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## DAMAGES - EXPENSES OF LITIGATION - COUNSEL FEES IN A PREVIOUS SUIT

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DAMAGES — EXPENSES OF LITIGATION — COUNSEL FEES IN A PREVIOUS SUIT — Plaintiffs brought this appeal from a judgment dismissing an action to recover the attorney's fees and other expenses of the prosecution of a prior suit with defendant. In the former action plaintiffs had secured a decree requiring defendant to convey to them certain property which the defendant had withheld fraudulently and maliciously. In the present action defendant successfully had moved to dismiss on the grounds that attorney's fees as between original litigants were not recoverable and further that this claim was *res judicata* due to the prior suit. *Held*, one justice dissenting,<sup>1</sup> as defendant's intentional and wilful misconduct necessitated the previous litigation, and as the present claim for damages was not there asserted, the judgment must be reversed. *Ritter v. Ritter*, 308 Ill. App. 337, 32 N. E. (2d) 185 (1941).

The prevailing American rule, as opposed to the English rule,<sup>2</sup> is that each

<sup>1</sup> Justice Dady dissented on the theory that this case was controlled by the prevailing American rule as to the allowance of attorney's fees, that here no third party was involved to take the case out of the general rule, and moreover, were this an allowable claim, the present action was now barred as an issue which might have been decided in the previous suit.

<sup>2</sup> The English view is that the attorney's fees of the adversary should be imposed upon the losing party in order to make indemnity as complete as possible for the successful claimant. 32 ILL. L. REV. 111 (1937).

party to a suit must bear his own expenses of litigation,<sup>3</sup> including counsel fees, except to the extent that such fees are made recoverable by statute,<sup>4</sup> or in special types of cases,<sup>5</sup> or are included by the express terms of a contract between the parties.<sup>6</sup> Various reasons have been asserted for this rule. It is said that counsel fees are not recoverable as they are a remote loss,<sup>7</sup> but this argument ignores the fact that expenses of litigation necessarily flow from any law suit. It is advanced that a good faith and honest claim should be freely litigated and the claimant should not be discouraged by the fear of heavier losses in the event that his suit fails,<sup>8</sup> but a public policy tending to encourage compromise and arbitration would weaken this reason. A fiction has been resorted to by some courts that costs are a full indemnity to a successful party.<sup>9</sup> There is also some feeling that an action for malicious prosecution is sufficient protection against groundless claims,<sup>10</sup> but it can be seen that the parties in the present case would not be so protected. However, all these arguments may be accepted with the rationalization that complete compensation is, after all, but an impracticable ideal. The difficulty of proving the proper amount to be allowed for counsel fees presents the best argument for their complete disallowance. Their variability would result in a greater controversy than the original cause,<sup>11</sup> and this factor may outweigh all the arguments against the rule. Historically in America, attorney's fees were allowable as taxable costs in amounts fixed by statute. When the value of money decreased, these statutory allowances became inadequate, but since the legislatures failed to enlarge them, courts refused to remedy the situation in absence of legislative action.<sup>12</sup> An exception to the general rule is made, however, where plaintiff is forced into litigation with a third party to correct the wrongdoing of defendant,<sup>13</sup> and this exception is established as widely as the rule itself. The

<sup>3</sup> I SEDGWICK, DAMAGES, 9th ed., § 229 (1912); McCORMICK, DAMAGES, § 61 (1935).

<sup>4</sup> McCORMICK, DAMAGES, § 65 (1935). See the talk by McCartney in the proceedings of the Illinois State Bar Assn., 1923 ANNUAL REPORT 419 (1923), wherein he makes the plea that counsel fees of the successful litigant be assessed against the losing party as statutory taxable costs.

<sup>5</sup> Suit for allowances from a common fund, for example. McCORMICK, DAMAGES, § 62 (1935).

<sup>6</sup> Allowed, *Ghirardelli v. Peninsula Properties Co.*, (Cal. 1940) 107 P. (2d) 41. But not allowed where the litigation was unnecessary. *Walsh v. Walsh*, (Cal. App. 1940) 108 P. (2d) 768.

<sup>7</sup> *St. Peter's Church v. Beach*, 26 Conn. 354 (1857).

<sup>8</sup> 32 ILL. L. REV. 111 (1937).

<sup>9</sup> I SEDGWICK, DAMAGES, 9th ed., § 236 (1912).

<sup>10</sup> 32 ILL. L. REV. 111 (1937).

<sup>11</sup> *Wisecarver v. Wisecarver*, 97 Va. 452, 34 S. E. 56 (1899); *Oelrichs v. Spain*, 15 Wall. (82 U. S.) 211 (1872).

<sup>12</sup> McCORMICK, DAMAGES, § 60 (1935). The view that only taxable costs are recoverable now excludes attorney's fees. *Dahlstrom Metallic Door Co. v. Evatt Construction Co.*, 256 Mass. 404, 152 N. E. 715 (1926); *Malloy v. Carroll*, 287 Mass. 376, 191 N. E. 661 (1934).

<sup>13</sup> *Himes v. Keighblynger*, 14 Ill. 469 (1853); *McEwen v. Kerfoot*, 37 Ill. 530 (1865); *Philpot v. Taylor*, 75 Ill. 309 (1874); McCORMICK, DAMAGES, §§ 66, 67 (1935); I SEDGWICK, DAMAGES, 9th ed., § 236 (1912).

court in the principal case, relying on the authority of this exception, holds that the wrongful and malicious conduct of defendant also justifies recovery of counsel fees where the plaintiff has been forced to take corrective action against the defendant himself<sup>14</sup> in order to protect his property rights.<sup>15</sup> Though the decision is strictly limited to the facts presented, it is nevertheless a radical departure from the general rule.<sup>16</sup> But the additional test that the action must be "necessarily required" narrows the application of the decision still further.<sup>17</sup> However, if there are to be exceptions to the general rule and problems of administration can be ignored, it is difficult to escape the rationale of this decision that a defendant who has wilfully necessitated corrective measures should bear all the expenses reasonably incurred therein. The court differed on another point in the principal case. The dissenting judge felt that the present claim was barred under the doctrine of *res judicata*.<sup>18</sup> Stated simply, the only essential requirement to impart a conclusive effect to a former judgment is identity of the claim or claims involved.<sup>19</sup> But the claim for counsel fees was never litigated, and the previous suit is *res judicata* only if it may be said to fall within the generalization that a judgment is conclusive of every matter which might have been litigated.<sup>20</sup> But such a general statement is misleading. Only those issues are required to be litigated which are necessary to support the cause of action.<sup>21</sup>

<sup>14</sup> One test suggested for the allowance of attorney's fees is whether the legal action taken is corrective in nature, i.e., remove cloud from title, etc., or whether it is to secure redress, compensation. In the latter case they should be disallowed. *McCORMICK, DAMAGES*, § 67 (1935).

<sup>15</sup> "In our opinion, no sound distinction is to be made between instances, where the wrongful act of the defendant necessitates action by plaintiff as against that defendant, and cases where action against third parties is required to be undertaken in order to repair the damages which may have been done by such wrongdoer. . . . the result of a defendant's wrongful conduct, where action is required to be instituted against such defendant, is equally as apparent as it is in cases where action would be required to be instituted or defended as against third parties." Principal case, 32 N. E. (2d) 185 at 187.

<sup>16</sup> If the litigation is unnecessary there can be no recovery of these expenses. Cf. *Walsh v. Walsh*, (Cal. App. 1940) 108 P. (2d) 768; 1 *SEDGWICK, DAMAGES*, 9th ed., § 241a (1912).

<sup>17</sup> This test increases the complexities of the rule. The determination of when litigation is "necessarily required" may result in controversies as great as what are proper allowable counsel fees.

<sup>18</sup> *Supra*, note 1.

<sup>19</sup> 2 *FREEMAN, JUDGMENTS*, 5th ed. (Tuttle), § 671 (1925).

<sup>20</sup> 2 *FREEMAN, JUDGMENTS*, 5th ed. (Tuttle), § 674 (1925).

<sup>21</sup> A plaintiff is required to tender all material allegations necessary to maintain his cause of action. A defendant must controvert all these allegations which he wishes to gainsay. Further than that no tender of issues is required, and separate causes of action, counterclaims, cross bills, and equitable defenses, or new rights rising during the litigation are not barred unless tendered. 2 *FREEMAN, JUDGMENTS*, 5th ed. (Tuttle), § 675 (1925). This rule may be changed by statute, but for the most part compulsory joinder applies only to counterclaims. As to separate claims by plaintiff, joinder is permissive. Cf. Rule 18, Federal Rules of Civil Procedure. 3 *OHLINGER, FEDERAL PRACTICE* 295 (1939). As to compulsory counterclaims, see *CLARK, CODE PLEADING*, § 99 (1928).

Where one has the option to litigate a particular matter in action, failure to do so then does not subsequently bar the right.<sup>22</sup> The present claim was the result of the previous action, but was not a part of it. Thus even though the court could have gone on in the previous suit to allow this claim,<sup>23</sup> as the particular claim was never tendered to the court the doctrine of *res judicata* properly was not applied.

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<sup>22</sup> 2 FREEMAN, JUDGMENTS, 5th ed. (Tuttle), § 675 (1925).

<sup>23</sup> *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034 (1890). It may, of course, be argued that the expense of the first suit is merely an item of damage resulting from the defendant's original wrongful act, and hence an item that must be proved in the first suit or be barred forever. Such reasoning is clearly the basis of the dissenting judge's thesis. The answer to such an argument must be that attorney fees and other expenses of litigation must be treated as a unique element of damages, in that the total expenses can never be determined until the prior action is fully completed. For instance, no verdict could ever be handed down which would compensate for expenses to be incurred in the future in the event of an appeal. This being so, it is apparent that the expenses of litigation should not be an item of damages which must be proved in the original action or be barred forever, since the original action cannot give full reparation.