

## Maintenance By Champerty

LEGAL JUSTICE consists in the right determination by a judge of a controversy between two litigants. Even in criminal law there is regularly an accuser and an accused, whether the accuser is there in a representative capacity or as the party injured. In the early history of law, there was a strong feeling not only that these three parties, the judges and two litigants, were necessary but that there must be no one else and that any one who intruded himself between the judge and the parties could only mean mischief.

There was, of course, always an exception. It was expected that a man would come to his trial attended by friends, kinsmen or followers, his *secta*—his “back,” as the seventeenth century put it—and frequently this back was no inconsiderable array.<sup>1</sup> Out of this *secta*, or “back,” grew compurgation or wager of law. And out of it grew the whole system and theory of advocacy, one of the sources—let us remember, only one of them—of the profession of law.

It seemed quite natural that this should be the case. It may have come from the widespread custom of group-responsibility in obligation as in penalty. It was as disgraceful to appear unescorted to one's trial as it would have been to go so to one's grave. It was not merely a suitor's right to appear with friends and kinsmen. It was also the duty of these kinsmen to attend him.

This basic notion persisted throughout most of the legal development of ancient Greek communities. It showed itself again in the earlier stages of Roman law, and it was repeated in the medieval law of Western Europe, especially in England. Except as a personal friend of the litigant—often as a person jointly responsible by the mere fact of being a member of the same group—no one but the litigants and the members and officers of the court had any business to be present at all, except as spectators in those parts of Europe in which judgments were originally made by popular assemblies.

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<sup>1</sup> Frequent reference is made to the “assache after the custom of Wales” in which the compurgators numbered three hundred. 1 HENRY V c. 6. Cf. MAITLAND, *COLLECTED ESSAYS*, i, 229. They might even be six hundred. Cf. ELLIS, *WELSH TRIBAL LAW* (1926) ii, 304. Large groups of retainers and followers at the trial involving great men were common, particularly in Scotland. Readers of Caesar will remember the array of Orgetorix (*GALLIC WAR*, i, 4) on which I may refer to my note in 16 *Classical Journal* 142-45, where Scottish examples are cited. The incident in 13 Henry IV between William Ross and Justice Robert Tyrwhit is doubtless a vestige of a similar practice in England. Ross and Tyrwhit were ordered to appear at a “love day” before Chief Justice Gascoigne “with a few friends” to submit a dispute to arbitration. Tyrwhit, instead, assembled five hundred men. He was compelled to apologize and to make his peace with his antagonist. FOSS, *JUDGES OF ENGLAND* (1848-1864) p. 666. Rot. Parl. iii, 649.

A man who appeared at a trial flanked by supporters was a personage of dignity and power. If he was not so supported, he was a miserable wretch in the literal sense of both words. It was a great innovation when in the sixth century B. C., it was made possible for kindly men to come to the assistance of such wretches as poor and friendless plaintiffs. Our first authenticated instance is the reform of Solon at Athens,<sup>2</sup> and out of it apparently was created the distinction between civil and criminal law as the ancient world knew it, although for a long while thereafter, no one seemed to think of the distinction as substantial or important.

Intervention on behalf of another, therefore, was first permitted for an injured party who otherwise could not safely or effectively appear against a more powerful antagonist. And from the beginning, the rationale of such an exceptional intervention was declared to be the public interest, although it was not till the institution was developed in Rome that the intervenor was directly called the representative of the public and deemed to have the *populus Romanus* as his client.<sup>3</sup>

In Athens, instances in which the public interest permitted intervention of private persons multiplied and the excessive use of this privilege became a striking and intolerable abuse. It received a special name, *sykophanteia*, "sycophancy"; the practitioners were known as "sycophants," and every Athenian prosecutor might be sure of having this epithet cast in his teeth by the defendant. The impulse to "sycophancy" came from the enormous political capital which could be made from successful prosecutions and was often connected with substantial rewards.<sup>4</sup>

<sup>2</sup> CALHOUN, G. M., *THE GROWTH OF THE CRIMINAL LAW IN GREECE* (1926) pp. 72-88. BONNER AND SMITH, *THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE* (1930) pp. 167-192.

<sup>3</sup> For the criminal procedure proper, cf. JUSTINIAN'S INSTITUTES IV, 18. The accusation is open *cuius ex populo*. The *actio popularis*, to collect a public fine which usually went into the pocket of the plaintiff is distinguished from an ordinary action, *ubi quis quasi unus ex populo*. Cf. DIG. 47, 23, 1. PAUL, DIG. 3, 3, 42, pr; 43, 2. Cf. Wlassak, in the Pauly-Wissowa Realenz., s. v. *actio*, col. 318 ff. and the bibliography cited in col. 320. Cf. also BRUNS, *DIE POPULAR-KLAGEN*, KL. SCHR. I, 313 ff. WENGER, *ROM. PROZESSRECHT*, pp. 16 ff; 158 ff.

<sup>4</sup> Cf. for the whole question, LOFBERG, *SYCOPHANCY IN ATHENS* (1917). Very little is added to Professor Lofberg's discussion by the article s. v. *sykophanteia* in the Pauly Wissowa Realenz. Cf. further BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* (1927) pp. 59-71. This book and the other studies of Professor Bonner are especially noteworthy because the author is not only an eminent Greek scholar but a man of legal training and practical experience. Cf. also LIPSJUS, *DAS ATTISCHE RECHT UND RECHTSVERFAHREN* (1908) ii. pp. 448-451. It is hardly necessary to point out that "sycophancy" is a technical term of Greek law and is quite different from the use of the word in modern English as the equivalent of flattery. The traditional etymology is quite untenable, but no satisfactory one has been offered. Cf. the attempts by S. Reinach, *Rev. Et. Gr.* 19, pp. 335 ff; P. Girard, *ibid.* 20, pp. 143 ff; Cook, *Class Rev.* 21, pp. 133 ff.

The result was that the declaration of complete disinterestedness—which all modern public representatives proclaim—was looked upon with grave suspicion, and these intervenors often were driven to invent or allege some imaginary private interest, in the subject matter of the controversy or some personal relationship or friendship with the claimant or of hostility toward the defendant. In ancient Athens it relieved a man from the charge of sycophancy to show that he had an old and bitter quarrel with the defendant and that he was in this public matter wreaking a private grudge.<sup>5</sup>

There was also the situation created by the presence in Athens of strangers and freedmen who had no *locus standi* in a court except by a patron, *prostates*. This *prostates* might obviously be either plaintiff or defendant and in either case was really or presumptively maintaining his own interest, although the interest of the resident alien or freedman was frequently far greater.<sup>6</sup>

That a substantial citizen would need help in a law-suit was never fully admitted at Athens. With the rise of what may well be called a general intellectual training, the so-called "sophistic" movement of the fifth century, there was found in Athens a constantly increasing number of skillful writers and speakers who would for pay prepare legal arguments, especially the formal speech required in the Athenian court. The speech was always delivered by the litigant himself and the fiction was maintained that he had written it himself.

The original family or group solidarity<sup>7</sup> showed itself in the way already described, by the fact that the relatives or friends or clansmen who were the attendants of a litigant might support him by actual pleading. They were advocates in the literal sense, *synegoroi*, or "legal assistants," *syndikoi*. But the litigant himself spoke first and his advocates spoke after him, and it was a serious fraud on the court if they were not as they professed to be, friends or relatives, but were hired for the occasion.<sup>8</sup>

There is no essential difference between the private prosecutor, the sycophant, and the public prosecutor, the advocate or secretary of any public board charged with the duty of collecting public revenues or punishing delinquents, the fiscal agent of Roman times. An overzealous prosecutor like the sycophant, protested his patriotism for his excessive activity and doubtless justified the feeling of hatred and fear which

<sup>5</sup> Cf. the Demosthenic speech against Nicostratus (53) §1; against Callicles (55) §35.

<sup>6</sup> LIPSIUS, *DAS ATTISCHE RECHT UND RECHTSVERFAHREN*, II, pp. 370-371.

<sup>7</sup> For the whole question cf. GLOTZ, *LA SOLIDARITE FAMILIALE DANS LE DROIT GREC*. (1904).

<sup>8</sup> Cf. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS*, pp. 200-244.

he inspired. There must have been another side to the picture which our literary sources neglect to give us. Clearly some of the prosecutions were amply justified and any energetic prosecutor, honestly desirous of fulfilling his sworn duty, would seem a sycophant and a vexatious persecutor to the tax-dodgers and embezzlers of the time.<sup>9</sup>

Sycophancy was, however, not merely a device by which individuals profited either in money or prestige. It became a recognized means of political agitation and a part of the organized activity of what we should call political parties. Professor Calhoun has called attention to the part political clubs played in the Athens of the fifth and fourth centuries B. C. and there is abundant evidence that the members of these clubs were pledged to support each other in the litigation which was deliberately fomented against political antagonists.<sup>10</sup>

This has an astounding resemblance to the form which "maintenance," proper, took in fifteenth-century England. And, besides this type of intermeddling in litigation, Athens knew of the acquisition of interest in litigious matters that would in England have been obvious examples of champerty. The Athenian capitalist Apollodorus bought interest in a current claim<sup>11</sup> and we have in an oration of Isaeus (4th Century B. C.) the statement that Melas prosecuted a claim of Dicaeogenes on the understanding that he was to receive half the proceeds.<sup>12</sup>

Similarly, deliberate blackmail was practised by Callimachus by threat of legal proceedings, and the orators are full of references to direct bribery and intimidation of witnesses and courts.<sup>13</sup> Obviously these are often the wild charges of zealous advocates, but in many instances there is additional evidence.

In Athens, consequently, every one of the specific types of interference between the litigants and the court which was to do justice between them, was fully developed. The general term "sycophancy" seemed to cover them all.

<sup>9</sup> The career of the Athenian orator Lycurgus is an excellent example of a relentless prosecutor whose integrity is unquestioned and who doubtless seemed a sycophant to his opponents. WRIGHT, *GREEK LITERATURE* (1907) pp. 364-365. BONNER, ROBERT, *op. cit. supra* note 8, at pp. 70-71; KENNEDY, *DEMOSTHENES* (Bohn Libr.) II, pp. 330-334.

<sup>10</sup> CALHOUN, *ATHENIAN CLUBS IN POLITICS AND LITIGATION* (Austin, 1913) pp. 40 *seq.* 79-80. The instigation and support of litigation by other persons is, of course, "maintenance" proper, and the word "sycophancy" is used of this type of intermeddling as well as of vexatious prosecutions in general. Midias, the enemy of Demosthenes, had paid retainers to conduct prosecutions for him, Dem. in Mid. §139.

<sup>11</sup> Demosthenes pro Apollodoro, §53.

<sup>12</sup> Isacus, 5, §40. LOFBERG, *op. cit. supra* note 4, at 47.

<sup>13</sup> BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* (1927) pp. 66, 79.

All this was taken over in the Roman system. Advocacy, *ars oratoria*, became a recognized profession during the Republic, but the fiction of a personal connection with the litigant was maintained.<sup>14</sup> Fees could not be officially charged and no agreement to pay them was actionable. The *iuris peritus* or *iuris prudens* who might offer his services at any stage of the legal proceedings, or wholly without reference to such proceedings, similarly was deemed to give his services gratuitously and to be satisfied with the repute he obtained which was often as a matter of fact the best avenue of political preferment.<sup>15</sup>

The attitude toward "sycophancy" was less marked than at Athens. The idea existed and had from ancient times received the technical designation of *calumnia*.<sup>16</sup> It constituted a valid defense to a claim and was besides a tort for which damages could be demanded. It was frequently contrasted with the opposite offense of *praevaricatio* which existed when a claim was prosecuted with deliberate ineffectiveness, either to forestall another claim or with some other fraudulent purpose generally by collusion with the defendant. There was also the offense of *tergiversatio* which was applied to a failure to carry a case to judgment.<sup>17</sup>

<sup>14</sup> The position of the Roman advocate has been made the subject of a number of special studies. The fullest account is probably that in FRIEDLANDER'S *SITTENGESCHICHTE*, (5th ed.) pp. 290 ff. The articles in the Pauly-Wissowa *Realenzykl.* (I, pp. 436-438) by Kubitschek, and in the Daremberg-Saglio, *Dict. des Ant.* I, 81 ff. by Humbert, contain a fund of material. To this should be added the article in Ruggiero's *Diz. Epigr.* I, 116 ff.

<sup>15</sup> This was the rule during the Republic. In the Empire, fees of lawyers, known as *honoraria*, were recoverable in the *extraordinaria cognitio* which ultimately displaced the procedure of the ordinary courts, but they were not recoverable as a contract. The limit was placed at 100 aurei (about \$400) D. 50, 13, 1, 10-12, but might well be less. This seems to have been a determination of the Emperor Claudius; Tacitus, *Ann.* 11, 5; 13, 42. The ancient Cincian law (obsolete or repealed after Constantine) specially forbade gifts to advocates before the trial or contracts to make such gifts; *cavetur antiquitus ne quis ob causam orandum pecuniam donumve accipiant*. (Tac. *Ann.* 11, 5). By a decree of the senate (105 A. D.) a gift, up to 10,000 hs, might be made after the case was completed. Evasions were common. The gift was sometimes disguised as a loan (Cod. Just. 2, 6, 3.)

<sup>16</sup> A special title of the Digest (3, 6) is devoted to *calumnia*, as well as 46, 16 although the name is not used in the heading, and a special section of the Code (9, 46). The antiquity of the offense is indicated by the official retention of the letter K in writing it, which otherwise was confined to a few ancient phrases and formulas. This K was branded on the forehead of the convicted calumniator by an old statute of the Republic, the *lex Remmia*. Cf. Cicero pro Rosc. Am. 19, 55; 20, 37. SCHOLIA GRONOVIANA, (ed. Orelli) p. 431. Cf. Hitzig in Pauly-Wissowa, *Realenz.* III, 1414-1421. Humbert in Daremberg-Saglio, *Dict.* I, 853-854. The subject has been much studied and there are a number of special monographs available, of which WEGELE, H., *GESCHICHTE DER FALSCHEN ANSCHULDIGUNG*, (1892) may be mentioned. Cf. especially, MOMMSEN, *ROMISCHES STRAFRECHT*, pp. 491-503.

<sup>17</sup> DIG. 48, 16, 1, 1; 4, 6, 24; 4, 3, 4, 4; 50, 16, 212; CODE JUST. 2, 7, 1; 9, 2, 11.

The terms became far more important in criminal than in civil proceedings, but *calumnia* as a vexatious civil suit, especially one prosecuted for hire, was also legislated against.

The Roman *calumniator* is normally the equivalent of the Greek *sycophant*.<sup>18</sup> He brings unnecessary or baseless actions, and usually public actions which we should call criminal prosecutions. The title of the Digest which deals with the matter (48, 16) seems to be concerned solely with such criminal prosecutions, as does the corresponding title in the Code (9, 46). But the full definition of a calumniator given in the Theodosian Code is far more extensive.<sup>19</sup>

"Calumniators are (1) those who without authorization bring actions (in the name of another) with which they have no concern; (2) those who after losing their suit by a just determination, attempt to bring the action again; (3) those who seek or file claims in court for property, that does not belong to them; (4) those who under the pretense of aiding the Treasury, plan to acquire the property of other persons and do not suffer law-abiding citizens to be at peace; (5) those who by bringing false charges against an innocent person undertake to arouse the wrath of the governmental authority against them. Such persons are all driven into exile."

Such calumniators include all the types which in English law were differentiated as maintainers, champertors and barrators as well as almost any other type of those who perverted justice by means of the judicial machinery, conspirators and black-mailers of every variety. And evidently the definition of the Theodosian Code will include the persons called *litigiosi*, who traffic in litigation.<sup>20</sup>

In *calumnia* applied to public, *i. e.*, criminal prosecutions, it was essential that the charge be false. If it was not false, it was not merely a right but a duty to prosecute the guilty. Indeed, as we have seen, there was a penalty for assisting to conceal crimes or half-heartedly prosecuting them (*praevaricatio*) as well as discontinuing without good reason a prosecution once begun (*tergiversatio*). The best evidence that there had been no *calumnia* was the fact that the accused was convicted, unless to be sure he had been convicted by perjury or corruption of the court. And a failure to convict was *prima facie*, but not conclusive, evidence of *calumnia*. This fact was doubtless deemed a sufficient deterrence for rash prosecutors.

<sup>18</sup> *Calumniator* is used as a translation of *sykophantes* in the Septuagint, Job. 35, 9; Psalms, 71, 4. The collection of Glosses in Medieval manuscripts regularly gloss the one by the other; Corpus Gloss. II, 441, 16; III, 440, 6.

<sup>19</sup> Cod. THEOD. 9, 39, 3. It is in the *interpretatio* added in the Code (426 A. D.) to a constitution of Arcadius and Honorius of 398 A. D.

<sup>20</sup> Dig. 44, 6; Code Just. 8, 36, 2.

But in *calumnia*, as in sycophancy, we are dealing only with the prosecutor himself, not with a third person. Combinations to instigate unjust prosecution, *concussio*,<sup>21</sup> conspiracy in the proper and technical sense of the common law, certainly existed and were punished by the Lex Cornelia of Sulla.<sup>22</sup> The abuse never reached the proportion it did in Athens. In the case of civil suits, while apparently malicious and purely vexatious suits were forms of *calumnia*, failure to recover was not often followed by punishment. If money had been paid to avoid a vexatious civil suit, this by the praetor's<sup>23</sup> edict could be recovered with fourfold damages. The danger of combining for such a purpose in civil matters was less great than in criminal.

But there was a danger in civil cases caused by the intermeddling of a third person, which did not exist in criminal cases. The Roman law did not quite have the difficulties with assignment which the Common Law had and still has, but it was generally provided that there should be no traffic in litigation. A *res litigiosa*, a chose in action *pendente lite*, could not be sold. The transaction was void, and, if the purchaser sued, this could be set up as a defense.<sup>24</sup>

This general prohibition can scarcely be based on an attempt to discourage litigation. It is more likely to be derived from the feeling always present in most communities that a controversy properly concerned only the persons actually involved in the original transaction. It was difficult for Roman jurists to imagine an adequate reason for transferring to some one else a claim on which an action had already been commenced. The motive might be to avoid the penalties of *calumnia* or *tergiversatio*, which were obvious frauds on the law. The purchaser of law suits, the *redemptor litium alienarum*<sup>25</sup> was at worst a lay figure designed to help extortioners to escape and at best a speculator or gambler. In either case, his purchase was void. The purchase, said Diocletian, was against public policy, *contra bonos mores*.<sup>26</sup>

<sup>21</sup> Dig. 47, 13, in general.

<sup>22</sup> Dig. 47, 13, 1 and 2. The words of the Cornelian law punish "those who combine to accuse innocent persons or any one who takes money to bring an accusation or not to bring one or to give evidence or not to give it." An accuser, however, in a case based on an injury to himself might compromise a case in good faith without being guilty either of *concussio* or prevarication. (D. 3, 1, 1, 3; a decision of Ulpian.)

<sup>23</sup> Dig. 3, 6, 5, 1.

<sup>24</sup> Into the finesse by which the purchase of an expectation (*emptio spei*) was distinguished from the purchase of a thing expected (*emptio rei speratae*) we need not enter here. The constitution of Severus and Caracalla uses terms which are strongly suggestive of champerty. Dig. 50, 13, 1, 12. *Hoc ius est, si suspensa lite societatem futuri emolumenti cautio pollicetur*, etc. The *societas futuri emolumenti*, i. e. a partnership in the expected profit, was previously called *malus mos*, an "evil custom."

<sup>25</sup> Cod. Just. 2, 12, 15; 4, 35, 20-22.

<sup>26</sup> Cod. Just. 2, 12, 15.

But a claim could be sold before it was a *res litigiosa*. Assignment of a chose in action (*cessio actionis*) had become fully developed in the Empire, although it is not quite certain when the final stage was reached.<sup>27</sup> Evidently traffic in such claims was not different from the purchase of actions *pendente lite*. A famous constitution of the Emperor Anastasius of 506 A. D.<sup>28</sup> forbade it, and forbade it in response to complaints brought to the courts against these "men who sought to devour the property or fortunes of others." The specific difficulty was that the real plaintiffs were induced or forced to part with their claims for sums far below their value. The constitution gave the purchaser a claim only for the amount actually paid with interest and otherwise avoided the transaction. A subsequent constitution of Justinian of 531,<sup>29</sup> confirmed the law and extended it to cover all attempts at evasion.

If the sale of claims was in this instance prevented on behalf of the plaintiff in other cases it was prevented on behalf of the defendants. The device of selling or giving a claim or a part of one to some person of power or influence, whose prosecution of it was much more likely to be successful,<sup>30</sup> and might well be successful because of the mere fact of the plaintiff's rank, was evidently freely practised in the second and third century. These persons of rank, *potentiores*, *honoratiores*<sup>31</sup> were rapidly becoming a definitely recognized upper class with legal and extra-legal privileges, and at the same time the courts of first instance were being manned by bureaucratic officials of low rank, easily cowed or intimidated by influential plaintiffs or defendants.

The transaction was generally prohibited and a rescript of Antoninus Pius sharply checked an ingenious extension of it, by which a claimant offered to give, or actually gave, a share in his claim to the Imperial Treasury (the *fiscus*).<sup>32</sup> The *fiscus* had far-reaching procedural privileges and in general was so powerful a plaintiff that its claims were rarely resisted. Evidently if this transfer was accepted, many a dubious claim would be recovered, and the claimant might well be satisfied with half. A series of enactments forbade this peculiarly knavish fashion of sharing ill-gotten gains with the state.

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<sup>27</sup> BUCKLAND, TEXT BOOK OF ROMAN LAW (2d ed. 1932) p. 520.

<sup>28</sup> COD. JUST. 4, 35, 22.

<sup>29</sup> COD. JUST. 4, 35, 23.

<sup>30</sup> COD. JUST. 2, 13, 1. This determination of Diocletian (293 A. D.) is expressly referred to his predecessor, the Emperor Claudius II, *consultissimus princeps*. The situation depicted, in which litigants will seek to get the assistance of great men in their claims is comparable point for point with the medieval English situation. Cf. 3 STUBBS, CONST. HISTORY OF ENGLAND (1891-1906) 550.

<sup>31</sup> For the position of the *honestivus* cf. DIG. 2, 15, 18, 23. Cf. Jullian in Daremberg-Saglio, III, 235-236.

<sup>32</sup> COD. JUST. II, 17, 2. DIGEST 49, 14, 22, 2 quotes a rescript of Antoninus Pius to the effect that he will accept no gifts of choses in actions.



A new point of view gained ground when the Empire became Christian. In the first three centuries of Christianity, recourse to the secular courts among Christians was discountenanced, first, because to forgive debts was a fundamental Christian virtue sanctified by the Lord's Prayer, and, secondly, because a pagan court involved the taking of oaths contrary to a Christian's faith and conscience. The church authorities themselves offered a tribunal for their coreligionists, the later *episcopalis audientia*, in which we may see the germ of the Canonical courts.

The Christian attitude that litigation was itself something to be discouraged, even if the claim as well-founded, does not formally appear until the time of Justinian, to whose temperament and pious zeal, the doctrine would offer much that was attractive. In a constitution of 531,<sup>33</sup> the idea is clearly expressed and if it ran counter to the older view of Roman jurists, it fitted in well with the opposition which the courts found it necessary to encourage to traffic in litigation.

Greek sycophancy had as its characteristic mark the fact that a man maintained quarrels in which he had no real interest, solely to vex the defendant. That, as we have seen, was not the sole meaning of the term. Roman calumnia usually, but not always, implied that he had a real interest, but a sordid one. In both it was taken for granted that the action ought not to have been brought at all, that it was either wholly unfounded or was based on so trifling a grievance that a well-meaning man would not have undertaken it.

But until Christian times in both communities if the action was justified, if the claim was sustained, if the accused was found guilty, the motive or absence of motive was immaterial. The state had no agency to set in motion the process of justice. It must be done by private citizens both in civil and criminal matters. No injury was done in punishing a wrongdoer or in obtaining due compensation or restitution. The suspicion directed against hired assistants and advocates was based merely on the obvious danger that those men professed special skill in legal matters, and that skillful manipulation of procedure might result in wrongful judgments. This danger would be minimized if in most cases men relied on themselves or their friends in order to secure redress.

What was apprehended, therefore, was a wrong done by means of the very legal process created for the purpose of righting wrongs or preventing them. And from earliest times this has seemed a peculiarly detestable form of misconduct. This feeling of resentment which it aroused in the public mind is shown in the fact that it was the wrongs

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<sup>33</sup> COD. JUST. 2, 58, 2, 8.

which, like mutilation, long maintained the punishment of talion,<sup>34</sup> and resisted the general trend toward compensatory damages. This was specially noteworthy in the Biblical attitude toward this offense and the Biblical rule was taken over into the law of many European countries during the Middle Ages.<sup>35</sup> It seemed both practical and poetic justice that a man should be hoist with his own petard and that if he had maliciously and unsuccessfully attempted to convict an innocent person, he should be treated as though he himself were guilty of his false charge. The most famous of our ancient law codes, the Code of Hammurabi, provides in its first sections against false accusations.<sup>36</sup> If it is a capital case, the false accuser is punished with death, the penalty he sought to inflict. The rule is the same in the various pentateuchal codes. "You shall do unto him as he purposed to do to his brother" (Deut. 19, 19). This ancient and much approved form of talion is found in Egypt and was still current in the Levant in the fifth century.<sup>37</sup>

Bribery of judges is similarly dealt with. The attempted briber is punished with the penalty he proposed against the victim of his craft.<sup>38</sup>

Abuse of legal process could, of course, be far more direct than by the process of maintaining unfounded or unnecessary accusations. It might take the directly criminal form of tampering with judges, witnesses or court-officers. That corruption by bribery was an always threatening danger, some of our earliest texts make clear, and the phrase "crooked judgment" used of corrupt determinations is as old as Hesiod.<sup>39</sup> Conspiracy to bribe or to intimidate judges, extortion by threat of legal process, the Roman *concessio*, all these are variations in the methods by which judgments were made crooked, were made to deviate from the straight line (*rectum, directum*, "right," *droit*) to the detriment of a citizen. The introduction of a third person as an intermediary in this process created a danger of its own precisely to the degree to which this third person could be called an expert.

Medieval society exhibited the same apprehensions in regard to the abuse of legal process as ancient society did, and knew special forms which that danger seemed to take. The first of these elements was a

<sup>34</sup> Cf. 1 JEWISH ENCYCLOPEDIA, 394a. Jüdisches Lexikon, sub voce *Zeuge*; cf. also SUCTOMIUS, AUGUSTUS, c. 32; MOMMSEN, STRAFRECHT, 496-497.

<sup>35</sup> LEX VISIGOTHORUM, II, 2, 4; MONUMENTA GERM. HIST. LEGES I, p. 81. LEGES BURG. CONST. LXXX; MON. GERM. HIST. II, 1, 104.

<sup>36</sup> CODE OF HAMMURABI, § 1-4. COOK, THE LAWS OF MOSES AND THE CODE OF HAMMURABI (1903) pp. 67-68. Cf. also Exodus, 23, 1-3.

<sup>37</sup> BRUNS AND SACHAU, SYRISCHEROMISCHES RECHTSBUCH AUS DEM FUNFTEN JAHRHUNDERT (Leip. 1880) p. 70; 1 JEWISH ENCYCLOPEDIA, 394a.

<sup>38</sup> COOK, S. A., *op. cit.* *supra* note 36, at p. 67.

<sup>39</sup> *skoliai dikai*, Hesiod Works and Days. v. 219, as distinguished from "straight judgments," *itheiai dikai*, *ibid.*, vss. 35-36. BONNER AND SMITH, THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE (1930), p. 44-46.

lively sense of the perilous character of all legal procedure. Trial was normally by ordeal, by battle or by compurgation. All of these invoked sanctions that were beyond human control and while this fact might seem to put their efficiency on a higher plane of certainty than the method of research and investigation, it was obvious that God might refuse to intervene and also that divine intervention might be directed to ends too obscure and complicated for human wits to fathom.<sup>40</sup>

A trial was, therefore, in itself a dangerous instrumentality. Even in a good cause it was well to forego resort to it. Added to this was the fact, already set forth, that litigiousness became as such an indication of a quarrelsome and un-Christian spirit.

Vexatiousness, accordingly, consisted not merely in using legal process unjustifiably, but also in using it excessively, even when it was justified, or in using it all except under the pressure of necessity. A man might properly protect his own interests or avenge his own wrongs, although Christian charity would limit even that. But he had no business to intermeddle with the interest or wrongs of some one else. It was no part of the ordinary citizen's task to see that justice was done. That was the duty of the king and his officers who could, to be sure, command the assistance of anybody. But the voluntary instigation of prosecution, civil or criminal, by a person who had suffered no direct injury, was not public spirit, but dangerous officiousness, likely to be based on the worst possible motives.

A special opportunity for this unsocial intermeddling was to be found in the existence of trial by combat. This was quite general in Western Europe in the early Middle Ages, but became more and more restricted everywhere as the influence of the Church became consolidated after the Gregorian reforms of the eleventh century. It persisted longest and most extensively in the lands of the "customary law" and particularly in Normandy, Brittany and England. Of these three, as is well known, it clung most obstinately to English procedure, but even here it became associated chiefly with the writ of right and with appeals.

Trial by battle in which an accuser offers to prove a fact by his body implied a competent antagonist, and in the four famous "essoins"<sup>41</sup> age, sex, infirmity and feudal rank, the offer of this trial could be declined,

<sup>40</sup> It is expressly declared by Justinian that all cases must be tried *deo inspectore adhibito*, COD. JUST. 3, 1, 14, 2.

<sup>41</sup> FLETA, i. 34, 25. BEAUMANOR, COUTUMES DE BEAUVOISIS, ch. 61, 6 (ed. Beugnot, ii, 377) speaks of five essoins, omitting that of feudal rank and giving three types of physical disability. Frederick II in the Const. of Naples, 37, 4 gives these essoins statutory force. The statement of Hotoman, De Duell, p. 901, and of Alciati, *De Sing. certamine*, that anyone in France may have a champion, if he wishes, was shown to be false by Loisel; Inst. Cout. VI, 1, 24. Cf. the GLOSSAIRE DU DROIT FRANÇOIS, SUB VOCE CHAMPIONS, pp. 963-988.

if there was another form of trial available, or else a representative, a "champion," *campio*, could be selected.<sup>42</sup> Besides these *essoins* there were other proper occasions for a champion.

The result was the appearance of the professional champion, the man who will intervene for hire. This sort of a person, the *campio conductivus*,<sup>43</sup> became, almost at once, an example of all that was evil. Beaumanoir writing about 1275 classes the hired champion with procurers and prostitutes, and expresses gratification that he is rarely found in the lands of which he writes.<sup>44</sup> In Fleta, the man who hires a champion loses his right of offering battle.<sup>45</sup> Indeed, it is the prevalence of the practice that strongly helped the spread of trial by inquest.

But if the hired champion was a striking example of unwarranted and wicked interference in a legal proceeding, such interference was not eliminated when the trial by battle became restricted and obsolescent. Direct corruption of juries, sheriffs and judges was, if anything, commoner in the fourteenth and early fifteenth centuries than in the time when the judicial machinery was much less developed.<sup>46</sup> And as this judicial machinery became complicated, expertness in dealing with it was at a distinct premium. This expertness was the characteristic of two types of persons, the attorneys and the *narratores* (*conteurs*) and their apprentices, the later barristers.

That these persons were looked upon with suspicion was, of course, due not only to the ancient dread and distrust of all legal experts, but also the ancient feeling against representation generally, and to a constantly growing feeling that the machinery of justice, just because it was complicated, was easily perverted. But their presence was likewise resented because they encouraged resort to the law and such resort among Christians ought to be discouraged.

As knowledge of Roman law sources increased among educated men, it was evident that what such persons were practising could be called a form of *calumnia*, a maintenance of vexatious lawsuits for profit. It would not have been *calumnia* at Roman law, because it was not clearly

<sup>42</sup> The word *campio* is very fully discussed in Ducagne, *sub voce*. It is in fact a very fully documented article. In England the appellee could vouch some person to warranty who was able to testify *de visu et auditu*. If instead he vouched a professional champion, the offense was capital. BRACTON 151b; BRITTON, I, 25, 5, FLETA, I, 38, 8. SPELMAN, GLOSS. ARCH. s. v. CAMPUS.

<sup>43</sup> The phrase *campio conductivus* is taken in Ducagne, s. v. as a term of abuse.

<sup>44</sup> Cont. Beau. ch. 38, 15 (ed. Beugnot, ii, 84) *Dieu merci, tels malveses coutumes ne queurent pas*.

<sup>45</sup> FLETA, I, 34, 25.

<sup>46</sup> HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1924), 343. The Paston letters show a deplorable situation throughout the fifteenth century. Cf. WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921) pp. 106-108.

the maintenance of a wrongful action. But there was always a presumption that an unsuccessful action was deliberately wrongful and all systems of law are full of penalties for an unsuccessful plaintiff.

In the early common law the attorney was secure from being thought of as a calumniator merely by being an attorney, because he had a royal writ to justify his appearance, and the *narratores*, the *serjeants-contours*, were removed from that classification, because they were advisers and colleagues of the king's judges. The fact that they were feed by one or the other of the litigants was no matter. So were the judges, wholly apart from the excessive gifts which were meant to be bribes.

The complaint against the lawyers so often and so bitterly voiced in popular literature was part of the general complaint against the delay and the expensiveness of justice. It does not appear that lawyers were particularly in the mind of those who inveighed against the medieval equivalents of the sycophants and calumniators of Greece and Rome, the stirrers up of litigation to the distress and disturbance of peaceable men. Such men were not so much the legal experts who multiplied in the thirteenth century, as men whose resources or determination made it possible for them to finance litigation for poorer claimants.

The earliest examples which seem to us innocent enough were instances in which one of two joint claimants bought out his poorer associate while the case was pending, or just before it was instituted. The objection to this was probably based on the fact that under such circumstances the richer joint-claimant was likely to have driven a hard bargain and to have profited by the necessities of the other. This was a kind of misconduct which medieval society sought particularly to check.

The converse of this was the situation in which a man bought an interest in a claim under litigation under an agreement to bear the expenses himself and share the result, if the suit was successful. Since the most important suits were suits for the recovery of land, this would mean that persons with capital could in this way become joint owners of landed estates.

A contract of this sort would at the present time be unexceptionable and since land was freely bought and sold in the Middle Ages, it is hard to see what objection was raised against it in the thirteenth century. But in all likelihood considerations of a sort already suggested were effective here as well. A landowner who sold his land or part of it would be likely to demand and receive a price of which the fairness could be estimated. But what was a fair price for a mere chance to recover land? It was clear that a purchaser in all likelihood paid far below the price which would have been demanded if the land were in possession, and the whole transaction in medieval eyes was tainted with that speculation

which was the essence of the abhorred sin of usury. The attempt to prevent usury on the part of the church and the courts and the efforts to evade the prohibition on the part of the propertied classes, especially the slowly rising group of mercantile capitalists, gives us the keys to more than legal development in all European countries.

That the name champerty was applied to this transaction was probably a figure of speech. "Chainpart," *campi pars* or perhaps *campi partus*, was a definite type of feudal tenure known throughout all the sections of customary law, especially those of northern France.<sup>47</sup> It consisted in a grant in which the *reddendum* was a specified quota of the actual produce of the land granted. This was a variant of those tenures in which the *reddendum* was in money, called "fee-farm" in England and *census* in France,<sup>48</sup> and it differed slightly from ordinary service in kind, in which the return must be made whether a harvest had been obtained or not. In the champart the grantor took the risk that crops might fail and that there would, therefore, be no return at all. There was, however, an implied stipulation that the land must be cultivated and failure to do so was a ground of forfeiture.

The tenant by champart then was only a partial owner of the land he held. He was bound to share its rents and profits with the grantor. And the man who obtained an interest in a plea of land would share in the result with the original claimant and to some extent hold of that claimant in champart.<sup>49</sup> This derived meaning continued when the tenancy by champart proper, always uncommon in England, became completely obsolete.

That it did become obsolete in England is not in the least strange. It was relatively uncommon even in northern France, where, however, it survived till the Revolution. At no time was it a convenient or desirable form of tenancy.

It was to be noted in this connection that the first reference by name to champerty in England, in the Statute of Westminster II, is not as

<sup>47</sup> A list of the *coutumes* that had the tenancy of *champart* is given in DE LAURIÈRE, GLOSSAIRE DU DROIT FRANÇAIS (1881) sub voce *champart*. A brief article by Paul Cauvès, in LA GRANDE ENCYCLOPÉDIE, vol. 10, pp. 440-441, gives a resumé of them. Pothier gives a summary of the law in his tiny TRAITÉ DES CHAMPARTS (1776) ii, 430-446. Book IV, Tit. II of Loisel's Institutes Cout. is called *De Cens et Champarts*, especially Numbers 544-546. Equivalent terms were *terrage*, *agrier* and other words. In every case, the terms imply that the *reddendum* was in products of the soil. The tenancy was abolished with all other feudal institutions in the Revolution, Decret of Aug. 4-11, 1789, and Mar. 15, 1790.

<sup>48</sup> The *cens* and the *champart* are regularly taken together (*cf.* the previous note). The special duties of the tenant are given in BEAUMANOIR, COUT. DE BEAUVOISIS (ed. Beugnot) ch. XXX, 73-77, ii. pp. 435-436.

<sup>49</sup> This is merely suggested as one way in which the term got its special meaning in English law.

both Professor Holdsworth and Professor Winfield suppose, the later Common Law champerty, but the tenancy by champart.<sup>50</sup> The Statute of Westminster II in Chapter 49 enacts that no royal officer shall purchase anything in litigation "shall not receive any church nor advowson of a church, nor land, nor tenement in fee, by gift nor by purchase nor to farm nor by champerty (*ne a ferme ne a champart*) nor otherwise, so long as the thing is in plea before us."<sup>51</sup> It is difficult to see how we can divorce champart from its context. It is obviously to be taken as a contrast with *ferme*. And if we see the use of *ferm* and *champart* in the corresponding texts of French law, there can be little doubt that it describes a tenancy, just as *ferme* does, and so completes the forms of acquisition.<sup>52</sup> The officer may not buy the land nor take it as a gift. He may not take it for a money or ground rent, nor for a rent to be paid in kind from the produce. He may not get either a complete or a qualified title.

Professor Winfield says correctly,<sup>53</sup> "It may seem curious that there was any need to distinguish five things all which to our eyes were only modes of the fourth—champerty." The strangeness disappears when we take the words "by champerty" to mean what they would at that time have meant in some of the French dominions of Edward, tenancy by champart. In that case, the position of the phrase is quite natural. But without the word the substance was already contained in the Statute of Westminster I of 1275, where it was again applied only to royal officers.<sup>54</sup> No such officer shall maintain pleas "for lands, tenements or other things, for to have part or profit thereof by covenant made between them" (c.25). Further in Ch. 28, clerks of justices and sheriffs are forbidden to take part in pleas whereby common right may be delayed or disturbed.<sup>55</sup>

The *De Conspiratoribus ordinatio* of 1293 uses "champerty" in the same sense. *Ut campi partem vel aliquod aliud commodum inde habeant*, "that they may get therefrom a share in the produce of the land or some

<sup>50</sup> WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921) p. 25. This first rate book is the leading authority on the history of the problem. 3 HOLDSWORTH, HIST. OF ENGLISH LAW (3d ed., 1924) 397, cites Professor Winfield for this reference of the term to the later champerty. The reference is, in my opinion, incorrect. BRITTON, II, ii, 4, speaks of chattels (*i.e.* bees) held *à champart*, and Winfield mentions the tenancy in the Chanel Islands, p. 140, note 3. The "popular" sense of champerty as a partnership in illicit gains, he quotes from Bishop Hall in the seventeenth century. But by that time the special legal sense of *cambipartie* etc. had long been established.

<sup>51</sup> These statutes can now best be found in 4 HALSBURY'S STATUTES OF ENGLAND (1929) pp. 261-262.

<sup>52</sup> These ground rents are of course not to be confused with the rents in a lease.

<sup>53</sup> *Op. cit. supra* note 50, at p. 145.

<sup>54</sup> 4 Halsbury's Statutes (1929) 261; 3 Edw. I c. 25.

<sup>55</sup> *Ibid.* p. 267.

other profit.”<sup>56</sup> *Campi-pars* can certainly not be the later “champerty” in this context and the equivalence of *campi-pars* and *commodum* is clearly another illustration of champerty in the sense of the French *champart*.

The Statute of Conspirators of 1305 certainly takes conspirators to include those who in later law were called “maintainers” or “champertors” and especially mentions stewards or bailiffs of lords as the zealous agents of such conspiracy or maintenance.<sup>57</sup> But it does not use the word “champerty.” The definition of champertors in English, as “persons who move pleas and suits,” which is printed in many texts of the statutes, as in Pickering, does not occur in the text at all, but is a later gloss found almost verbatim in the Termes de la Ley, as well as in Cowell’s Interpreter, *sub voce*.<sup>58</sup>

As far as the “Statute Concerning Conspirators” is concerned, the date is quite uncertain. The older manuscripts omit any dating whatever. It is further quite incomplete. The preamble recites that “none of our court shall undertake any plea *a champart* by craft nor by engine.”<sup>59</sup> And in one manuscript the prohibition is extended to “countours, attorness, apprentis, seneschals, bailiffs of great men.”<sup>60</sup>

The terms are quite different from those of contemporary statutes. Whenever this law was passed, it is likely that by that time, the tenancy *per campi-partem* as a variant of *per firmam*, had disappeared, and the metaphorical meaning of *a champart*, which made it equivalent to “for part of the profits of the suit” had become established.

In all these contexts the word “maintain,” *manutenere*,<sup>61</sup> is frequent enough. But it is a general word used in other connections with one of the meanings it has in ordinary speech at the present time. It does not differ from “undertake” or “entreprendre,” which are both used as equivalents for it in ordinary texts. It certainly has no technical sense in the legislation of the thirteenth century.

The enormous importance of the later “maintenance” in English

<sup>56</sup> Rot. Parl. I, 96a; WINFIELD, *op. cit. supra* note 50, at p. 26.

<sup>57</sup> 4 HALSBURY’S STATUTES (1929) 266; 33 EDW. 1.

<sup>58</sup> *Ibid.* p. 266. The fact that is not found in the text of the statute has long been noticed. This fact might well indicate that Cowell and the author of the TERMES DE LA LEY found it in some authoritative definition, but the definition is in all probability much later than Edward I.

<sup>59</sup> 4 HALSBURY’S STATUTES (1929) 266. The note (266-267) gives a full account of the text-history of the “Statute,” which is also discussed in WINFIELD, *op. cit. supra* note 50, at pp. 23-24.

<sup>60</sup> 4 HALSBURY’S STATUTES (1929) 266-267. The ms. is one of the Cottonian group.

<sup>61</sup> The term suggests “protect” rather than merely “carry on.” Cf. Ducagne, *sub. voce*.



legal history has been sufficiently emphasized by Holdsworth.<sup>62</sup> But the maintenance is that against which the Star Chamber Act of 1487 and the Statute of Liveries of 1504 were specifically directed,<sup>63</sup> *i.e.*, the support given by a feudal magnate to his retainers in all their suits, without any reference to their justification. This type of support became in fact one of the means by which powerful men aggrandized their estates and the background was unquestionably that of private war.

The movement against maintenance was, therefore, part of the attempt to liquidate this characteristic feudal institution. It began as early as the growth of the power of the Crown. In Scotland mutual "maintenance" was understood as a feudal obligation and just as in England, but somewhat later, had to be restricted by statute.<sup>64</sup>

It is this publicly condemned maintenance which gives occasion for sedition and tumult which is in the mind of the author of the *Termes de la Ley*, *s. v.* maintenance,<sup>65</sup> "Where any man giveth or delivereth to an other that is plaintife or defendant in any action, any summe of money, or other thing for to maintain his plea or else maketh extreme labor for him when he hath nothing therewith to doe." Such an act gives an injured person the right to sue out of writ of maintenance which had, of course, an important bearing on the development both of the law of libel and conspiracy.

With maintenance we may class embracery<sup>66</sup> which is an example of the more obviously vicious perversions of justice by direct intimidation. Barratry in Scotland was understood to mean bribery of judges<sup>67</sup>

<sup>62</sup> 3 HIST. OF ENGLISH LAW (3rd ed. 1924) 395-399, 5 *ibid.* 201-203, 8 *ibid.* 397-402. WINFIELD, *op. cit. supra* note 50, at pp. 131-160; BODKIN, THE LAW OF MAINTENANCE AND CHAMPERTY (1935) pp. 1-3; THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898) pp. 125-130.

<sup>63</sup> The Act of 1847 (3 HENRY VII, c. 1. STATUTES OF THE REALM II, 509) recites that the king "remembereth how by unlawful maintenances etc., the policy and good rule of this realm is almost subdued." The Statute of Liveries of 1504 (19 HENRY VII, c. 14; STATUTES OF THE REALM II, 658) uses the word "retain," but covers largely the same subject-matter. Cf. TANNER, TUDOR CONSTITUTIONAL DOCUMENTS (1922) pp. 7-9, 258-260.

<sup>64</sup> CRAIG, JUS FEUDALE, II, DIEG. 5 and 11. (Clyde's transl. 1935).

<sup>65</sup> I cite the edition of 1609, in which changes taken from Coke's INSTITUTES have not yet appeared.

<sup>66</sup> The definition in TERMES DE LA LEY is as follows:

"Embrasour or Embraceour, is he that when a matter is on trial between party and party cometh to the barre with one of the parties (having received some reward so to do) and speaketh in the case, or privily laboureth the Jurie, or standeth there to survey or overlooke them, thereby to put them in feare or doubt of the matter. But men that are learned in the law, may speake in the case for their clients." Cf. WINFIELD, *op. cit. supra* note 50, at p. 161; BODKIN, *op. cit. supra* note 62, at p. 48; HAWKINS, PLEAS OF THE CROWN, I, 27, 8; COWELL, INST. 4, 52.

<sup>67</sup> BELL, DICTIONARY OF THE LAWS OF SCOTLAND, *s. v.* barratry. But CRAIG, JUS FEUDALE, 3, 5, 15, says it was quite generally used for any perversion of justice by

but in England came to be little more than habitual maintenance and, as such habitual maintenance, was a criminal offense.<sup>68</sup>

It is a striking fact, however, that in all these three types of interference with the course of justice, it is not lawyers who are involved. All three types are offenses which, it might be supposed, were easier for lawyers to commit than for other men. Yet the Statute of Westminster itself expressly exempts lawyers from its provisions as far as champerty was concerned. And in defining embracery the *Termes de la Ley* also explicitly declares that men learned in the law may speak for the litigants without incurring the reproach of being *embraceours*.<sup>69</sup> Maintenance, again, as understood in the older statutes, almost necessarily excluded them. The great men who protected their liveried men in their acts of force and fraud, were not likely to be lawyers.

It was, however, assumed that lawyers might be instruments of such practices and as such instruments they are mentioned in the statute. But in the same text, it is made clear that the maintainers are not the lawyers but those who employed them. And when, in later documents, the various devices are listed by which the judgments of courts are perverted—*confederaciones, impetitiones, deceptiones, extortiones, manutentionias, campipartias*,<sup>70</sup>—the acts are not the acts of lawyers.

There were accordingly two elements in the structure of medieval English society which made champerty and maintenance matters that required special attention. Maintenance may be said to be the last flaring up of feudalism. It contained echoes of the system of private war and constituted the last of the attempts of feudal landowners to create within the limits and the framework of the *regnum*, a continuance of the centrifugal tendencies inherent in the feudal theory.

Champerty, on the other hand, had its source in the resistance to the slowly growing capitalism that followed the Renaissance of the eleventh and twelfth centuries. It got its name in England from a specifically feudal institution that lent itself most easily to the evasion of the laws

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bribery, and goes on to say that by the Italian post-glossators (quoting Baldus and de Castro) it was used for the *caupones beneficiorum*, the professional dealer in benefices whether feudal or ecclesiastical. This is, of course, very like the English barrator.

<sup>68</sup> WINEFIELD, *op. cit. supra* note 50, at pp. 200-212; BODKIN, *op. cit. supra* note 62, at pp. 48-51; 8 COKE'S REP. 36b. The term of the indictment for barratry contain the words "*perturbator, communis malefactor, calumniator et seminator litium*," in which the reappearance of *calumniator* is significant. Cf. the statute 34 EDW. III, c. 1. In one of the glosses collected in the CORP. GLOSS. II, 336, 58, the word *calumniator* is glossed by *kakopragmon*, i.e. evil-doer, *malefactor*, or troublemaker, *perturbator*.

<sup>69</sup> Cf. *supra* note 66.

<sup>70</sup> This is found in Ducagne, under *cambipartia*. It is cited there from RYMER, FOEDERA, 13, p. 233, col. 2. I have not been able to verify the reference in any of the editions of Rymer available to me.

against usury, and may have disappeared as a feudal tenure because it did so.

If we add to these two the clerical opposition to litigation in general—particularly litigation in the secular courts—we have the background against which the law of champerty and maintenance grew up. Evidently that background has disappeared. Great families are no longer seeking to establish little principalities for themselves by supporting large bodies of retainers. Interest-bearing investments are no longer under a ban. Indeed, the parable of the talents is taken with painful literalness by many kinds of economic moralists. The condemnation of litigiousness alone remains as a common element in the medieval and modern attitudes, but neither then nor now did it play a controlling role.

But champerty, now joined with maintenance in a sort of indissoluble hendiadys, remained an offense for which a new basis had to be found. Subconsciously, that basis was the fundamental distrust of legal procedure and of lawyers. And it became almost specialized as a lawyer's transgression. The champertors are nearly always lawyers. In England, of course, nearly always solicitors.<sup>71</sup>

Curiously enough, it is chiefly lawyers who make the accusation. Whether medieval champerty was felt by people in general to be a serious menace is doubtful. Certainly it plays a minute part in the indictment constantly repeated against the lawyers by laymen. That indictment enumerates venality, treachery, falsehood, oppression and indifference to justice among its counts. The large fees of lawyers are attacked, which must be paid whether the case is lost or won, not the readiness of lawyers to speculate on whether they will get a fee or not.

In most instances, the modern objections to champerty are voiced by the more successful members of the profession and on behalf of propertied defendants. It is true that champerty may be committed on behalf of a defendant, but that is clearly the rarer situation. It is the impecunious plaintiff who enters into a champertous bargain with his attorney, and as a rule it is—or was—the less successful attorney with whom he makes this bargain. There is consequently an economic cleavage between those who view champerty in general with alarm and concern, and those who do not. It would be idle to ignore this fact and idle to deny that the usual formal denunciations of champerty do not always ring true. Under all circumstances, it would be well to omit all attempts to connect it with the medieval offenses which had a rationale of their own, and deal with it as a modern phenomenon to be judged by modern standards and in relation to existing conditions.

If a maintainer is one who stirs up vexatious suits to which he is not

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<sup>71</sup> BODKIN, *op. cit. supra* note 62, at pp. 60-91.

a party, if a barrator is one who makes a profession of doing so, if a champertor is one who does so for pecuniary gain and if an embracer is one who in the course of such proceedings seeks to influence or intimidate judge or jury, it must be admitted that in the minds of the lay public, the chief maintainers, barrators, champertors and embracers of today are the members of the legal profession.

We may note again that when these words are first used in the sense—or in something like the sense—they have in the above definitions, they were not supposed to refer primarily to lawyers, but rather to men of property who speculated in the results of litigation or to feudal magnates who supported an army of retainers. Lawyers were occasionally involved as the instruments of such misconduct, but not as the prime movers of it.

Champerty, embracery and barratry were crimes, pleas of the Crown. Their suppression was in the interests of the public welfare. Maintenance in general was an actionable wrong, a tort in modern terminology, and persons who suffered from it could obtain compensation. As crimes, they have become obsolete. Some of them are still found in our penal codes.<sup>72</sup> But actual prosecution under them is rare in either England or the United States. As a tort, maintenance is more likely to be lost in such specific torts as slander, libel, conspiracy or malicious prosecution.<sup>73</sup> But the economic and social background which made maintenance and its variants seem a real danger has pretty well receded, and it does not appear that men inclined to such acts form any considerable portion of our anti-social groups.

How little relation champerty has to the public conscience, may be realized by recalling that assignments of choses in action are definitely within the scope of champerty.<sup>74</sup> It was not really this fact that rendered

<sup>72</sup>In the note by Seymour D. Thompson to *Courtright v. Burnes* (C. C. W. D. Mo. 1881) 13 Fed. 323, the American states are listed in which at the time of writing (1882) maintenance was no longer an offense. This list has been much increased since. Common Law maintenance still exists in Oklahoma, Kentucky, Alabama, Massachusetts and Georgia, if nowhere else. Mr. Thompson makes the point that Hawkins and Coke omit from their definition of champerty the element that the expenses of the suit are borne by the maintainer although Chitty and Blackstone do. However, in the *Termes de la Ley* and in Cowell's *Interpreter*, this is taken to be essential. Both these definitions, as has been pointed out, either are taken from the gloss found in some manuscripts of the *Ordinacio de Conspiratoribus*, or go back to a common source.

<sup>73</sup>Lord Sumner in *Oram v. Hutt* [1914] 1 Ch. 98, 106, "That the action of maintenance is now in small favour and that indictments for maintenance have been drawn by few among living men are nothing to the point." This is the case even in England, where the action of maintenance is much more alive than any anywhere else. In some jurisdictions, such contracts are denied validity on general grounds of public policy without any direct reference to champerty or maintenance. Cf. *In re Lynch's Estate* (1935) 154 Misc. Rep. 260, 276 N. Y. Supp. 939; *Peraino v. De Mayo* (1935) 13 N. J. Misc. 233, 177 Atl. 692.

<sup>74</sup>Cf. BODKIN, *MAINTENANCE AND CHAMPERTY* (1935) pp. 91-128; 7 HOLDSWORTH, *HIST. OF ENG. LAW* pp. 523-524.

assignments difficult in England, except as establishing an agency, but Coke gave maintenance as the reason for the objection to assignments, and until recently his statement has been accepted. In the United States, the rejection of this notion came early.<sup>75</sup> Courts quite correctly declared that maintenance, which was taken to include champerty, was prohibited in England because of the special situation there and had no real foundation in the United States. The complete legality of such assignments became established by statute or by judicial decision, and the terminology of the New York Code of Civil Procedure of 1848, that an action shall be brought in the name of the "real party in interest" gave the assignee, —the indubitably champertous assignee,—a recognition and a standing.<sup>76</sup>

But the lawyers have moved from the position of being the occasional and more or less casual instruments of maintainers into the front line of this form of offending. This is probably the inevitable result of the change by which lawyers instead of being a small number of highly privileged technicians, not really in competition with each other because all were assured of a living, became an enormously large group constituting a recognized calling and competing desperately for an amount of legal business which could not possibly provide for all of them. The old and ingrained popular resentment against lawyers gained a new rationalization. It seemed likely that active competitors for legal business would seek every possible means not only of preëmpting what was open to all, but of multiplying it.

We must remember that the psychological background is the medieval and Christian one in which litigation is at best a necessary evil, and litigiousness a vice. This was in direct contrast with the notion of ancient society which determined litigation by its purpose or result. If it was to secure a right it was commendable. It was admitted by ancient moralists that constant resource to the law rendered men somewhat indifferent to the moral justification of their conduct, and it was at all times evident that maintenance of right could easily be a pretext. On the other hand, in medieval and modern society, it has often been declared that litigiousness is harmful because it so often leads to wrong judgments. But that is not the fundamental reason. Litigation is usually declared to be something to be avoided under all circumstances, and when we come upon

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<sup>75</sup> Coke's statements are found in 10 Rep. 48a, and Co. Litt. 232b n. 1; AMES, *Disseisin of Chattels*, III ANGLO-AMERICAN LEGAL HISTORY, pp. 580, *et seq.*; LECTURES ON LEGAL HISTORY (1913) p. 258; 1 WILLISTON, CONTRACTS (1920) § 405, n. 3; POLLOCK, CONTRACTS (8th ed.) App. Note F; Winfield, *Assignment of Choses in Action in Relation to Maintenance and Champerty* (1919) 35 L. Q. REV. 143-162.

<sup>76</sup> CAL. CODE CIV. PROC. § 367, taken from § 20 of the New York Code in its original form.

the conclusions of Kant and von Ihering<sup>77</sup> that a man who fails to maintain his right, in order to avoid annoyance and trouble, or merely as a voluntary concession to his neighbor, has neglected his duty and helped the triumph of wrong, we think of this doctrine as an inhuman paradox.

Maintenance in the proper sense, as the mere instigation or furtherance of litigation, simply as an evidence of power and importance, or to do a gratuitous injury to a competitor, is not unknown but it is scarcely important. And lawyers are less likely than other persons to be engaged in it. But champerty, the prosecution of suits by lawyers with the view of profiting by it, is near enough to the ordinary and necessary activity of lawyers paid for their services, to have required specific statutory exception as early as Westminster II. But although it was felt desirable to make this specific exception, fees are after all quite different from champerty.

A claim in litigation is often as such a valuable piece of property. But it involves a risk. It may turn out to have considerably less value than that assessed by the claimant. Indeed, it may turn out to be quite worthless or less than worthless, without impugning the good faith of the plaintiff or the moral justice of his demand. To acquire a share in such a claim is essentially a speculation and in the Middle Ages is tainted with the discredit which attached to every form of speculation. As has been said, it was probably this element, which caused the early disappearance of the feudal tenancy by champart, as distinguished from fee farm and rent in kind, with which the champart was associated and which it strongly resembled. When the practice first arose of offering a lawyer a share of the profit of litigation in lieu of his fee, it was clearly champerty—more precisely “maintenance by means of champerty,” *manutenentia per campipartem*,—because it would have been champerty, if anybody, lawyer or layman, had acquired such a share in the profits with or without consideration.

The contingent fee has often been discussed.<sup>78</sup> The objections raised against it have been based in part on what is properly enough called legal ethics. But it forms the lower grade of ethics, what may be said to be Grade B ethics, the etiquette of the profession rather than its moral obligation. The contingent fee, it was said, lowered the dignity of

<sup>77</sup> IHERING, *DER KAMPF UM'S RECHT* (14th ed., Vienna, 1900) Tr. by Lalor as *THE STRUGGLE FOR LAW* (2d ed. by A. Kocourek, Chicago, 1915). Kant's *Philosophy of Law* has been translated in somewhat abridged form by W. Hastie, Edinburgh, 1887.

<sup>78</sup> COSTIGAN, *CASES ON THE LEGAL PROFESSION AND ITS ETHICS* (2d ed. 1933) pp. 643-649; COHEN, *THE LAW, BUSINESS OR PROFESSION* (1916) pp. 205-210; Report of Comm. on Contingent Fees, 81 N. Y. BAR ASS'N REP. (1908) pp. 100-101. Note (1906) 1 Ann. Cas. 209 *seq.*

the Bar.<sup>79</sup> The transaction savored of merchandising, because it reeked of speculation. Payment of a lawyer's fee was assumed to be as definite a condition precedent to litigation as the fee for the writ itself. Except for a pleading *in forma pauperis*, there never was a pretense that litigation was cheap.<sup>80</sup>

The attitude was naturally very strong in England.<sup>81</sup> In the United States, doubts were felt early enough about the unqualified validity of the objection.<sup>82</sup> It seemed hard that a claimant who had no money or marketable property but a chose in action which might be valuable—indeed, extremely valuable—should be unable to secure his right. A conditional contract to pay a fixed sum, if the suit was successful, was unsatisfactory because the chose in action was after all speculative, and the amount, even if a recovery was had, not quite certain even on the strongest *prima facie* case. Speculation in the United States never had the continuous history of slight moral obliquity which it retained in England, even after loans on interest were not merely legal but constituted one of the economic bases of society.

Contingent fees, therefore, fees to be paid out of the profits of the suit and not to be paid at all if there were no profits, fees which were scaled upon the recovery, a *quota pars* in the damning words of the old texts, became fairly common, and could not be summarily brushed aside, champertous though they were. Since etiquette, legal or other, depends more than anything else on actual practices, professional rules had necessarily to be modified in order to include what was becoming an unmistakably common practice.<sup>83</sup>

<sup>79</sup> Boston Bar Ass'n Canons, XIII, cited in COSTIGAN, *op. cit. supra* note 78, at pp. 645-646.

<sup>80</sup> The book of MR. REGINALD HEBER SMITH, *JUSTICE AND THE POOR*, is a modern restatement of this ancient complaint. Cf. also PARRY, *THE LAW AND THE POOR* (1914).

<sup>81</sup> As will be seen later, even the Solicitors Act of 1932 expressly forbids such agreements, and two recent cases, *Haseldine v. Hosken* (1932) 49 T. L. R. 254, and *Danzey v. Metropolitan Bank* (1912) 28 T. L. R. 327, have indicated the unchanging attitude of the English law in this respect. Cf. (1933) 77 SOL. JOURNAL 188-189; and (1912) 56 SOL. JOURNAL 436. It may, however, be noted that as early as 1791 in *Master v. Miller* (1791) 4 T. R. 340, Justice Buller expressed a very decided opinion on the desirability of modifying the ancient law of maintenance, especially in relation to assignment. The rule, declares Buller, violates "good sense." It is "repugnant to every honest feeling," "a bad maxim," a "shadow" of which the substance was gone.

<sup>82</sup> The opinion of Chancellor Sanford in *Thalhimer v. Brinckerhoff* (N. Y. 1824) 3 Cow. 623, 15 Am. Dec. 308, decided in April 1824, is one of the earliest and best discussions of the basis of maintenance, its dependence on a special situation in England and the inutility of the doctrine in the United States. It is full of quotable phrases. It will be noted, however, that the Chancellor cites no American cases, and that at the time a statute against maintenance was still in force in New York, although repealed in other places. It may be well to note that in Mr. Bodkin's book this case is wrongly cited as in 3 COWPER 628 (*op. cit. supra* note 74, p. 1, note a).

<sup>83</sup> Cf. the cases cited in 3 WILLISTON, *CONTRACTS* (1920) p. 2997 (§ 1712, note 7).

There is no doubt that the growth of contingent fees coincided with the rapid increase of actions for negligence which accompanied the multiplication of new forms of rapid transportation.<sup>84</sup> There was a widespread feeling that the safety of passengers and ordinary pedestrians ought to be insured by transportation companies, to the same extent as the safety of goods was insured. Another factor was clearly the general feeling that these companies were rich and powerful and could easily afford to pay compensation. But recovery was even more problematical in such cases than in others and both attorneys and plaintiffs found it advantageous to share the risk.

The official attitude of the bar continued to be condemnatory in spite of the spread of the practice. That was partly due to the fact that the bar was represented in its official utterances by the more successful members, who represented litigants of means and who had consequently little occasion to enter into contingent fee contracts. But this official opposition was quite ineffective. Codes of legal ethics were compelled to recognize and approve—at least to refrain from disapproving—an already established type of legal contract.

If we dealt with this as a matter of abstract logic, it would be hard to justify the objection to champerty either in the case of lay champertors or lawyers. A chose in action is property. Under modern conditions, it may be as freely assigned, granted, sold or mortgaged, as merchandise. If the consideration, instead of being money, were the transfer of an extraneous *res* or the performance of extraneous services, no one would find any objection to it. If the amount of the consideration were left to later arbitration, there would be equally no objection. It is hard to see why it at once becomes objectionable, because the consideration bears a definite ratio to the amount of the recovery.

As far as lawyers are concerned, not only is it expected that they will be feed, but it is assumed that they will be feed heavily. Law, it has been judicially stated, is an expensive luxury. To say that they have no pecuniary interest in the case, therefore, is in itself a palpable absurdity. It becomes even more so, when we remember that in many American states, a lawyer has both a charging and a retaining lien on the properties, on the monies recovered and on the documents necessary for such recovery.<sup>85</sup> That is to say, he has a property interest—a *ius in re aliena*—as tangible as any other such interest, in everything of value that comes out of the particular litigation. There is certainly nothing in logic

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<sup>84</sup> Cf. *Stanton v. Embrey* (1877) 93 U. S. 548, "The proposition (*i.e.* that contingent fees are legal) is one beyond legitimate controversy."

<sup>85</sup> Cf. Note (1930) 67 A. L. R. 442.



or in common sense that denies the existence of the interest because its money value is not determinable in advance.

But, of course, abstract logic has nothing to do with such matters. Champerty is an evil, because it may increase improper litigation, because as between attorney and client, it may lead to hard and oppressive bargains, because it encourages solicitation of legal business and tends to degrade the profession. If it could not help doing so, the objection to champerty would be obvious. But this is not so at all. There is no necessary and inevitable connection between improper litigation, hard bargains and solicitation on the one hand and the acquisition by a third party of an interest in a litigated case, on the other. Surely it would be more rational and sensible to say that champerty is an evil when, and only when, it leads to these evils. When it does not, it is not merely unobjectionable, but may actually serve a good purpose, as so many courts have expressly and quite justifiably found.<sup>86</sup>

It is quite true that it readily lends itself to the accomplishment of the wrongful purposes just specified. But the real source of such purposes goes much deeper in social life than the mere existence of an instrumentality. Fraud and overreaching have never been abolished by outlawing the particular form they have assumed at any given time. If champertous contracts can serve any good purpose—and they apparently can—it is not foresight, but the infantile psychosis of “all-or-nothing” which demands that we discard them altogether.<sup>87</sup>

We must also discard, I think, the assumption of Medieval society, that a law suit is an evil in itself. It is hard to see how either the legal profession or our court machinery can justify its existence, if we go on the assumption that it is always better to suffer a wrong than to redress it by litigation. A law suit is an evil if it is baseless, or so uncertain that no man of common sense would wish to maintain it. If it is well-founded, if a wrong has been done or an obligation unfulfilled, if the wrongdoer will not of his own accord give proper reparation, a law suit ought to be considered proper and commendable. If we have so little confidence in the process of law as to think otherwise, we shall do well to consider seriously a fundamental overhauling of our system.<sup>88</sup>

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<sup>86</sup> *Browne v. Bigné* (1891) 21 Ore. 260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L. R. A. 745.

<sup>87</sup> For an excellent presentation of this fundamental psychological tendency, a definite characteristic of most of the defensive reactions of lower animals, we may compare W. H. R. RIVERS' posthumous book, *PSYCHOLOGY AND POLITICS* (1923). There is no better field than the law both in legislation and in the course of judicial decisions, in which this propensity to protect oneself from a danger by rushing into another one, can be effectively studied.

<sup>88</sup> We may recur to the statement of *Thalhimer v. Brinckerhoff*, *supra* note 82, at 623, “where the administration of justice is firm, pure and equal to all, and where the laws give adequate redress for groundless suits, it is not easy to conceive that

The undoubted fact that champertous agreements may be abused should suggest the obvious remedy that such agreements be scrutinized. As far as the common form of champerty is concerned, the contingent contract of the lawyer, that suggestion has been formally made in nearly all Codes of Ethics.<sup>89</sup> For some types of these contracts, those made with minors, such scrutiny is often required by statute.

There is really no insuperable difficulty in making it. Courts often speak as if such matters were beyond human power. Such a case as *Goldstone v. The State Bar*,<sup>90</sup> indicates that it is quite feasible to say that the merely clerical work of filing a claim for Workman's Compensation is not worth \$310. Doubtless opinions will differ on the value of legal services. They differ on the value of real estate parcels, but that does not make valuation of such property insuperably difficult.

Evidently if the equitable defense of unconscionability, the Roman *laesio*, were applied to all such contracts, we should be able to avoid the difficulties that have been suggested. But we shall not avoid them or any other difficulties unless we clear the ground of historical debris, and restate our problem in the terms of today.

Contingent fees of lawyers, supported by a lien on the proceeds of a suit, can scarcely be differentiated from the assignment of a cause of action, or rather part of one.<sup>91</sup> If assignments are not invalid *per se*, these contracts should not be, unless we place them definitely among those contracts in which the danger of overreaching is so great that they cannot safely be tolerated at all. The danger undoubtedly exists, but it can be readily enough obviated, if courts will not exaggerate difficulties into impossibilities.<sup>92</sup> It is true that lawyers are restive about the impu-

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mischievous can arise from opening the courts of justice to all suitors." It is quite true that what the Chancellor desiderates in the administration of justice is not always present, but it does seem to follow that in an imperfect system of justice, there is at least a calculable chance of securing a just result, whereas refraining from using it makes injustice fairly certain. Evidently the correction lies as the case suggests in multiplying means of easy access to courts, in improving their quality and penalizing proven instances of misuse of process. It is not an impossible undertaking.

<sup>89</sup> Canon 13 of the Code of Ethics of the American Bar Association has been widely copied. Cf. Costigan, *The Canons of Legal Ethics* (1909) 21 GREEN BAG 271, 276.

<sup>90</sup> (1931) 214 Cal. 490, 6 P. (2d) 513, 80 A. L. R. 701.

<sup>91</sup> It is quite true that the lien is one in equity and not in law. And it is equally true that for many purposes, the attorney does not thereby "obtain an interest" in the subject matter of the proceedings. For both these statements, abundant authority can be found. But the net result is that when proceeds of a suit come into existence, the litigant who owns them cannot ordinarily dispose of them until the attorney's claims are satisfied. It really does not make much difference under such circumstances whether we call this situation an assignment or not.

<sup>92</sup> In a nobly worded opinion, Justice Cardozo speaks of "self-imposed restrictions," of a "feeble *non possumus*," in a case of reinstatement of an attorney. In re Kaufman (1927) 245 N. Y. 423, 157 N. E. 730.

tation that they charge excessive fees and this fact makes any judicial scrutiny of fees unpleasant and delicate. But the real danger in contingent fees—and not the imaginary one—certainly justifies a special treatment of them.

If contingent fees are thus specially treated, if the approval of the change is as much a regular part of the final judgment as it would be in many forms of liquidation in equity, there is no more real objection to them than to the fact that in most cases involving large sums of money, lawyers are likely to receive large fees, often without any relation to the skill they have displayed or the efforts they have made.

In America, it may be said that the general position of the courts is that without clear proof of undue influence or fraud, conditional fees, even if they amount to one-half of the recovery, will not be set aside, unless, indeed, statutes or rules of practice equivalent to statutes, have set a limit or required a specific determination of the reasonableness of the fee. Bar associations and code-making committees have as a rule taken the position formulated in the Code of Ethics of the American Bar Association:

"Canon 13. Contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges."

This canon, as a matter of fact, is considerably beyond what law or statute requires in most jurisdictions. Supervision by a court is required generally only when the plaintiff is a minor.<sup>93</sup> It cannot be said that there is ordinarily any judicial limitation upon the character of the bargain which a lawyer may make with his client in regard to fees. In those states—now sixteen in number—in which a statutory bar has formulated codes which have been approved by the Supreme Court, there is generally a provision against exorbitant fees, but there has been little examination of that question.

Obviously a general legalizing of contingent fees is as mischievous as a general rejection of them. The difficulties of champerty which are based on facts, and not on the inclusion of types of acts within categories made in the sixteenth century, are derived from the readiness with which inexperienced and ignorant clients can be overreached by their lawyers. The complaint that such overreaching is common

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<sup>93</sup> It is quite general to deny validity to any agreement to share proceeds in divorce litigation. While lawyers and judges can scarcely be heard to declare that litigation is an evil *per se*, our system of law has committed itself to the proposition that divorce litigation is an evil and that in every case, however serious the situation, it would be better for the litigants to forego it. Whether this is defensible socially or not, is beside the question. In any case, a scrutiny of fees in such litigation is a definite element of our procedure.

is an old one, and, while obviously exaggerated, does not altogether want foundation. It is just this type of client, inexperienced, ignorant and easily intimidated, for whose protection American courts have been inclined to legalize contingent fees.

It is important to dwell on this because nothing is gained, and a great deal is lost, by clinging to terms that are denuded of content. It is unfortunately a very legal attitude. Lord Sumner, in a case to be mentioned again, declared that "Whether an act is an act of maintenance or not depends on its own character, not on the character of the maintainer."<sup>94</sup> That acts have a character of their own, divorced from the impulses which give rise to them or to the effects which they produce, is a legal standpoint which the next generation of lawyers must learn to forget. Contingent fees are neither good nor bad. They are good when they assist an otherwise helpless litigant to secure his right against a powerful antagonist. They are bad when they deprive this litigant of a substantial part of the compensation for his injury. And the canon of the American Bar Association, if honestly and intelligently applied, will help to make this doctrine a reality.

It remains doubtful<sup>95</sup> whether this canon can be reconciled with the general prohibition of Canon 10 that:

"The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

If the interest was purchased from his client it is presumptively invalid, on the general principle that persons in such positions as lawyers dealing with clients have the burden of proof that the transaction was fair and reasonable. This is quite as it should be, but it is far short of the blanket veto imposed by the Canon. Again, if the interest was purchased from a third party, it runs counter to reason or fairness, only if it is an interest adverse to the client, in which case the transaction is obviously void.

Apparently the Committee had in mind the Statute of Henry VIII<sup>96</sup> against the purchase of pretended or doubtful titles. There is really no difference in practice or common sense between such an act on the attorney's part and any other form of chicanery. If it can be shown that there was no bona fide belief in the validity of the title or the interest acquired, but that its chief purpose was to extort money, it is as objectionable when done by an attorney as when done by anyone else. Otherwise, the rule is as wooden as its congeners.

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<sup>94</sup> *Oram v. Hutt* [1914] 1 Ch. 98, 107.

<sup>95</sup> Doubt on this matter has already been expressed by an anonymous writer in (1915) 20 *DICKINSON L. REV.* 1, 12, 13, cited in *COSTIGAN, CASES ON THE LEGAL PROFESSIONS AND ITS ETHICS* (2d ed. 1933) p. 644.

<sup>96</sup> 32 *HENRY VIII*, ch. 9; 4 *HALSBURY'S STATUTES OF ENGLAND* (1929) 301.

The point of view of the Association was not reached without a struggle. In an answer to a specific question on the general subject of contingent fees, the New York Committee made the following answer: "In the formulation of the canons of ethics of the American Bar Association, no subject precipitated such debate as Canon 13."<sup>97</sup> Mr. Fort in his book on Legal Ethics declares that they lead to an attitude which is "of necessity destructive of all ethical principles."<sup>98</sup> The Boston Bar Association said that experience showed they tended to breed evils. Similar pronouncements are common enough.

As a matter of fact, legalized or not, approved or not, contingent fees will always labor under a taint, and will always have a suggestion of impropriety so long as the oldest and most impressive of the Common Law jurisdictions still classes them not merely as void, but actually wrongful and criminal. And in England the rejection of contingent fees and the survival of maintenance and champerty are firmly fixed.

The Solicitors Act of 1932, Sec. 63 (1) provided that nothing in the act should give validity to

"(i) Any purchase by a solicitor of the interest or part of the interest, of his client in any action suit, or other contentious proceeding; or

(ii) 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."

One thing is evident. Although there is no doubt that champerty and maintenance, combined or separate, are quite illegal in England, and although the courts seem to take a certain somber pride in that fact, that is no indication that lawyers or courts have examined the situation in its modern aspects. Lord Sumner in *Oram v. Hutt*<sup>99</sup> held it was maintenance for a trade union to pay the costs of a suit on behalf of one of its officers who had been seriously slandered, although the union was in fact adversely affected by the slander and had a "common cause" with its officer, and this in spite of the court's admission that the action of maintenance was not widely favored. The court said, "That the action of maintenance is now in small favor and that indictments for maintenance have been drawn by few among living men are nothing to the point."

Such a case may be taken to be the high water mark of judicial logic and the low water mark of judicial participation in the life of the community,<sup>100</sup> but it is clear that where this determination can be

<sup>97</sup> New York Committee, Question 141, *COSTIGAN, op. cit. supra* note 95, at p. 648.

<sup>98</sup> *LEGAL ETHICS* (1908) pp. 10-11.

<sup>99</sup> *Supra*, note 94.

<sup>100</sup> Lord Sumner says, on p. 107, "It is said that the motives both of Mr. Johnson and the association were honourable and their wrongs grievous—and that was

reached without a critical voice raised against it, there is no present chance that any change will be made in regard to contingent fees of solicitors.

It is not apparent that there is any objection to contingent fees except, first, they are champertous and, therefore, within the definition of Coke, secondly, that they stir up litigation, which "perhaps" said Coke, "they [the parties in interest] would not venture to go in upon their own bottoms,"<sup>101</sup> and, finally, that they involve speculation and are therefore inconsistent with the dignity of the profession.

The first is an historical fact which can scarcely interest us *per se* except to discover that it is an historical fact. The second assumes that litigation is an evil no matter what the purposes are or how definitely it subserves justice or "common right." The third is difficult to take seriously, unless its rigid enforcement has really made English solicitors, as a class, indifferent to the income they derive from their profession.

It is the second reason that must be controlling, if it is sound. It is the one repeated in the earlier stages of the discussion of the subject. Kent believed it was 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."<sup>102</sup> But if we ask ourselves why they do not venture to go in "upon their own bottoms," or why they are not disposed to enforce their rights, surely it must be obvious that the sword cuts both ways and that against the group of men who harass their neighbors with improper and unnecessary suits, however lawfully commenced, we may set the meek and economically feeble persons who without support are afraid or incapable of calling in the law to secure their rights. The shoe is really on the other foot. If in medieval England, powerful men oppressed their weaker fellow subjects by maintaining suits against them, in modern society powerful people are more

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true . . . I think this is no distinction." If there is a rule of law which can deny redress to persons who suffer grievous wrongs and honourably seek the aid of the courts in respect of them, one might think it is a rule that should be looked at forward, upward and downward, before it is enforced. And when it is a rule for which the courts have been busy to find exceptions almost since its existence, the point of view of their Lordships would seem to need ampler justification than this particular *non possumus*. For example, nothing would have been said if the union had lent the money for the costs to its officer and had afterwards forgiven the debt or omitted to collect it.

<sup>101</sup> *Supra* note 75.

<sup>102</sup> 4 COMMENTARIES (14th ed.) p. 528, \*447, note c. Under exactly similar circumstances, the Roman texts speak of entering on a suit, *suo Marte* (Cod. Just. 2, 13, 1; 3, 1, 13, 9). The contrast between the maritime metaphor of Coke and that of the Romans is not without significance.

likely to achieve their ends by daring their victims to maintain suits.

That the English law on the subject is full of inconsistencies has been admitted even by Englishmen. The law of champerty remained rigid both at law and equity, said Mr. Justice McCardie, although the basis for it has almost wholly changed.<sup>103</sup> Mr. Edmond H. Bodkin in his recent excellent little manual on "Maintenance and Champerty" devotes two pages to the "inconsistencies of the law"<sup>104</sup> on this subject and quotes with approval the doctrine long applied in the Indian courts, that the best test is whether the courts have to deal with "the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive."<sup>105</sup> This is all the more pertinent, since in his History of the Criminal Law, Sir James Stephen pointed out that the earlier conditions in India in regard to maintenance were curiously like those of medieval England.<sup>106</sup>

Not the least of the advantages both in England and the United States of compelling the scrutiny of each transaction in which a champertor appears, is the fact that it will substitute judgment by reality for judgment by category. It is indubitably easier to reject all agreements between lawyers and clients in bulk or to accept them in bulk. But there is no reason why judges should be relieved from the most important part of their task which is to take into account the actual conditions within which the parties before them live.

And perhaps realism permits another general inference in this connection. The multiplication of suits is an evil because it is in fact true that litigation is still perilous and expensive, even when it is *bona fide* and reasonably supported by evidence. But the recognition of that fact is scarcely a good reason for not seeking to change it. The cock-pit theory of legal trials which, to the appalled amazement of reasonable men, many of our courts support, the preposterous character of some of our rules of evidence, are two elements which go far toward giving a basis for the doctrine that litigation is essentially bad whatever its result and whatever the character and motives of the maintainers. Lawyers singly and in groups might justifiably be required to do something about it.

Max Radin.

SCHOOL OF JURISPRUDENCE,  
UNIVERSITY OF CALIFORNIA.

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<sup>103</sup> County Hotel Co. v. The L. and N. W. Railway [1918] 2 K. B. 251.

<sup>104</sup> *Op. cit.* *supra* note 62, at pp. 9-10.

<sup>105</sup> Chedambarra Chetty v. Renga etc. Naickar [1874] L. R. 1 Ind. App. 241, 265.

<sup>106</sup> 3 HISTORY OF CRIMINAL LAW (1883) 238.