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*Feb. 1, 2, 3
*Mar. 7

SAMUEL MAX MEHR ..... APPELLANT;

AND

THE LAW SOCIETY OF UPPER CANADA ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Barrister—Solicitor—Law Society of Upper Canada, Discipline Committee, powers of—Admissibility of Statutory declaration to rebut defence to professional misconduct charge—Only members hearing case would appear qualified to participate in Discipline Committee's decision—The Law Society Act, R.S.O. 1950, c. 200, s. 48—Law Society Rules, r. 74 (4).

The appellant, a member of the Law Society of Upper Canada, was charged with conduct unbecoming a barrister and solicitor in that he had failed to account for money had and received on behalf of a client. At an inquiry conducted by the Society's Discipline Committee the appellant admitted the receipt of the money and claimed he had advised his client by letter that he was retaining it as payment on account of an agreed fee of $10,000 for conducting certain litigation. At a second meeting of the Committee a declaration of the client, who had left the country, was introduced. This declaration, which was obtained by the Committee on its own initiative, denied the appellant's evidence. The appellant objected to its reception but the objection was overruled. Following a third hearing the Committee reported to the Society that it found the appellant guilty of the misconduct charged. The report set out the fact of the declaration having been obtained and a summary of its contents, but stated that

*PRESENT: Kerwin C.J. and Rand, Kellock, Estey and Cartwright JJ.

the Committee had disregarded it in reaching its decision. Its report was adopted by the Benchers of the Society in Convocation and as a result the appellant on the order of the Registrar of the Supreme Court of Ontario was disbarred.

Held: That the appeal be allowed, the resolution of the Benchers of the Law Society of Upper Canada, and the report of the Discipline Committee, be quashed; the order of the Supreme Court of Ontario set aside, and the name of the appellant be restored to the Rolls.

Per Curiam: The Committee regarded the declaration as admissible in evidence under r. 74 (4) which provides, that for the purpose of its investigation and report the Committee may receive and accept as *prima facie* evidence of any facts stated in it, a statutory declaration. Assuming, without deciding, that r. 74 (4) is valid, the declaration was neither sought nor received as *prima facie* evidence of the facts stated in it, but as evidence to contradict on a vital point the defence which had been sworn to by the appellant. The reception of such evidence was wrongful and fatal to the proceedings which accordingly should be quashed. This result was not avoided by the statement in the report of the Committee that the declaration had been disregarded. *Walker* v. *Frobisher* 7 Ves. 70 approved in *Szilard* v. Szaz [1955] S.C.R. 3, followed.

Decision of the Court of Appeal for Ontario [1954] O.R. 692, reversed.

Semble: Only those members of the Discipline Committee who have heard all the evidence given at the inquiry should take part in rendering a decision. *Rex* v. *Huntingdon Confirming Authority* [1929] 1 K.B. 698 at 714 and 717 referred to.

APPEAL by the appellant in person by special leave from the judgment of the Court of Appeal for Ontario (1) affirming a judgment of McRuer C.J.H.C. (2) dismissing the appellant's application by way of appeal from the order of the Supreme Court of Ontario striking the appellant off the rolls of the Law Society of Upper Canada.

S. M. Mehr in person.

C. H. Walker, Q.C. for the respondent.

The judgment of the Court was delivered by:

CARTWRIGHT J.:—This is an appeal from an order of the Court of Appeal for Ontario, dismissing an appeal from an order of McRuer C.J.H.C. (2) dismissing a motion brought by the appellant by way of appeal from an order of the Registrar of the Supreme Court of Ontario dated Jan. 21, 1954, striking the applicant off the rolls, and asking for an order restoring the name of the appellant to the rolls and for an order in the nature of *certiorari* removing into

(1) [1954] O.R. 692; 3 D.L.R. 796.

(2) [1954] O.R. 337.

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the Supreme Court of Ontario the resolution made by the Benchers of the Law Society of Upper Canada on Jan. 21, 1954, the report of the Discipline Committee dated Jan. 12, 1954, the evidence taken at the purported hearings of the Discipline Committee on Sept. 18, Oct. 2 and Nov. 19, 1953, the record of its proceedings and all other matters, exhibits, documents or things incidental or relevant hereto, so that the said resolution might be quashed.

In the view that I take of the matter it is not necessary to deal with all of the points argued before us or to set out the facts at any great length.

On July 22, 1953, the appellant was notified that a complaint had been made to the Law Society that he had been guilty of professional misconduct and conduct unbecoming a barrister and solicitor in that in July 1950 he had received on behalf of the Ambassador to Canada of the Chinese Nationalist Government the sum of $5,237.35 for which he had failed to account and that such complaint or charge would be brought before the Discipline Committee for investigation and trial on Sept. 18, 1953.

There were hearings before the Committee on Sept. 18, 1953, Oct. 2, 1953, and Nov. 19, 1953. On Jan. 12, 1954, the Committee made a lengthy report finding that the appellant was guilty of professional misconduct and conduct unbecoming a barrister and solicitor and recommending that he be struck off the rolls of the Society. At a meeting of the Benchers in Convocation on Jan. 21, 1954, the report of the Discipline Committee was read and a motion made that it be adopted. Before the motion was put counsel for the appellant addressed Convocation. Following this a motion that the report be adopted and that the appellant be disbarred and declared unworthy to practise as a solicitor was put and carried.

The appeal was argued by both parties on the assumption that the function of the courts below and of this court was not to examine and weigh the evidence taken before the Committee with a view to determining whether the Committee had drawn a right conclusion from it but rather to consider whether there had been a denial of natural

justice in the proceedings before the Committee or whether there was error in law appearing on the face of the proceedings and, accordingly, I propose to deal with the matter on that assumption.

The appellant did not deny receipt of the $5,237.35. His answer to the complaint was that the complainant was indebted to him in the sum of $10,000 and that he had advised the complainant that he was retaining the $5,237.35 on account of that indebtedness. There was uncontradicted evidence before the Committee that the appellant had been retained by Mr. Yin-Tso Hsiung then Consul-General of the Republic of China to bring action in the Supreme Court of Ontario for a declaration that certain freehold lands in the City of Toronto, held by Mr. Hsiung in trust for the Government whose representative he was, were not subject to taxation by the City, and that he was not liable to pay taxes aggregating $4801.11 claimed by the City for the years 1946, 1947, 1948 and 1949. The appellant brought action accordingly. A special case was stated under r. 126 of the Ontario Rules of Practice and was argued before Smily J. on March 1, 1950. That learned judge reserved the matter and on May 25, 1950 gave judgment in favour of Mr. Hsiung for all the relief claimed, (*vide Yin-Tso Hsiung* v. *The City of Toronto* (1)). The party and party costs of the action were taxed at between $600 and $700 and were paid to the appellant. According to the evidence of the appellant there were discussions between him and Mr. Hsiung before the commencement of the action in which the appellant explained that the question to be raised in the proposed action was one of general importance and might well be carried to the court of last resort. The appellant states that he made an agreement with Mr. Hsiung which was not reduced to writing, that his fee for conducting the litigation to its final conclusion should be $10,000 and disbursements. The appellant states that the diplomatic representatives of the governments of other countries were also interested and that he understood from Mr. Hsiung that they would be contributing to the costs which he had agreed to pay. The appellant gave evidence that he made a number of trips to Ottawa and Washington in connection

(1) [1950] O.R. 463; 4 D.L.R. 209.

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with the matter. Prior to the rendering of the judgment of Smily J. the lands in question had been sold and in order that a clear title could be given to the purchaser a sum of money sufficient to cover the amount claimed for taxes was deposited with the City to abide the result of the pending action. It appears that a written direction signed by the client was given to the City requesting that in the event of the action succeeding this money should be paid to the appellant and this is the sum of money for which it is charged the appellant has failed to account.

The appellant gave evidence that after receiving this money he wrote to his client advising him of its receipt and of the fact that the City was not appealing from the judgment of Smily J. and asking for payment of the difference between the amount received and the $10,000. The Committee reported that it did not believe the evidence of the appellant either as to the making of the agreement for a fee of $10,000 or as to his having written such a letter to his client. Had this evidence of the appellant been accepted by the Committee I cannot think that they would have found him guilty of the charge made against him. I have not overlooked the fact that had it been in writing such an agreement as that alleged would seem to be subject to the provisions of s. 49 of *the Solicitors Act* R.S.O. 1950, c. 368 and that the client would seem to be entitled to have the appellant's bill taxed even should the making of the agreement be established. But, on the uncontradicted evidence the appellant was entitled to a substantial sum for costs as between solicitor and client and it must be remembered that it was not possible for the appellant to take any proceedings against the Ambassador for the purpose of taxing or collecting his costs while the Ambassador, on the other hand, was at liberty to take proceedings in the Supreme Court of Ontario in which his claim to the money and the claim of the appellant for his costs could have been expeditiously determined. At the conclusion of his evidence the appellant had deposed to facts which if established furnished an answer to the charge against him. At this point in the proceedings a joint declaration, dated Oct. 22, 1953, made by Mr. and Mrs. Hsiung was placed before the Committee. Mr. Walker in answer to a question from the Court said that it was a fair inference that the Committee had taken

the initiative in obtaining this declaration. A few days before the hearing held on Nov. 19, 1953, a copy of this declaration was furnished to the appellant's counsel and at that hearing he objected to the declaration being received as evidence. The Chairman intimated that it was admissible under the terms of r. 74 (4) to be referred to hereafter. Counsel for the appellant then unequivocally took the position that the Committee should not make a report without bringing Mr. and Mrs. Hsiung before them so that they might be cross-examined. This was not done and the appellant had no opportunity of cross-examining them.

In its report the Committee deals with the declaration as follows:—

> In a joint declaration dated and sworn Oct. 22, 1953, both Mr. and Mrs. Hsiung deny (with some vigor) having received those letters, and deny having made any arrangement to pay Mehr $10,000 as a fee. The Committee has not given any effect to these declarations because the Hsiungs were not present in person and available for cross-examination.

Rule 74 (4) reads as follows:

> (4) For the purposes of its investigation and report the Committee may receive and accept as prima facie evidence of any facts stated in it the statutory declaration of any person who therein declares to his personal knowledge of such facts.

It was argued before us for the appellant that this subsection of the rule is invalid. I do not find it necessary to decide this question as even assuming the rule to be valid it did not render the declaration admissible. The declaration was neither sought nor received as prima facie evidence of the facts stated in it but as evidence to contradict on a vital point the defence which had been sworn to by the appellant. The reception of such evidence was, in my opinion, wrongful and fatal to the validity of the proceedings.

The learned Chief Justice of the High Court dealt with this matter as follows:—(1)

> However, after listening to argument at some length on the question of the admissibility of certain statutory declarations which came before the Committee it eventually developed that the Committee in its report expressly stated that these statutory declarations were excluded from consideration in arriving at its decision. That being the case, I think the report of the Committee is to be treated as the judgment of a Judge would be treated where inadmissible evidence, and I am not saying that this evidence was inadmissible, was brought before the Court and the Judge expressly stated in his reasons for judgment that he excluded that evidence from his consideration in arriving at his conclusion.

(1) [1954] O.R. 337 at 342.

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Laidlaw J. A. who delivered the unanimous judgment of the Court of Appeal dealt with it in these words:—(1)

> The objection taken in respect of the declaration made jointly by Mr. and Mrs. Hsiung can be answered in a word. The report of the Committee shows that: "The Committee has not given any effect to these declarations because the Hsiungs were not present in person and available for cross-examination." That statement is accepted by the Court and is conclusive.

With the greatest respect I am unable to agree with either of these passages. They appear to me to be directly contrary to the following language of Lord Eldon in *Walker* v. *Frobisher* (2) which was approved in the unanimous judgment of this Court delivered by my brother Rand in *Szilard* v. *Szasz* (3) on Nov. 1, 1954:—

> But the arbitrator swears it (hearing further persons) had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that which I cannot reconcile to general principles. A judge may not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice, but upon general principles it cannot be supported.

The statement of the Committee that it did not give any effect to the declaration, although of course I accept it as made in perfect good faith, does not enable the Court to support the report.

It must also be borne in mind that the decision as to whether or not the appellant should be struck off the rolls rested not with the Committee but (subject to the power reserved to the Court by s. 48 of the *Law Society Act* R.S.O. 1950, c. 200) with Convocation and the passage from the report of the Committee quoted above informed Convocation that the evidence of the appellant on a crucial point in the case was denied "with some vigor" on oath.

In my respectful view the course taken in regard to this joint declaration requires the quashing of the proceedings referred to in the notice of motion.

While this is sufficient to dispose of the appeal I wish to mention two other matters.

It is not necessary for us to consider the appellant's argument that, subject only to the exception provided in r. 74 (4) (if that subsection be valid), the Discipline Com-

(1) [1954] O.R. 337 at 342. (2) (1801) 6 Ves. 70 at 72; 31 E.R. 943.
(3) [1955] S.C.R. 3.

mittee in hearing a charge against a member of the Society is bound to observe the rules of evidence as administered in the Supreme Court of Ontario. I do not wish my silence in regard to such argument to be construed as an agreement with the views adverse to it expressed in the reasons for judgment in the courts below.

The other matter to which I wish to refer is as follows. At the hearing before the Discipline Committee on Sept. 18, six members were present. At the hearing on Oct. 2 the same six members and two additional members were present. At the hearing on Nov. 19 the eight members who had been present on Oct. 2 were present and one additional member was present. There is nothing to indicate that all nine of these members did not take part in deciding as to the report which the Committee should make to Convocation. While it is not necessary to express any final opinion as to whether such a course would render the report invalid I am much impressed by the reasoning of Lord Hanworth and Romer J. in *Rex* v. *Huntingdon Confirming Authority* (1). At page 714 Lord Hanworth said:—

> One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on April 25, but who appeared at the meeting of May 16. We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision, on this question of confirmation.

And at page 717 Romer J. who agreed with Lord Hanworth added:—

> Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.

I would allow the appeal and direct that the resolution of the Benchers of the Law Society of Upper Canada and the report of the Discipline Committee referred to in the notice of motion be quashed, that the order of the Registrar

(1) [1929] 1 K.B. 698.

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of the Supreme Court of Ontario, dated Jan. 21, 1954, be set aside and that the name of the appellant be restored to the rolls as asked in the notice of motion. The appellant is entitled to his costs throughout. In taxing such costs in this Court regard must be had to the facts that an order was made permitting the appellant to proceed *in forma pauperis* and that he acted for himself.

Appeal allowed.

The appellant in person.

Solicitors for the respondent: McDonald and McIntosh.

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*PRESENT: Rand, Kellock, Estey, Locke and Fauteux JJ.