ley & Co. from all claims for damages on account of accident and make no claim against him or hereby reserving my right to sue any other party or parties." The two were treated as identical.

[2] In Gilbert v. Finch, 173 N. Y. 455 (1903), it is not certain whether the instrument was under seal; in Duck v. Mayer [1892] 2 Q. B. 511, it certainly was not; in McDonald v. Grocery Co., 171 S. W. Rep. (Mo. 1914), *obiter;* in Smith v. Dixie Park & Amusement Co., 157 S. W. Rep. 900 (Tenn. 1913), and Musolf v. Duluth Elec. Co., 108 Minn. 369 (1909), the words themselves were rather of a covenant not to sue than of a release, the former case recognizing that if a release, the reservation was bad.

[3] Cooper v. Keady, 144 Pac. Rep. 99 (Ore. 1914).

[4] Clark v. American Bridge Co., 190 Ill. App. 134 (1913).

[5] Parry Manufacturing Co. v. Crull, 101 N. E. Rep. 756 (Ind. 1913). This is true although the person released was not in fact liable, Seither v. Philadel-

effect, any reservation of rights against others is repugnant and void.[6] A covenant not to sue a joint tortfeasor is absolutely noncommittal as to the liability of the covenantee and is a mere covenant not to prosecute any claim which the covenantor might have (not might have had) against the covenantee. Since the covenantee himself is not relieved from liability, *a fortiori* his co-tortfeasors are not relieved, regardless of the nature of the instrument containing the agreement not to sue or of the presence therein of a reservation of rights clause.[7] Since the consideration for the covenant not to sue is paid by reason of an injury sustained, it is compensation therefor and is a discharge *pro tanto* of the other joint tortfeasors,[8] so that there can be no argument of public policy against a covenant not to sue, since the covenantor may at all events proceed against one or as many as he pleases, but can never get more than full compensation for his injury. The right of the covenantee to recover back from the covenantor whatever may have been received by the covenantor in an action by him in breach of the covenant, makes the covenant not to sue ultimately as full a discharge as is a release. To simplify the question it may be conceded that the only practical difference between a covenant not to sue and a release is that by the former, only the covenantee is relieved from liability, while by the latter all joint tortfeasors are released.

If the Dwy case were decided on some other ground than the interpretation of an instrument under seal, the last of a substantial (so far as the relation of the immediate parties is concerned) difference between the two terms would be of great importance. As Professor Wigmore has said, there is no magic in words, for, as symbols used by persons, they mean what the parties intended them to mean. But in arriving at the intention of the parties there are several rules restricting the broad interpretation of an instrument. First, persons do not always act according to their best intent. They may release when if better advised, they would have covenanted not to sue. Second, parties may intend what the law will not allow them to effectuate. If the parties here entered into a release and intended it not to affect liability of others, it is clear what they intended, but the condition being repugnant, will not be enforced. Third, where there are more parties than one to an instrument, the meaning of the words must be restricted to that meaning understood by both parties. Fourth, the rule that an instrument shall be so interpreted *ut res magis valeat, quam pereat* has no application where the mean-

---

phia Traction Co., 125 Pa. 397 (1889); Casey v. Auburn Telephone Co., 155 App. Div. 66 (N. Y. 1913).

[6] Flynn v. Manson, 19 Cal. App. 400 (1912); Bride v. Scott, 132 Mich. 176 (1913).

[7] Matheson v. O'Kane, 211 Mass. 91 (1912); Parry Manufacturing Co. v. Crull, *supra,* note 5.

[8] Gore v. Hunstin, 165 Ill. App. 222 (1912).

ing is clear but unable to be effectuated, its proper application being to the adoption of one of two possible meanings. It seems too clear for argument that the intention of the parties here was that there should be an absolute discharge from liability of the one joint tortfeasor, but that that absolute release was not to have the effect of releasing others. If there exists a condition void for repugnancy (and it seems there have been some) this seems to be in that class.

The fact that, under the old state of things, an evil was felt, can no longer be denied. There must be a change and what remedy is open if not the one suggested in the Dwy case? It is against logic to allow a reservation after an absolute release and it is against sense to say that a release is not intended in almost all cases. May a remedy be suggested humbly and with trepidation on the theory that a positive commanding paternalism is more tolerable than a cowardly misinterpreting paternalism? There seems to be somewhat of an analogy between a release and a penalty in this respect, that the one is a receipt of less than full compensation (shown by reservation clause), the other a promise to pay more than full compensation. The penalty, although intended, is held good only so far as it provides for substantial justice for the parties; hence recognizing the release as to the parties to it, but refusing to enforce it against others, not because it is none the less a release, but because it is better policy and prejudices none of the parties to it, to give it that effect. The net result is the same as in the Dwy case.

J. F. H.

LEGAL ETHICS—CHAMPERTY AND MAINTENANCE—ELEMENTS—Notwithstanding the promulgation of a Code of legal ethics by the American Bar Association, and its adoption by the bar associations of thirty States,[1] the courts have frequently indicated that their opinions will be guided by legal rather than ethical considerations, so that although a transaction may be legally unethical, it may, nevertheless, be not illegal. A recent decision[2] by the Supreme Court of Minnesota, one of the States which has adopted this Code, is an excellent illustration of the distinction. Attorneys solicited[3] the claim of one Johnson for personal injuries against a railroad company. The solicitation was successful and Johnson employed them under a contingent fee contract, by which they were to receive for their services one-third of any amount recovered by suit or settlement. The client was advised, however, not to settle, on the ground that heavy damages might be obtained by a jury trial. The attorneys

[1] Amer. Bar Assoc. Rep. 560 (1914).

[2] Johnson v. Great Northern Ry. Co., 151 N. W. Rep. 125 (1915).

[3] In what manner the claim was solicited does not appear and apparently was considered of no importance by the court.

advanced money to their client with which to pay living expenses and hospital bills during the pendency of the case, while he was unable to earn anything. The contract further provided that the costs of litigation should be paid by the attorneys, and that they should be reimbursed therefor from the gross amount received from the proceeds of the action. The court held that the transaction did not constitute champerty or maintenance and that it was not against public policy. The court said: "We may have our individual opinions on these propositions as questions of good taste or legal ethics. But in the absence of some statute, we are unable to hold that it is illegal or against public policy for an attorney to solicit a case." It has been held, however, that to solicit causes of action tends to promote litigation and to degrade the profession and that not only was a contract made by an attorney with a client in consequence of solicitation invalid, but that also the attorney was not entitled to recover *quantum meruit* for the services rendered by him.[4] The latter view is strictly in accordance with the canons of ethics of the American Bar Association, in which it is provided,[5] *inter alia,* "It is disreputable . . . to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients."

Authorities are greatly at variance as to what elements constitute champerty and maintenance. Blackstone defined the latter as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it".[6] Champerty is a species of maintenance and includes the additional element of sharing in the possible proceeds of the litigation.[7] One of the commonest instances of such profit-sharing is exemplified in contracts by an attorney for a contingent fee, which, as a general rule, are not regarded champertous,[8] unless they are unreasonable or unconscionable, as where it is clear that advantage has been taken of the client's poverty.[9] Most mod-

---

[4] Ingersoll v. Coal Creek Co., 117 Tenn. 263 (1906), in which case the attorney went to the scene of a disaster and solicited numerous injured persons to intrust him with the prosecution of their rights of action. It has been decided that a contract whereby an attorney agrees to pay for business brought to him is void. *In re* Clark, 184 N. Y. 222 (1906); *contra,* Vocke v. Peters, 58 Ill. App. 338 (1895).

[5] §28. Disbarment is therein advocated as a penalty for stirring up litigation.

[6] 4 Commentaries, 135.

[7] *Ibid.*

[8] "Wisely or unwisely, a point on which opinions may differ, the law has long been settled that such [*i. e.,* contingent] fees are lawful and enforceable by the courts, and something more than mere contingency of compensation is necessary to make them champertous." *Per* Mitchell, C. J., in Williams v. Phila., 208 Pa. 282 (1904).

[9] Moorehouse v. Brooklyn, 185 N. Y. 520 (1906). A contingent fee of

ern courts consider that a fair and honest contract for a contingent fee is as much for the benefit of the client as for the attorney, because if the former has a meritorious cause of action but no means with which to pay for legal services unless he can lawfully contract for a contingent fee to be paid out of the proceeds of the litigation, he will necessarily be deprived of his remedy, unless he confides his case to an attorney sufficiently unscrupulous to make a secret illegal agreement.[10] However, in view of the existence of legal aid societies in many communities, and also the possibility of a poor person suing *in forma pauperis,* and of the power of the courts to assign counsel to litigate the case of a poor client, it is believed that contingent fees might well be eliminated.[11] In a few States, a contract for an attorney's compensation will be deemed champertous where it provides that payment is not only to be contingent on success but also that such payment is to be made only from the amount recovered by him for the client.[12] But in the jurisdictions where this principle is followed, the rule is readily evaded by providing merely that a percentage of the amount recovered is to be paid after the successful termination of the suit, and by omitting a provision that the attorney is to have nothing if unsuccessful.[13] According to the weight of authority, a contract for a share of the proceeds of litigation is not champertous, unless the attorney carries on the proceedings at his own expense.[14] There are some States in which such a contract is not champertous, even though the costs of the suit are so paid.[15] However, in nearly all jurisdictions, where the suit is for divorce, a stipulation for the attorney's compensation providing that it is to be contingent upon the amount of alimony recovered, is illegal.[16]

As has just been stated, it is generally recognized that an agreement by an attorney to conduct litigation at his own expense, in consideration of all or a part of the recovery, is champertous and unen-

---

fifty per cent. is not "unconscionable". *In re* Fitzsimmons, 174 N. Y. 15 (1903).

[10] Lipscomb v. Adams, 193 Mo. 530 (1906). See also Thornton on Attorneys at Law, Vol. 2, §421, where contingent fees are regarded favorably.

[11] This view is strongly advocated in Sharswood's "Legal Ethics" (4th ed.), p. 159 *et seq.* Committees of the Pennsylvania Bar Association (1908 and 1909) and a Committee of the New York Bar Association (1909) have reported against contingent fees. See, also, §13 of Amer. Bar. Assoc.'s Canons of Ethics.

[12] Ackert v. Barker, 131 Mass. 436 (1881); Butler v. Legro, 62 N. H. 350 (1883). The fact that in case of failure, the attorney is to receive a nominal recompense such as one dollar does not prevent the transaction from being champertous. Kelly v. Kelly, 86 Wis. 170 (1893).

[13] Hadlock v. Brooks, 178 Mass. 425 (1901). See also the interesting opinion in Phillips v. Louisville, *etc.,* Co., 153 Fed. Rep. 795 (1907).

[14] Jeffries v. Mutual Ins. Co., 110 U. S. 305 (1884); Geer v. Frank, 179 Ill. 570 (1899).

[15] Shelton v. Franklin, 224 Mo. 342 (1909).

[16] Neuman v. Freitas, 129 Cal. 283 (1900).

forceable. Obviously, an agreement by which the attorney indemnifies the client against costs is no less champertous.[17] But, it is not against public policy for an attorney to lend his client money with which to pay the costs of suit, when there is an undertaking for its repayment, regardless of the outcome.[18] *A fortiori*, where the client is a poor person, it is not improper to make such advances. The law of champerty and maintenance has never been carried so far as to render objectionable the rendition of legal services or the giving of assistance in aid of the litigation of indigent persons.[19] It has been said that "to investigate the claims or redress the wrongs of the indigent and the injured is no quixoticism, but a grave and highly honorable duty of the profession, the performance of which, if not voluntarily assumed, may be enforced by the court".[20] However, charitable motives are controlling as to whether or not such rendering of assistance constitutes champerty or maintenance.[21] There must be no speculative bargain to participate in the amount recovered.[22] In the principal case, the attorneys not only advanced the expenses of litigation, with an agreement of reimbursement therefor out of the proceeds, but they also lent the indigent client an amount sufficient to pay his living expenses and hospital bills. The court admitted that such a loan "may, in a sense, tend to foment litigation, by preventing a settlement from necessity; but we are aware of no authority holding that it is against public policy or of any sound reason why it should be so considered". It is submitted, however, that as the facts indicate that there was no purely charitable motive on the part of the attorneys, and that their interest was purely speculative, the contract should have been held to be champertous.

A. L. L.

---

[17] Roller v. Murray, 107 Va. 527 (1907).

[18] Christie v. Sawyer, 44 N. H. 298 (1862).

[19] Wallace v. C. M. & St. P. Ry. Co., 112 Ia. 565 (1900); Jahn v. Champagne Lumber Co., 157 Fed. Rep. 407 (1908); Bristol v. Dann, 12 Wend. 142 (N. Y. 1834).

[20] Moore v. Campbell, 9 Yerg. 115 (Tenn. 1836).

[21] Harris v. Brisco, 17 Q. B. D. 504 (1886). *Cf.* Holden v. Thompson, [1907] 2 K. B. 489.

[22] Taylor v. Perkins, 157 S. W. Rep. 122 (Mo. 1913); *Re* Evans, 22 Utah, 366 (1900).