1904
*May 18.
*June 8.

SOPHIA KNOCK (PLAINTIFF)..........APPELLANT;

AND

D. M. OWEN AND OTHERS (DEFENDANTS)..............RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Solicitor and client—Costs—Confession of judgment—Agreement with counsel—Overcharge.

A solicitor may take security from a client for costs incurred though the relationship between them has not been terminated and the costs not taxed but the amount charged against the client must be made up of nothing but a reasonable remuneration for services and necessary disbursements.

A country solicitor had an agreement with a barrister at Halifax for a division of counsel fees earned by the latter on business given him by the solicitor. The solicitor took a confession of judgment from a client for a sum which included the whole amount charged by the Halifax counsel only part of which was paid to him.

Held, that though the arrangement was improper it did not vitiate the judgment entered on the confession but the amount not paid to counsel should be deducted therefrom.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the defendant.

In 1895, the respondent, Joseph Knock, commenced an action against the appellant in the Supreme Court of Nova Scotia. The other respondents who compose the firm of Messrs. Owen & Ruggles, were retained, and acted throughout as his solicitors.

Upon the trial of said cause judgment was given in favour of the plaintiff, which was affirmed upon appeal

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

to the Supreme Court of Nova Scotia *in banco*. From that judgment an appeal was taken by the present plaintiff to the Supreme Court of Canada, which said appeal came on for argument on the 4th and 5th days of May, 1897, and judgment was delivered by the said Supreme Court of Canada, on the 10th day of November, 1897, reversing the decisions below, and dismissing the action with costs (1).

On December 2nd, 1897, an order embodying said decision was granted, and the costs on appeal to the Supreme Court of Canada were taxed. On December 6th and 10th, 1897, the present plaintiff's costs of action and of appeal to the Supreme Court of Nova Scotia *in banco*, were taxed. On January 4th, 1898, judgment was entered at Lunenburg for the present plaintiff against the said Joseph Knock for the sum of $804.14, and said judgment was recorded in the registry deeds for the County of Lunenburg, on January 7th, 1898.

On or about the 13th day of November, 1897, the said Joseph Knock confessed judgment in the Supreme Court of Nova Scotia to the said Owen & Ruggles, for the sum of $860 debt and $16 costs, and said judgment was entered for $876 in the prothonotary's office at Lunenburg, on November, 13th, 1897, and recorded in the said registry of deeds, on November 19th, 1897. On or about November 20th, 1897, the said Joseph Knock confessed a second judgment to the said Owen & Ruggles, in the Supreme Court, for the sum of $100, which judgment was entered in the prothonotary's office at Lunenburg, on November 20th, 1897, and recorded in said registry of deeds on December 2nd, 1897. On or about the 27th day of January, 1898, the said Joseph Knock assigned all his real estate, being the same as bound by said judgments and personal

(1) 27 Can. S. C. R. 664.

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property, except such as was exempt from execution to the said appellant, in trust for the payment of her said judgment debt, as provided by the Collection Act, 1894.

After said judgments had been obtained by the said Owen & Ruggles, and after the same had been recorded for upwards of one year, the said Owen & Ruggles issued executions thereupon under which executions the sheriff for the County of Lunenburg sold the real estate of the said Joseph Knock at public auction to the said Owen & Ruggles and conveyed the same to them by the usual sheriff's deed.

Counsel was employed by the said Owen & Ruggles for the said Joseph Knock, in said suit, the total amount of whose account was $371.80. The said Owen & Ruggles included in said judgment the said account as the amount paid by them to said counsel. As a matter of fact, said Ruggles admits that they had only paid said counsel $100.80, and they subsequently settled with him by paying $75 cash, and a contra account of $16.31, in all, $91.31.

Mr. Ruggles, in his evidence, seeks to explain this by stating that he had a continuing arrangement with the counsel he employed to the following effect: "I had an arrangement with Mr. Harrington when I left his office about costs, agency costs. He was to divide his charges with me according to the circumstances of the case. I was to explain the case to him, and he was to make a reasonable allowance to me." Joseph Knock knew nothing of this arrangement. Mr. Ruggles transacted the most of the business between Owen & Ruggles and the said Joseph Knock.

Wade K.C. for the appellant. A retainer makes an entire contract determinable only by mutual agreement or performance of the whole services. Until the relationship of solicitor and client ceases the former

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can recover nothing for his services. *Holman* v. *Loynes* (1); *Harris* v. *Osbourn* (2).

If the judgment is bad in part it is bad *in toto*. *Martin* v. *McAlpine* (3); *Ley* v. *Madill* (4); *Freeman* v. *Pope* (5).

Borden K.C. for the respondent cited *Ex parte Hemming* (6).

The Chief Justice and Girouard and Nesbitt JJ. concurred in the judgment of Mr. Justice Davies.

DAVIES J.—The plaintiff who was a judgment creditor of one Joseph Knock, and also his general assignee, under The Collection Act, 1894, brought this action to set aside two prior judgments given by Joseph Knock and the sheriff's sale and deed thereunder. These judgments had been given by Joseph Knock to his solicitors, the other respondents, Owen & Ruggles, as security for the payment of the amount of the latters' costs in defending a law suit brought against Knock, and which had gone through many stages until finally disposed of by this court on appeal, *Knock* v. *Knock* (7). The grounds upon which the judgments were attacked were that they were given fraudulently and for the purpose of hindering and delaying the respondent Knock's creditors. There was an alternative claim that the judgments should be reduced

The learned trial judge found as facts that the amount charged for the services rendered was not unreasonable; also that Knock was fairly used and his interests sufficiently guarded for the circumstances of the case; also that the judgments were given *bonâ fide* and not for the purpose of retaining any benefit for

(1) 4 DeG. M. & G. 270.
(2) 2 Cr. & M. 629.
(3) 8 Ont. App. R. 675.
(4) 1 U. C. Q. R. 546.
(5) 5 Ch. App. 538.
(6) 28 L. T. O. S. 144.
(7) 27 Can. S. C. R. 664.

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the debtor. The Supreme Court of Nova Scotia on appeal, in a majority judgment, sustained the trial judge's findings, saying:

> The learned judge finds that there is no evidence of gross error or charges amounting to imposition or fraud or under pressure, and nothing has been pointed out to us to lead to a contrary conclusion.

Under these findings it would require strong evidence in a case of this kind, which depends almost entirely upon questions of fact, for us to allow the appeal and set aside the security attacked. Mr. Wade, during the course of the argument, admitted that the judgment he was attacking did not cover any future costs, but even if it did the authorities show it would still stand good for those already incurred and for which it was given. *Holdsworth* v. *Wakeman* (1); *Re Whitcombe* (2).

The observations of the Master of the Rolls in this latter case are so applicable to the appeal now under consideration that I quote them:

> I must remark on the great danger which solicitors incur when they enter into such arrangements with their clients. An agreement like this between a solicitor and client for taking a fixed sum in satisfaction of all demands for costs, is an agreement which may be perfectly good; but this court, for the protection of parties, looks at every transaction of this kind with great suspicion. The matter may turn out to be perfectly fair and right; still it exposes the conduct of the solicitor to suspicion, and naturally awakens the vigilance and jealousy of this court, seeing that one party has all the knowledge, and the other is in ignorance. But it is not because the transaction may be opened that, therefore, it is to be considered as open upon an occasion on which the court is exercising a jurisdiction in which it cannot set aside the transaction.

The circumstances in this case were not free from suspicion and the flat contradictions given by both Knock and Ruggles at the trial to the sworn evidence given by them before the commissioner, McGuire, seem fully to justify the severe strictures passed upon

(1) 1 Dowl. 532.
(2) 8 Beav. 140.

them by Mr. Justice Meagher in his dissenting judgment. But none of these suspicious circumstances, nor all of them combined, were strong enough to convince the trial judge or the Supreme Court of Nova Scotia of the existence of such fraud or gross error as would vitate the entire transaction and upon the whole case, notwithstanding the able argument addressed to us, I am not convinced that the judgment of the court below should be reversed.

On the other branch of the case I am satisfied, however, that the judgment attacked should be reduced by the difference between the amount charged as paid to Mr. Harrington, the counsel in the cause. and the amount actually paid. This reduction does not necessarily involve any finding of fraud against the solicitors. At the time the bill of costs was being made up or shortly before Mr. Harrington was applied to for the amount of his charges. He gave them and as given they were charged in the bill $371.10. Subsequently Mr. Ruggles settled with him by paying $191.31, leaving a sum charged against Knock, which was never paid, of $180.59. Ruggles refused to make the necessary reduction of the judgment by this amount, on the grounds that his firm either had a right to retain any deductions made by counsel from his bill on general principles, or that such right existed under a special agreement existing between Mr. Harrington and Mr. Ruggles, as to agency costs. I am, however, perfectly clear that this agreement as to agency costs, which is quite a common one and quite defensible, can have no relation whatever to counsel fees such as those of Mr. Harrington, and if it had it is equally clear it never would receive the sanction of this court. The relations existing between solicitor and client are peculiarly sacred. The latter has a right to receive from the former not only his best judgment and skill, but the strictest integrity and

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the most scrupulous good faith in dealing with his clients' rights and business. It would be intolerable that a solicitor could charge and exact payment from his client of a larger sum of money as paid to counsel retained to advocate that client's interests than was actually paid or be permitted to retain money actually his client's and coming into his hands by way of reductions made in the charges of counsel or otherwise. This court, I take it, will be astute to see that under no possible guise or contrivance will any such a breach of the trust which a client is compelled to place in his solicitor be permitted. I adopt the language used by the Lord Chancellor in delivering the judgment of the House of Lords in *Tyrrell* v. *Bank of London* (1):

> My lords, there is no relation known to society, or the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honest observance, than the relation between solicitor and client; * * * a solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled.

I am willing to admit that in this case the original charge was not fraudulently made and that the subsequent refusal to allow his client the reductions which Mr. Harrington subsequently made in his charges was based upon a mistake as to his duties and rights as a solicitor.

In the result I am of opinion that the appeal should be allowed to this extent that the judgments of the respondents Owen & Ruggles against Joseph Knock should be reduced by the amount of the overcharge of $189.50 with interest if any charged but, under the circumstances, as neither party has been fully successful, without costs.

(1) 10 H. L. Cas. 26, at p. 44.

The form of the order will be to set aside altogether the second judgment for $100 and to reduce the first judgment by the remaining $80.59.

KILLAM J.—It appears to me immaterial whether or not the relation of solicitor and client was formally terminated between the defendants Owen & Ruggles and the defendant Joseph Knock before the giving of the confessions of judgment.

Admitting that the solicitors were not then in a position to sue, they had performed valuable services and paid out money for their client, who could at any time waive further services and bind himself by an agreement to pay for what had been done. And there was a sufficient consideration to prevent the first confession of judgment being held void as being devised to delay, hinder or defraud the creditors of Joseph Knock. I have nothing to add upon these points to what has been so well said by Graham and Townshend JJ. in the court below.

The trial judge expressed himself as

> satisfied that Knock was fairly used and that his interests were sufficiently guarded for the circumstances of the case.

He further said,

> In my opinion there was valuable and adequate consideration for the confession of judgment in each case. I am satisfied that they were *bonâ fide* and not for the purpose of retaining any benefit for the debtor.

And, in reference to the claim for a taxation of the costs, the learned judge said,

> on this branch of the case she stands in no better position than Joseph Knock. He was offered the privilege of taxing the costs and waived it. There was no pressure and I cannot say that he was overcharged.

And, further,

> I think the amounts charged for services were not unreasonable, as costs are now taxed by the taxing authorities.

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And,

In the plaintiff's written argument no point is made that Knock was overcharged.

The majority of the Supreme Court of Nova Scotia, sitting in appeal, adopted these findings and opinions. Under ordinary circumstances, then, it would not seem proper for this court to go behind them and examine into the reasonableness of the charges, a task for which we cannot be nearly so well fitted as the learned judges in Nova Scotia.

But one point that has been raised involves a question of principle which renders it proper for our earnest consideration. The solicitors are shewn to have included, in making up their costs, the full amount of an account rendered to them by a firm of barristers and solicitors in Halifax for counsel fees both in the Supreme Court of Nova Scotia and in the Supreme Court of Canada, as well as for services as agents in Halifax.

In making up the costs for the purpose of obtaining the confessions of judgment, Mr. Ruggles procured, by telephone, a statement of the amount charged by the Halifax firm, and included it in his claim for costs. After the giving of the confessions the account was rendered, amounting to $371.80, of which $100 had been paid. This, according to Mr. Ruggles' recollection, was about the amount given him by telephone. Subsequently, Mr. Ruggles and Mr. Harrington agreed upon a settlement of the account, by which Ruggles paid $75.00 and set off a contra account which appears to have amounted to $19.21. Thus, upon my reading of the evidence, the utmost which Messrs Owen and Ruggles can claim to have paid to the Harrington firm was $194.21

Mr. Ruggles' evidence, in explanation of this transaction, is thus reported:

I had an arrangement with Mr. Harrington, when I left his office, about costs. Agency costs. He was to divide his charges with me according to the circumstances of the case. I was to explain the case to him and he was to make a reasonable allowance to me. I suppose he lived up to that in this case.

It is a well known practice, as between solicitors in different places, that a rebate, usually of one half, is made upon charges for services performed by one on behalf of the other, and the law allows the latter to charge the full amount of the fees as against the client. Usually the fees are small and regulated by a tariff, and the services are such as might be performed for the solicitor by another person, sometimes a clerk or another solicitor, sometimes one unconnected with the legal profession. Counsel fees are for personal services, and large as compared with solicitors' fees. The client is interested in having the intervention of a solicitor to advise in selecting the counsel and in settling the fee. If the solicitor is to have the advantage of every reduction upon the fee as first charged the interests of the client will have little protection.

Undoubtedly, the circumstances differ greatly in the various provinces of Canada from those existing in England. Mr. Justice Graham has pointed out some differences in respect of Nova Scotia. In Ontario, Harrison C.J., in *Robertson* v. *Furness* (1), and Boyd C., in *Armour* v. *Kilmer* (2), pointed out other such differences, many of which were applicable to other portions of Canada. Both practice and statute may give rise to such.

In England one person cannot be at once solicitor and barrister. For professional reasons the solicitor cannot be allowed to share a barrister's fee, which must be treated by the solicitor as a disbursement to be charged for only at the amount actually paid.

(1) 43 U. C. Q. B. 143. (2) 28 O. R. 618.

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In most, I believe in all, the provinces of Canada, solicitors may be barristers, and, by partnership with other barristers, these may share the counsel fees of one member of the firm, and the client retaining them must take the consequences.

In this case the counsel on both sides are members of the Nova Scotia bar of long standing. One asserts and the other denies that it is a recognized practice with city counsel to divide their fees with country barristers and solicitors. Nothing in the opinions expressed in this case by the learned judges of Nova Scotia indicates that any of them recognized such a practice as actually prevailing. I cannot find that any express reference to the point was made by Graham J. Townshend J. merely said:

> I know of no reason why such an arrangement may not be made, provided no unjust advantage is taken of the client in doing so.

Weatherbe J. said:

> Only the amount charged in the bill of counsel at Halifax has been demanded of Knock. At least, I think, if this was contended as sufficient to vitiate the transaction, evidence should have been furnished to convince the trial judge that that claim of counsel could not be enforced. There is nothing to show it may not be enforced. I think the trial judge was bound to assume it could be enforced.

Meagher J., however, said:

> The inclusion of a sum which was neither due nor payable, and which was included so as to give the defendants (solicitors) a gain or profit from their client, beyond their fair professional remuneration, being fraudulent, both as against Knock, who was left in ignorance of the fact, and especially as against the plaintiff, vitiates the judgment entirely under the statute.

And, again:

> So far, too, as the judgment included a sum for the services of Halifax counsel, in excess of what was paid or payable, it was fraudulent on the part of Ruggles, the party who claims under it.

Possibly, if there were a well known practice in the profession in Nova Scotia, recognized and counte-

nanced by the courts, to allow one barrister and solicitor the benefit of agency terms as to the counsel fee of another barrister retained by the former for a client, we might feel bound to recognize and countenance it too, but when neither of the judges supporting the transaction suggests this, and the judge disapproving of the transaction does not indicate that he has heard of such, it seems impossible for this court to assume its existence.

The circumstance that admission to practice in one branch of the profession is in Nova Scotia an admission to practice in the other branch also, does not appear to me to distinguish the position from that in a province where it is merely admissible and customary to admit the same person to practice in both branches. "The Barristers and Solicitors Act," R.S.N.S. (1900), ch. 164, recognizes a distinction between barlisters and solicitors, and I can find nothing in that statute involving the application of a rule different from that which should prevail in Ontario.

In my experience in practice, both in Ontario and in Manitoba, an attorney or solicitor, upon taxation of a bill of costs, was required to prove actual payment of counsel fees charged, unless he or his partner had acted as counsel. Whether that practice is now rigidly adhered to in either province, I am unable to say; but I feel that I can say, with confidence, that in neither would the sharing of counsel fees, contended for in this case, be countenanced. I can see no greater reason for countenancing it in Nova Scotia.

Here $112.80, out of the amount of Mr. Harrington's account, were for disbursements, leaving only $259 in which the solicitors could seek to share, since any deduction for an excessive charge of disbursements would clearly be for the client's benefit. Taking it, then, most favourably for the solicitors, they seek

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to charge $259 as paid for professional services o· others when they have paid only about one-third thereof. Undoubtedly a number of items in the account were for purely solicitor's work, in the fees for which the defendant solicitors would be entitled to share. Still it is very evident that there was a large overcharge to the client.

I am unable, however, to agree with the view of Meagher J. that, on this ground, the first confession of judgment should be treated as fraudulent and void as against the creditors of Joseph Knock. He certainly is not shewn to have intentionally given a confession of judgment for a larger sum than he owed.

Ruggles made up his bill, apparently, upon the basis of the statement by the telephone. He did not then know what reduction would be made. He was probably entitled to some without allowing it to his client. But having afterwards settled as he did, he was bound to give credit to his client for a considerable sum, and a court of equity would, I think, compel him to give this credit upon the judgment in favour of the present plaintiff.

For myself I would like to see the cause referred back for taxation of the costs, both because we cannot, in my opinion, properly determine the extent of the reduction which should be made, and because the circumstance of this overcharge appears to me to throw doubt upon the whole charge, and on other grounds, but as the majority of the court are of opinion to the contrary, it seems unnecessary for me to lengthen my remarks by further discussing this part of the case.

I think that it sufficiently appears that there must be such a reduction; that the full amount of the second judgment must be taken as improperly charged, and the difference of amount in other respects seems of no practical importance. I, therefore, concur in the setting

aside of the second judgment, and do not dissent from the reduction of the first.

Appeal dismissed without costs.

Solicitors for the appellant: *Wade & Paton.*

Solicitor for the respondent: *W. H. Owen.*