ROSS SHEPPARD (DEFENDANT).....APPELLANT; 1941

* May 26.
* Oct. 7.

AND

MAX ARNO FRIND (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Maintenance—Suit for damages for alleged intermeddling and stirring up litigation—Requisites for recovery—Absence of proof of special damage.

Respondent sued to recover damages against appellant for maliciously instigating and stirring up respondent's wife to commence and prosecute an action for alimony. Appellant had had nothing to do with the alimony action itself, but had merely put into the wife's head the idea of bringing it. During the course of the trial of the alimony action, respondent entered into a settlement by which he agreed to pay his wife $500 per annum for life and to deposit securities as security for payment and to pay her costs; and judgment was given declaring the settlement binding.

Held (reversing the judgment of the Court of Appeal for Ontario, [1940] O.R. 448, and restoring the judgment of Roach J., [1940] O.R. 292): Respondent's claim against appellant should be dismissed.

Per the Chief Justice: In the circumstances of the case, the action could only succeed on proof of the absence of reasonable and probable cause for the alimony action. Also special damage was not proved. On both these grounds respondent's claim should be dismissed.

Per Rinfret, Davis and Hudson JJ.: In the case of civil proceedings, while there cannot be "maintenance" in the strict sense of the term until the action is commenced, a person who, without reasonable and probable cause, instigates another to bring an action incurs a civil liability to the defendant similar to that incurred by a maintainer. But the action against the instigator is only maintainable in respect of legal damage actually sustained. In the present action it cannot be said that the settlement in the alimony action was not the recognition by respondent of a legal obligation on him towards his wife or that appellant, who stirred up the litigation, was the cause of respondent having to make the payments under the judgment. At least it can scarcely be said that the wife had no right to bring that action.

Per Taschereau J.: Appellant intermeddled and stirred up litigation; but no special damage to respondent had been proved; and without proof of special damage a civil action for damages by reason of said facts cannot succeed. Such an action at common law is not one for the invasion of a right; it is one in respect of an offence which causes damage to the plaintiff. The annual payments ordered in the alimony action were clearly the discharge of a legal obligation; and they do not, nor do the costs adjudged against respondent (or incurred by him) in that action, constitute special damages for which the present action can be maintained.

* PRESENT:—Duff C.J. and Rinfret, Davis, Hudson and Taschereau JJ.

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APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which (reversing, on the question now in issue, the judgment of Roach J. (2)) gave judgment to the plaintiff against the defendant for damages in the sum of $4,000 upon the plaintiff's claim that the defendant had "by officious intermeddling, improperly and maliciously, and for the purpose of stirring up litigation and strife and without having any interest in the suit, instigated, stirred up, encouraged and advised" the plaintiff's wife "to commence and prosecute an action" against him for alimony and other claims. The material facts with regard to the question in issue in this appeal are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was allowed and the judgment of the trial Judge restored. No costs were awarded of the appeal to this Court or to the Court of Appeal.

T. N. Phelan K.C. for the appellant.

A. C. Heighington K.C. for the respondent.

THE CHIEF JUSTICE—I agree with my brother Davis that in the circumstances of this case the action could only succeed on proof of the absence of reasonable and probable cause.

I agree also with my brother Davis and my brother Taschereau that special damage was not proved.

On both these grounds the appeal should, I think, be allowed, but without costs in this Court or in the Court of Appeal.

The judgment of Rinfret, Davis and Hudson JJ. was delivered by

DAVIS J.—The action out of which this appeal arises had two branches but we are only concerned in the appeal with one branch, what has been referred to as a claim for damages for maintenance. The respondent alleged that the appellant, who is a solicitor practising in Toronto, "by officious intermeddling, improperly and maliciously, and for the purpose of stirring up litigation and strife and without having any interest in the suit, instigated, stirred

(1) [1940] O.R. 448; [1940] 4 D.L.R. 455.
(2) [1940] O.R. 292; [1940] 3 D.L.R. 196.

up, encouraged and advised" the respondent's wife "to commence and prosecute an action" against him in which she claimed alimony amongst other relief.

The facts as found by the trial judge are not in dispute. The respondent was married in Montreal on December 11th, 1930. Husband and wife immediately went to Toronto. Four days after the marriage they separated and the wife returned to her father's home in Grand'Mère, Quebec, and has apparently remained there ever since. The husband continued to reside in Toronto. In the spring of 1931 and subsequently, the trial judge found, the wife attempted to bring about a reconciliation between herself and the respondent and offered to return and live with him as his wife, but the respondent spurned her offers. It was not until June 1st, 1938, however, that the wife took any action against her husband, at which time she commenced an action in Ontario against him and claimed alimony. That action went down to trial at Toronto before Chief Justice Rose in February, 1939, and after some evidence was given the parties agreed to a settlement. By the settlement the husband agreed to pay his wife $500 per annum for life and to deposit securities with a trustee as security for the said payments. He also agreed to pay his wife's costs fixed at $700. Judgment was given in the action declaring the settlement binding upon the parties. The respondent has complied with all the terms of the settlement.

The respondent in the present action seeks to recover damages against the appellant for instigating and stirring up his wife to commence and prosecute the action for alimony. What is said in effect is that the wife had been living in Quebec province for over seven years separate and apart from her husband and making no claim against him; that the appellant then maliciously put the idea into her head of bringing an action in Ontario against her husband for alimony. The appellant appears to have known and been a friend of both husband and wife, though the trial judge finds that he had not seen or heard from her from 1931 till November, 1937, during which time he had acted as the husband's solicitor and during which time the wife apparently had never contemplated any legal proceedings against her husband. The appellant then became annoyed with the respondent over a legal account and began a corre-

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spondence with the wife in Quebec, stirring her up to commence an action in Ontario against her husband.

It is plain that in the strict sense of the term there was no "maintenance" of the alimony action by the appellant. What he did was merely to put the idea of bringing the action into her head. She consulted another solicitor in Toronto, who advised the action and who subsequently brought the action on her behalf. The appellant had nothing whatever to do with the action itself. In the case of civil proceedings, however, while there cannot be "maintenance" in the strict sense of the term until the action is commenced (*Flight* v. *Leman* (1)), a person who, without reasonable and probable cause, instigates another to bring an action incurs a civil liability to the defendant similar to that incurred by a maintainer. See the judgment of Lord Alverstone, C.J., in *Greig* v. *The National Amalgamated Union* (2), Halsbury, 2nd ed., Vol. I, p. 71, para. 87 (*s*) and (*t*). But the action is only maintainable in respect of legal damage actually sustained. *Cotterell* v. *Jones* (3); and the decision of the House of Lords in the *Neville* case (4).

The learned trial judge dismissed the respondent's action, but the Court of Appeal reversed the judgment and gave damages for the respondent in the sum of $4,000, and from that judgment this appeal has been brought to this Court. The judgment of the Court of Appeal obviously went on the basis that the respondent's wife had really no valid claim against her husband and that it could not say that in the settlement of the action the husband was only discharging his just debts. But that action went to trial and during the course of the hearing the respondent, who was represented by experienced counsel, made the settlement of the action above referred to, and I do not see how it can be said in this action that that was not the recognition by the husband of a legal obligation on him towards his wife or that the apellant, who stirred up the litigation, was the cause of the respondent having to make the payments under the judgment. The husband has to make the payments under the judgment because he is the husband and entered into an agreement with his wife

(1) (1843) 4 Q.B. 883.
(2) (1906) 22 T.L.R. 274.
(3) (1851) 11 C.B. 713.
(4) *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A.C. 368.

which became crystallized in the judgment. At least it can scarcely be said that the wife had no right to bring the action. While I think it plain that the appellant instigated the bringing of the action, the appellant could only be made liable to the respondent in respect of legal damage actually sustained by him.

The appeal should be allowed and the judgment at the trial restored, but in view of the conduct of the appellant I think he should not be awarded any costs, either in this Court or in the Court of Appeal.

TASCHEREAU J.—I believe that the appellant intermeddled in a matter in which he had no concern. He interfered in such a way that Marcelle Collin conceived the idea of instituting against her husband, Max Arno Frind, an action for alimony, and enforced rights which she did not seem disposed to enforce. (*Goodman* v. *The King*) (1).

The appellant for many years had been the respondent's solicitor, and a quarrel relative to a bill of costs brought about a rupture of their friendly relations. It was then, as revealed by the evidence, that the appellant by his letters to the wife incited her and improperly encouraged her to prosecute an action in which he had no legal interest, thus stirring up a litigation against the respondent.

It is plain that the appellant technically incurred a civil liability, but it is claimed on his behalf that even if he did instigate a law suit, the judgment of the Court of Appeal ordering him to pay $4,000 and costs should be reversed, because no special damage has been occasioned to the plaintiff. The rule as laid down by the House of Lords in *Neville* v. *London "Express" Newspaper, Ltd.* (2), is that the action for maintenance at common law is not an action for the invasion of a right; it is an action in respect of an offence which causes damage to the plaintiff. As Lord Finlay says: "The criminal law prohibits and may punish the act, but in the absence of damage the remedy is not by civil action." Even nominal or exemplary damages may not be recovered. The plaintiff must have sustained special damage.

(1) [1939] S.C.R. 446.

(2) [1919] A.C. 368, at 380.

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In the present case, the respondent's wife enforced her rights to claim an alimony, and after an agreement had been reached by the parties, Chief Justice Rose ordered her husband, Frind, to pay to his wife $500 annually, and costs, and, to guarantee the payment of the alimony, he had to deposit with a Trust Company securities to the value of $10,000. This payment was clearly the discharge of a legal obligation. The amount paid by a debtor as the result of the exercise of a creditor's rights, even if the latter has been improperly induced to prosecute the action, may not be recovered as damages by the debtor against the maintainer. These payments in capital and costs do not constitute the special damages which are recoverable before the courts. The same thing may be said respecting costs paid by a defendant to his solicitor and incurred in a vain attempt to oppose the claim.

In the *Neville* case cited *supra,* Lord Finlay in his speech expressed as follows the views of the majority:—

> In the present case, there is no damage. The plaintiff, it is true, has had to repay money which he had obtained by fraud and to pay costs in respect of his having resisted payment. It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them.

These principles should be applied to this case where no special damage has been proven. The appeal should be allowed, but in view of the circumstances of the case, I would not award the appellant any costs, here and in the Court of Appeal.

Appeal allowed.

Solicitors for the appellant: *Phelan, Richardson, O'Brien & Phelan.*

Solicitors for the respondent: *A. and E. F. Singer.*