

Attorney and Client - Champerty

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RECENT DECISIONS

Attorney and Client—Champerty.—Attorneys who had represented the defendant, Pass, in a former action in which Pass had recovered, filed a petition to intervene in an action against Pass by his creditors. The attorneys alleged in their petition that they had been employed by Pass in the previous action; that they knew that he had no money, and that they looked solely to the anticipated judgment for payment of their fees. This agreement was held champertous, and therefore unenforceable, despite the fact that the defendant had agreed to pay his own expenses. *Baskin v. Pass* (Mass. 1939) 19 N.E. (2d) 30.

Maintenance is the act of assisting another or supporting him in prosecuting or defending an action not one's own. *Manning v. Sprague*, 148 Mass. 18, 18 N.E. 673 (1888); *Davies v. Stowell*, 78 Wis. 334, 47 N.W. 370 (1890). Maintenance looks specifically to the mode of carrying on the action, whereas champerty, a species of maintenance, looks to the mode of compensation, namely from the subject-matter of the suit. *Gilman v. Jones*, 87 Ala. 691, 5 So. 785 (1889); *Wilhoit's Adm'x. v. Richardson*, 193 Ky. 559, 236 S.W. 1025 (1921).

Under early English law champerty and maintenance were severely punished. But there is no unanimity as to what the common law rules with regard to them were. Coke and Sergeant Hawkins hold one view, Blackstone and Chitty another. Blackstone defines champerty as "a bargain with a plaintiff, or defendant, *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense. 4 BL. COMM. 135; to the same effect, 2 CHITTY, CONTRACTS (9th Am. ed.) 587. This view, which requires payment of expenses as well as division of the proceeds, has been adopted by most courts. *Brush v. Carbondale*, 229 Ill. 144, 82 N.E. 252 (1907); *Sparling v. U. S. Sugar Co.*, 136 Wis. 509, 117 N.W. 1055 (1908).

Coke and Sergeant Hawkins define champerty as "the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it." 2 HAWKINS, PLEAS OF THE CROWN (8th ed.) 472. There is no specific reference to expenses. This view, which regards as illegal a bargain by an attorney for a share of the proceeds of litigation as such, is followed in England and a few of the United States. WILLISTON, CONTRACTS, § 1712; *Taylor v. Rosenberg*, 210 Mass. 113, 106 N.E. 603 (1914). But in Massachusetts this rule is construed in hair-splitting fashion which emphasizes form rather than substance. Thus, a contract which provided that the attorneys should be entitled to liberal fees "in no event to exceed 50 per cent of the amount collected" has been upheld, although a contract for 50 per cent of the proceeds of the action would have been invalid. *Blaisdell v. Ahern*, 144 Mass. 393, 11 N.E. 681 (1887); WILLISTON, CONTRACTS, § 1712, n. 6. And even in Massachusetts an attorney may lawfully agree with a client that the latter is to pay nothing in the event that no recovery is had. *Blaisdell v. Ahern, supra*.

The conduct of the intervenors in the principal case clearly was champertous under the Massachusetts rule, since they looked solely to the judgment for their fees, even though the client was to pay the expenses of the action. In Wisconsin an attorney may bargain with his client for a share of the proceeds of an action as such, *Dockery v. Wilson*, 93 Wis. 381, 67 N.W. 733 (1896); and statute gives him a lien on such proceeds in tort actions and in actions for unliquidated damages in contract. WIS. STAT. (1937) § 256.36. The factor which makes an attorney's contract with his client champertous in Wisconsin is the agreement to pay

expenses, and this means not merely that the attorney is to advance the costs of litigation, but that he is not to be reimbursed in the event that no recovery is had. *Kelly v. Kelly*, 86 Wis. 170, 56 N.W. 637 (1893). The contract of the intervenors in the principal case would have been valid in Wisconsin.

JAMES F. HACKETT.

Criminal Law—Bank Night As a Lottery.—The State on information of Robert S. Cowie in an action against the LaCrosse Theatres Co. sought to abate as a nuisance the practice of "Bank Night." This was a scheme whereby a person would register his name at the theatre and on a certain advertised night a drawing would take place. The winning name drawn would receive a cash prize provided that the person appear on the stage within three minutes. The name was called both from the stage and from the lobby. If the person whose name was called were on the outside of the theatre, he could enter free of charge and claim his prize. Plaintiff claimed this was a lottery and contrary to the Wisconsin State Constitution, Art. IV, Sec. 24, and Sec. 348.01 of the Wisconsin statutes. The defense contended upon argument of a demurrer that there was no consideration so as to bring it within the lottery laws. The defendant's demurrer was overruled by the trial court.

Held, affirmed. The Supreme Court maintained that although chances may be had without payment, this does not remove such scheme from the lottery statute. The great number of those who pay for the ticket for the chance of participating in the drawing, thus making the scheme profitable to the theaters, furnish the consideration although others are given free chances. *State ex rel Cowie v. LaCrosse Theatres Co.* (Wis. 1939) 286 N.W. 707.

A lottery is loosely defined, but it is generally conceded to be a scheme involving a chance, a prize, and a consideration. *Brenard Mfg. Co. v. Jessup and Barrett Co.*, 186 Iowa 872, 173 N.W. 101 (1919); *Carl Co. v. Lennon*, 86 Misc. 255, 148 N.Y. Supp. 375 (1914). Courts deem it best not to attempt to define it because "no sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed, but not quite within the letter of the definition." *People v. McPhee*, 139 Mich. 687, 103 N.W. 174, 69 L.R.A. 505, 5 Ann. Cas. 835 (1905). As long as the above elements can be found, the name of the scheme is immaterial. *State v. Danz*, 140 Wash. 546, 250 Pac. 37, 48 A.L.R. 1109 (1926). Any scheme which tends toward arousing the public's spirit of gambling may be justly condemned as a lottery if these elements are involved. *Iris Amusement Corp. v. Kelly*, 366 Ill. 256, 8 N.E. (2d) 648 (1937).

The elements of chance and prize are generally conceded in such cases, but the element of consideration causes most of the trouble because of the different interpretations of the meaning of consideration. *Iris Amusement Corp. v. Kelly*, *supra*; *Central States Theatre v. Patz*, 11 F. Supp. 566 (1935); *State v. Hundling*, 220 Iowa 1369, 264 N.W. 608, 103 A.L.R. 861 (1936).

In construing the scheme of "Bank Night," as described in the principle case, as a lottery, the courts are in conflict. The majority of the decisions confirm the result of the *State ex rel Cowie v. LaCrosse Theatres Co.*, *supra*, holding, after admitting the elements of chance and prize, that the consideration for the lottery is the increased gross receipts of the theater owner. *State ex rel Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. (2d) 929, 109 A.L.R. 698 (1936); *State ex rel Hunter v. Fox Beatrice Theatre Corp.* (Neb. 1937) 275 N.W. 605.