cause forcing a party to arbitrate when he may later revoke his appointment of arbitrators is futile,[29] and because a court cannot force a party to arbitrate against his will.[30] The majority's dictum may remove the first two grounds for denying specific relief. As to the third, a court could hold a party in contempt for failure to participate,[31] could appoint arbitrators,[32] and could authorize an arbitration ex parte.[33] Unlike enforcement under the statutes, however, specific enforcement in equity would depend upon the discretion of the court.[34] The majority's dictum seems, therefore, to have removed the only obstacle to making general agreements to arbitrate irrevocable and specifically enforceable.

Attorney and Client—Recovery of Counsel Fees in Separate Action—Res Judicata —[Illinois].—The defendant had procured land from the plaintiff's deceased husband by means of fraud. Having recovered the property in a prior action against the defendant, the plaintiff brought a separate action to recover counsel fees and other expenses incurred in the first action. On appeal from the trial court's dismissal of the complaint, *held*, that the plaintiff may recover counsel fees incurred in the prior action if that action was made necessary by the defendant's wilful misconduct. Res judicata does not bar a later suit for counsel's fees since such a suit constitutes a separate cause of action. Judgment reversed. *Ritter v. Ritter*.[1]

The successful party in a law suit is generally not allowed to recover his counsel fees from the loser as an element either of costs or of damages.[2] Many courts make an exception where one party in bad faith engages the other in litigation. Where the wrongdoer has himself brought a groundless suit in bad faith, the courts disagree as to whether the successful defendant should be allowed to recover his counsel fees. State courts

[29] Greason v. Keteltas, 17 N.Y. 491 (1858).

[30] Tobey v. Bristol, Fed. Cas. No. 14,065 (C. C. Mass. 1845); Greason v. Keteltas, 17 N.Y. 491 (1858); Robinson v. Georges Ins. Co., 17 Me. 131 (1840); Meeker v. Meeker, 16 Conn. 403 (1844); March v. Eastern R. Co., 40 N.H. 548 (1860); Kaufmann v. Leggett, 209 Pa. 87, 58 Atl. 129 (1904); Pomeroy, Specific Performance of Contracts § 22 (3d ed. 1926).

[31] Cf. order to proceed to arbitration under statutes. N.Y. Civ. Prac. Act. (Gilbert-Bliss, 1939) § 1450; 43 Stat. 883 (1925), 9 U.S.C.A. § 4 (1927). If a court can enforce an order to proceed to arbitration under a statute, it ought equally to be able to enforce such an order at common law.

[32] Cf. appointment of arbitrators under statutes. N.Y. Civ. Prac. Act. (Gilbert-Bliss, 1939) § 1452; 43 Stat. 884 (1925), 9 U.S.C.A. § 5 (1927). Cf. also Anniston v. Alabama Water Co., 207 Ala. 497, 93 So. 409 (1922).

[33] Equity has not deemed enforcement of more complicated agreements impracticable; see, e.g., Union P. R. Co. v. Chicago, R. I. & P. R. Co., 163 U.S. 564 (1896).

[34] 6 Williston, Contracts §§ 1920, 1922 (rev. ed. 1938).

[1] 32 N.E. (2d) 185 (Ill. App. 1941).

[2] United Power Co. v. Matheny, 81 Ohio St. 204, 90 N.E. 154 (1909); Corinth Bank and Trust Co. v. Security Nat'l Bank, 148 Tenn. 136, 252 S.W. 1001 (1923); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897); McCormick, Damages § 61 (1935). See 39 A.L.R. 1218 (1925). In England, on the other hand, the court has discretion to allow a litigant to recover such expenses as part of costs. Several writers, after comprehensively reviewing the policies for and against the English and American "costs" systems, have favored adoption of the English view. Goodhart, Costs, 38 Yale L. J. 849 (1929); McCormick, Damages § 71 (1935).

generally deny recovery,[3] although most courts have allowed recovery even in the absence of bad faith where there has been an improvident application for appointment of a receiver[4] or an improper petition for an injunction.[5] The federal courts, however, have indicated a more liberal attitude. Two United States Supreme Court decisions suggest that equity may have inherent power to award counsel fees to the successful litigant in a suit brought in bad faith,[6] and a subsequent lower federal court case involving a "strike" suit against a corporation granted the corporation its counsel fees as part of costs.[7]

Although in many states a successful defendant in an action brought in bad faith cannot recover his counsel fees as such, in some he is allowed a separate action for malicious prosecution, in which counsel fees incurred in the first suit are recoverable as an element of damages.[8] This remedy is oftentimes inadequate, however, since recovery for malicious prosecution is frequently limited to cases involving interference with personal liberty, seizure of property, or other special injuries.[9]

In the instant case, the wrongdoer's bad faith consisted in making it necessary for the injured party to sue.[10] An individual is here subjected to the same kind of incon-

[3] Weinhagen v. Hayes, 179 Wis. 62, 190 N.W. 1002 (1922); Patterson v. Northern Trust Co., 286 Ill. 564, 122 N.E. 55 (1919); Dorris v. Miller, 105 Iowa 564, 75 N.W. 482 (1898). Where a wrongdoer procures a third person to sue the plaintiff, recovery from the wrongdoer of the counsel fees expended has, however, been allowed. McOsker v. Federal Ins. Co., 115 Kan. 626, 224 Pac. 53 (1924).

[4] Delcambre v. Murphy, 5 S. W. (2d) 789 (Tex. Civ. App. 1928); Anderson v. Marietta Nat'l Bank, 93 Okla. 241, 220 Pac. 883 (1923); Beach v. Macon Grocery Co., 125 Fed. 513 (C.C.A. 5th 1903); Ephraim v. Pacific Bank, 129 Cal. 589, 62 Pac. 177 (1900). The Illinois statute allows attorneys' fees in situations where receivership or injunction proceedings are later dissolved. Ill. Rev. Stat. (1939) c. 110, § 202.

[5] Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840 (1922); Joslyn v. Parlin, 54 Vt. 670 (1881); Spring v. Collector of Olney, 78 Ill. 101 (1875). Contra: Oelrichs v. Spain, 15 Wall. (U.S.) 211 (1872); First Nat'l Bank of Chillicothe v. McSwain, 93 S.C. 30, 75 S.E. 1106 (1912). See 16 L.R.A. (N.S.) 49 (1908).

[6] Rude v. Buchhalter, 286 U.S. 451 (1932); Kansas City S. R. Co. v. Guardian Trust Co., 281 U.S. 1 (1930). The lower court opinion in the Guardian Trust case presents a very persuasive argument on behalf of such a power. Guardian Trust Co. v. Kansas City S. R. Co., 28 F. (2d) 233 (C.C.A. 8th 1928). No such power exists on the "law" side of the federal courts. Maryland Casualty Co. v. United States, 108 F. (2d) 784 (C.C.A. 4th 1940).

[7] Gazan v. Vadsco Sales Corp., 6 F. Supp. 568 (N.Y. 1934).

[8] Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N.W. 930 (1913); McCardle v. McGinley, 86 Ind. 538 (1882); see Harper, Torts § 268 (1933).

[9] Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N.E. 569 (1898); Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 56 N.E. 198 (1900); Wetmore v. Mellinger, 64 Iowa 741, 18 N.W. 870 (1884).

[10] Another situation is that where a party to a bona fide suit prolongs the litigation in bad faith, and causes his opponent unnecessary trouble and expense. There is little authority, apart from statute, allowing recovery. Maryland Casualty Co. v. Tacoma, 199 Wash. 72, 90 P. (2d) 226 (1939). Contra: Baxter v. Brown, 83 Kan. 302, 111 Pac. 430 (1910). This may be due to the general acceptance by the legal profession of obstructionist tactics as part of a "sporting" theory of litigation, or it may be due to the fact that use of such tactics is checked by fear of judicial disfavor. Remedy is often provided by statute, however. Rules 37(a), 37(b) and 41(d) of Federal Rules of Civil Procedure, 28 U.S.C.A. § 723c (1941) (the refusal

venience and expense as he would be if a suit were maliciously brought against him: in the latter case he incurs expense in defending, in the former in bringing the action necessitated by the opposing party's bad faith. In a few instances the award of punitive damages may serve to compensate the injured party for his counsel fees.[11] Some courts allow recovery of these fees in a separate action where the wrongdoer's acts require a suit against some third person,[12] while denying recovery in a subsequent proceeding where the acts led to a prior suit against the wrongdoer and no third person is involved.[13] The justification for distinguishing the case where the wrongdoer's acts cause an action to be brought against him from one where they result in suit against a third party is not clear. Courts may feel that allowing such recovery cannot deter the third person from asserting his defense in the action against him, while the possibility of recovery of counsel fees, in addition to the other recovery sought in the action against the wrongdoer, might deter the latter from defending. The court in the principal case, however, refused to make the distinction, and its refusal seems sound for there is little danger of deterring honest assertion of a defense if recovery of fees is allowed only when bad faith is shown. But the liberal attitude of the court in the principal case apparently reaches a result inconsistent with the Illinois rule applicable in actions for malicious prosecution. There recovery is allowed only if a party brings a series of actions in bad faith.[14] Admittedly, if counsel fees are awarded to a party who sues another because of fraudulent or wilful misconduct, the number of such actions will be increased, but such a result is clearly in accord with the strong state policy against fraudulent and wilful misconduct of all kinds.[15]

Assuming the plaintiff's right to recover counsel fees, the defendant contended that his claim should have been asserted in the suit for recovery of the land and not in a later separate proceeding. If recovery of counsel fees is allowed as part of costs, it would seem that they should not be recoverable in a subsequent separate action brought for the purpose, inasmuch as the prior proceeding would be res judicata on this issue.[16]

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without "substantial justification" to answer or admit a question propounded, or the bringing of an action on a claim previously dismissed may subject a person to payment of expense caused the opposing party); Ill. Rev. Stat. (1939) c. 110, § 259.19 (if a party unjustifiably takes a deposition for discovery the court may assess the expense of taking such deposition, including a reasonable counsel fee); Ga. Code (1933) § 20–1404 (jury may allow expenses of litigation if defendant has "acted in bad faith or has been stubbornly litigious").

[11] Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994 (1884); New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242 (1859); New Haven & Northampton Co. v. Hayden, 117 Mass. 433 (1875).

[12] Feldmesser v. Lemberger, 101 N.J.L. 184, 127 Atl. 815 (1925); Bergquist v. Kreidler, 158 Minn. 127, 196 N.W. 964 (1924); Philpot v. Taylor, 75 Ill. 309 (1874).

[13] Choukas v. Severyns, 3 Wash. (2d) 71, 99 P. (2d) 942 (1940); Stickney v. Goward, 161 Minn. 457, 201 N.W. 630 (1925).

[14] Shedd v. Patterson, 302 Ill. 355, 134 N.E. 705 (1922); Merriman v. Merriman, 290 Ill. App. 139, 8 N.E. (2d) 64 (1937).

[15] Allowance of counsel fees in all cases where bad faith can be proved has recently been strongly advocated. Distribution of Legal Expense among Litigants, 49 Yale L.J. 699 (1940).

[16] Leslie v. Carter, 268 Mo. 420, 187 S.W. 1196 (1916); Van Horne v. Treadwell, 164 Cal. 620, 130 Pac. 5 (1913). Costs, whether or not including counsel fees, cannot be recovered in a second action. Armentrout v. Lambert, 83 W.Va. 569, 98 S.E. 731 (1919); Perlus v. Silver, 71 Wash. 338, 128 Pac. 661 (1912).

On the other hand, if the plaintiff's claim be regarded as essentially the same as a suit for malicious prosecution, it can be said that he has a separate cause of action. The Illinois Civil Practice Act does not require joinder of separate causes of action even though they arise out of the same conduct, transaction or occurrence,[17] and consequently the prior suit would not bar a subsequent proceeding. As a practical matter, however, it would seem desirable to require assertion of any claim for counsel fees to be made in the principal action, since substantially the same issues will have to be litigated in both cases.

Bailments—Automobiles—Interpretation of Provisions on Parking Lot Ticket Limiting Bailee's Liability—[Massachusetts].—The plaintiff parked his automobile in the defendant's parking lot, paid the required charge to the attendant, and left the keys in the automobile at the attendant's request. The attendant gave him a stub containing provisions exempting the defendant from liability for loss or damage to the car and stating that no attendant would be at the lot after 6:00 p.m. When the plaintiff returned at 6:15 there was no attendant in the lot and the automobile had been stolen. After the automobile was recovered in a damaged condition, the plaintiff brought this action to recover for the harm caused by the negligence of the defendant's agent. On appeal from a judgment for the plaintiff, *held*, that because the defendant's agent had not brought the provisions to the attention of the plaintiff, and the plaintiff had not read them, they cannot be given effect. Judgment affirmed. *Sandler v. Commonwealth Station Co.*[1]

The position of the court in the instant case is supported by that taken by courts dealing with other informal bailments[2] such as the checking of parcels and baggage[3]

[17] ". . . . any plaintiff . . . . *may* join any causes of action whether legal or equitable. . . . ." Ill. Rev. Stat. (1939) c. 110, § 168 (italics added). Rule 18 of the Federal Rules of Civil Procedure, 28 U.S.C.A. § 723c (1941), is also phrased in permissive terms.

[1] 30 N.E. (2d) 389 (Mass. 1940).

[2] The court found the lot operator in the present case to be a bailee for hire. The parking lot cases fall into two groups depending upon the manner of doing business: (1) where there is no surrender of possession of the automobile to the lot operator, the owner parking the car by himself and locking it if he wishes, the courts have declared the relationship to be that of a lease of parking space or a license to park, requiring no duty of care on the part of the operator. Ashby v. Tolhurst, [1937] 2 K.B. 242; Ex parte Mobile Light & R. Co., 211 Ala. 525, 101 So. 177 (1924); Lord v. Oklahoma Fair Ass'n, 95 Okla. 294, 219 Pac. 713 (1923); (2) where there has been a delivery of possession by the car owner to the lot operator, as evidenced by the owner's leaving the keys in the car, receiving a stub, and permitting the lot attendant to park the automobile, the courts have found the operator to be a bailee for hire. Doherty v. Ernst, 284 Mass. 341, 187 N.E. 620 (1933); Beetson v. Hollywood Athletic Club, 109 Cal. App. 715, 293 Pac. 821 (1930); cf. Galowitz v. Magner, 208 App. Div. 6, 203 N.Y. Supp. 421 (1924); Osborne v. Cline, 263 N.Y. 434, 189 N.E. 483 (1934); Jones, The Parking Lot Cases, 27 Geo. L. J. 162 (1938). A bailee for hire owes that degree of care which a prudent man would take with respect to his own property. Keenan Hotel Co. v. Funk, 93 Ind. App. 677, 177 N.E. 364 (1931); Meine v. Mossler Auto Exch., Inc., 10 La. App. 65, 120 So. 533 (1929).

[3] Jones v. Great Northern R. Co., 68 Mont. 231, 217 Pac. 673 (1923); Curtis v. United Transfer Co., 167 Cal. 112, 138 Pac. 726 (1914); Springer v. Westcott, 166 N.Y. 117, 59 N.E. 693 (1901). Contra: Noyes v. Hines, 220 Ill. App. 409 (1920).