THE LAW COMMISSION

PROPOSALS FOR REFORM OF THE LAW RELATING TO MAINTENANCE AND CHAMPERTY

Laid before Parliament by the Lord High Chancellor pursuant to section 3 (2) of the Law Commissions Act 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*
Mr. L. C. B. Gower, M.B.E.
Mr. Neil Lawson, Q.C.
Mr. N. S. Marsh.
Mr. Andrew Martin, Q.C.

Mr. Arthur Stapleton Cotton is a special consultant to the Commission. The Secretary of the Commission is Mr. H. Boggis-Rolfe, C.B.E., and its offices are at Lacon House, Theobald's Road, London, W.C.1.

LAW COMMISSION

Item XV(d) of First Programme

PROPOSALS FOR REFORM OF THE LAW RELATING TO MAINTENANCE AND CHAMPERTY

To the Right Honourable The Lord Gardiner,
the Lord High Chancellor of Great Britain

My Lord,

Introduction

1. Under the heading "Miscellaneous matters involving anomalies, obsolescent principles or archaic procedures" the Law Commission's approved programme singled out a number of matters for examination upon the grounds, amongst others, that they seemed to rest upon outdated considerations of public policy. The crimes and torts of maintenance and champerty were included amongst these.

2. The English law of maintenance was the product of particular abuses which arose in the conditions of mediaeval society and later led to a series of statutes reinforcing the common law by imposing penalties for the offences of maintenance and champerty.

3. According to Coke, maintenance "signifieth in law a taking in hand, bearing up or upholding of quarrels or sides, to the disturbance or hindrance of common right; . . . and it is two-fold, one in the country and another in the court."[1] Maintenance "in the country" or "ruralis", as it was called, has disappeared from the legal scene, though its existence was recognized in *Wallis* v. *Duke of Portland* (1797) 3 Ves. 494, the Lord Chancellor pointing out that maintenance was not confined to supporting suits at common law. Maintenance "in the court", or "curialis", as it was called, has survived the centuries, giving rise to litigation from time to time. It may be defined as the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognized by the law as justifying his interference.

4. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give to the maintainer a share in the subject-matter or proceeds thereof, if the action succeeds.[2]

5. Maintenance (including champerty) is a misdemeanour punishable by fine and imprisonment at common law and is forbidden by various statutes; it is also an actionable tort rendering the maintainer liable in damages to the other party to the action.

6. Old authorities (e.g. Coke, loc. cit.) treat embracery as a type of maintenance. Embracery is the attempt to influence a juryman in favour of a party; it is left expressly unaffected by our recommended clauses (see Appendix, draft clause A(1)).

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[1] Co. Litt. 368b.

[2] For the history of maintenance and champerty, see Winfield, *History of Conspiracy and Abuse of Legal Procedure*, Cambridge (1921), particularly chapter VI.

Maintenance and Champerty as Indictable Misdemeanours

7. Maintenance and champerty as crimes are a dead letter in our law. There are no records of any prosecution for either for many years past. They do no more today than add unnecessarily to the length of legal textbooks and the statute book. To rid the law of these crimes would be merely to clear away lumber discarded in practice, though not in theory destroyed.

8. There are a number of ancient statutes as yet unrepealed which are either declaratory of the common law upon, or regulate punishments for, the crime of champerty; as a result of proposals sent to your Lordship on 24th May 1966, these are scheduled for repeal in Part I of the Schedule to the Criminal Law Bill now before Parliament.

Maintenance and Champerty as Torts

9. The modern view of maintenance is that it consists of the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings, without lawful justification. The tort of champerty is that of maintaining a civil action in consideration of a promise of a share in the proceeds of the action, if successful. The Court of Appeal in *In re Trepca Mines Ltd.* (No. 2) [1963] Ch. 199 showed that the offence extended to civil proceedings other than actions strictly so called: it has, however, no application to criminal proceedings.

10. It is difficult to reconcile the decided cases as to what constitutes a "lawful justification". It is established that charitable motives or an "interest" on the part of the maintainer provide a defence; but the authorities conflict as to what, for this purpose, constitutes "interest". Without entering into a detailed analysis of the cases, it may be said that the trend of judicial decision has been to increase the number of interests which the courts are prepared to accept as lawful justification. A master has been held justified in maintaining his servant's litigation, and a member of a family in maintaining an action by another member of the family. One who has a proprietary interest, actual or prospective, in the subject-matter of the litigation has also been held justified in maintaining litigation to which he was not a party. In 1955 members of an angling club were held to have lawful justification in supporting an action brought to prevent the pollution of a river, the plaintiffs in the action being riparian owners and members of the club.[1]

11. Even if the plaintiff in an action of maintenance manages to show that the defendant was without lawful justification in maintaining the litigation of which he complains, his difficulties are only beginning. For to succeed in his action he must go on to show that he has suffered actual damage as a result of the defendant's unjustifiable maintenance. In *Neville* v. *London "Express" Newspaper Ltd.* [1919] A.C. 368 the House of Lords decided that where the maintained litigation has succeeded, the burden of costs falling upon the party against whom the litigation was maintained does not constitute recoverable damage in an action of maintenance brought by him. By a further development of the law, in the case of *Wm. Hill (Park*

[1] *Alabaster v. Harness* [1895] 1 Q.B. 339
Oram v. Hutt [1914] 1 Ch. 98
Baker v. Jones [1954] 1 W.L.R. 1005
Martell v. Consett Iron Co. [1955] Ch. 363 and cited cases therein.

Lane) v. *Sunday Pictorial* ("Times" newspaper April 15th 1961) it was decided that where the maintained action had *failed*, a claim for damages for maintenance also failed, unless it could be shown that the maintained action would not have been brought or continued without the assistance of the maintainer. Obviously the factor of damage is almost *impossible* of proof. In the light of the cases on lawful justification and proof of damage, our conclusion is that the action for damages for maintenance is today no more than an empty shell.

12. Further, it is doubtful whether the retention of maintenance as a tort is consistent with other developments in the practice of litigation. Today trade unions, trading associations, many friendly and benefit societies, provide their members with financial assistance in pursuing claims or defences in certain classes of civil action.

13. Similarly, there is widespread throughout our society the beneficent practice of third party liability insurance, under which insured persons are entitled to indemnity against damages and costs awarded against them in actions based upon negligence, nuisance or breach of statutory duty and under which the conduct of the proceedings is normally in the hands of the insurers.

14. Finally, there is the deeply significant fact that since the passing of the Legal Aid and Advice Act 1949 the volume of civil litigation which is, in fact, supported in whole or part by legal aid has been progressively increasing. The figures for the last year available, 1965, show some 99,376 cases supported by legal aid (of which nearly one half are domestic proceedings in magistrates' courts).

15. The truth is that today the great bulk of the litigation which engages our courts is maintained from the sources of others, including the state, who have no direct interest in its outcome but who are regarded by society as being fully justified in maintaining it. When one further reflects how little is the scope left to the action for damages for maintenance and how formidable the difficulties of proof, one is bound to ask whether its retention in the law serves any useful purpose.

Public Policy and Champerty

16. There is, however, one field in which that particular species of maintenance—champerty—plays an effective role. There is a substantial body of case law to the effect that champertous agreements (including in this context "contingency fee" agreements) are unlawful as contrary, to public policy; see, e.g. *Laurent* v. *Sale & Co.* [1963] 1 W.L.R. 829. This rule has an important bearing upon the practice of solicitors. For instance, section 65 of the Solicitors Act 1957 reflects the rule when it declares that nothing in the Act is to be treated as giving validity to

> "(*a*) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or
>
> (*b*) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding."

And it is clear that a client can apply pursuant to section 61 of the Act to set aside a champertous agreement made with his solicitor for the conduct of litigation.

17. This rule of public policy has many implications for solicitors. The following are important:—

(*i*) "Contingency fee" agreements are unlawful: see, e.g. *In re a Solicitor* [1912] 1 K.B. 302.

(*ii*) A solicitor cannot recover from professional indemnity insurers loss arising from his having entered into an agreement in fact champertous: *Haseldine* v. *Hosken* [1933] 1 K.B. 822.

(*iii*) A solicitor who has made, or knowingly participates in the furtherance of, a champertous agreement is not entitled to enforce a claim for costs: *re Trepca Mines Ltd.* (No. 2) [1963] Ch. 199—in which the earlier authorities are referred to. This aspect is important to an English solicitor asked to act for parties resident in a jurisdiction where litigation on a contingency fee basis is lawful—e.g. the United States of America or some of the Common Market countries.

(*iv*) A solicitor who is conducting his client's litigation on a champertous basis may find himself ordered by the court to pay the other side's costs: *Danzey* v. *Metropolitan Bank of England and Wales* (1912) 28 T.L.R. 327.

18. Furthermore, if agreements savouring of champerty between a client and his solicitor should fall to be considered by the courts or the professional disciplinary body, they would be subjected to the closest scrutiny. In this context note should be made of the provisions of Rule 4 of the Solicitors' Practice Rules 1936 (S.R. & O. 1936 No. 1005) which precludes relationships with, or the acceptance of clients introduced by, claims agencies in respect of claims arising from death or personal injuries. Moreover, a client has the right to make complaint to the Law Society.

Consultation

19. We have had the advantage of very full consultation with the Law Society, the General Council of the Bar, and the Society of Public Teachers of Law. Our consultations have naturally extended beyond the narrow limits of our present investigation and embraced such questions as:—

(*i*) where solicitors should be permitted to arrange for their remuneration in contentious matters upon a "contingency fee" basis—i.e. no win, no pay: but win, and the solicitor takes an agreed percentage of the moneys recovered:

(*ii*) whether the law, criminal as well as civil, should be strengthened to offer protection against unscrupulous "claims agencies".

These are big questions upon which the professional bodies as well as the public must have further time for reflection before any solutions can or should be formulated. Suffice it to say that the ancient and unused misdemeanours and the ancient and virtually useless torts with which we are at present concerned can be consigned to the museum of legal history without prejudice to further discussion of such questions and with advantage to the form and clarity of our law.

Law Commission's Proposals

20. Accordingly we make the following proposals, to which none of those whom we have consulted raises any objection:—

(1) The common law and statutory misdemeanours of maintenance and champerty should be abolished.

(2) Maintenance and champerty as actionable wrongs should cease to exist.

(3) Champertous agreements (including " contingency fee " arrangements between solicitor and client) should, for the present, continue to remain unlawful as contrary to public policy. Meanwhile, further study, in consultation with the Law Society, should be given to the question of " contingency fee " arrangements.

21. We attach to this proposal an Appendix which sets out a draft clause which, in our opinion, could be included in a Law Reform (Miscellaneous Provisions) Bill, if it were thought desirable to give legislative effect to our proposals.

LESLIE SCARMAN, *Chairman.*
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.
ANDREW MARTIN.

HUME BOGGIS-ROLFE, *Secretary.*

25*th October,* 1966.

APPENDIX

DRAFT CLAUSE

Maintenance and Champerty as crimes and torts, at common law.

A.—(1) The offences of maintenance and champerty under the common law of England and Wales are hereby abolished; but embracery of jurors is to be treated as an offence distinct from maintenance and as unaffected by this section.

(2) No person shall, under the law of England and Wales, be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law, except in the case of a cause of action accruing before this section has effect.

(3) Nothing in this section affects any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

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