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*Jan. 15.

WILLIAM NISBET PONTON (PLAINTIFF) ..... } APPELLANT;

AND

THE CITY OF WINNIPEG (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

"Lawful costs"—Taxation of fees to counsel and solicitor—Construction of statute, 1 & 2 Edw. VII. c. 77 (Man.)—Contract with solicitor engaged on salary—Conflict of laws.

Section 468 of the charter of the City of Winnipeg (1 & 2 Edw. VII. ch. 77), provides that where the city solicitor is engaged at a stated salary, the city has the right, in law suits and proceedings, to recover and collect "lawful costs," in the same manner as if such solicitor were not receiving such salary. The corporation enacted a by-law appointing its solicitor at an annual salary and, in addition thereto, that he should be entitled, for his own use, to such lawful costs as the corporation might recover in actions and proceedings, except disbursements paid by the city. Upon the taxation of the costs awarded to the respondent on an appeal to the Supreme Court of Canada (41 Can. S.C.R. 18):

Held, that the statute and contracts above recited applied to costs awarded on said appeal and that, on the taxation, the usual fees to counsel and solicitor should be allowed. *Hamburg-American Packet Co.* v. *The King* (39 Can. S.C.R. 621) distinguished.

APPEAL from an order of the Registrar in Chambers, on taxation of the costs awarded to the respondent on an appeal to the Supreme Court of Canada (1).

The judgment appealed from was delivered, as follows, by

THE REGISTRAR.—Upon the taxation of the successful respondents' costs in the Supreme Court, the solici-

*PRESENT:—His Lordship Mr. Justice Maclennan, in Chambers.

(1) 41 Can. S.C.R. 18.

tors for the appellant have claimed that inasmuch as the counsel and solicitor in this court has an agreement with the City of Winnipeg whereby the city pays him a specific salary of $3,600 per annum, by which they obtain all his time and services for the corporation, that the respondents are not entitled to tax against the appellant any other costs than his disbursements.

The "Charter of the City of Winnipeg" is contained in 1 & 2 Edw. VII. ch. 77 (Man.), and section 468 provides as follows:

468. Where an attorney or solicitor is employed by the city whose remuneration is wholly or partly by salary, annual or otherwise, the city shall notwithstanding have the right to recover and collect lawful costs in all suits and proceedings in the same manner as if such attorney or solicitor were not receiving such salary, whether such costs are by the terms of his employment payable to such attorney or solicitor as part of his remuneration in addition to his salary or not.

In addition to this by-law No. 3613 (*a*) of the City of Winnipeg provides as follows:

1. Theodore Alexander Hunt, of the City of Winnipeg, solicitor, is hereby appointed solicitor to the corporation of the City of Winnipeg at a salary of three thousand six hundred dollars ($3,600.00) per annum, and that, in addition to the said salary, the said Theodore Alexander Hunt shall be entitled for his own use to such lawful costs as the said corporation of Winnipeg may recover in actions and proceedings, which costs, except disbursements which may have been paid by the said city, shall be paid to the said city solicitor as additions to the salary payable to the said solicitor.

2. The said solicitor shall devote his whole time to the duties of the office, and shall perform the duties in respect of said office prescribed by by-law No. 1596 and any amendments thereto passed or to be passed by the council.

I have already had to deal, in *Wilson* v. *Davies*, with a somewhat analogous question, where the successful respondents in this court had an agreement with an accident insurance company, whereby the insurance company undertook the payment, as be-

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tween it and the respondents, of all the costs in this court, and wherein I have reviewed all the decisions in Ontario and the English decisions, and the recent judgment of Mr. Justice Maclennan in this court in the case of *Hamburg-American Packet Co.* v. *The King* (1). In my reasons in that case, I pointed out that, in the Province of Quebec, the law as to costs is different from that in the Province of Ontario, and that, by art. 553 of the Code of Procedure in the Province of Quebec,

> every condemnation to costs involves, by the operation of law, distraction in favour of the party to whom they are awarded,

and, therefore, so far as the Supreme Court of Canada is concerned, it was open to the court to adopt the ruling as to costs in force in Quebec in preference to that in Ontario, but that Mr. Justice Maclennan had affirmed the reasoning of the courts in Ontario, and had held that costs are payable to the successful party as an indemnity, and that where the party is under no liability for costs to his solicitor, and there is nothing against which the client requires to be indemnified, such costs cannot be taxed against the unsuccessful party in this court.

I have now to determine whether the facts of this case are so different from those in *Wilson* v. *Davies* that a different conclusion should be arrived at with respect to the liability of the appellant.

An agreement such as this would appear to be perfectly valid in England under the "Attorneys and Solicitors' Act, 1870," 33 & 34 Vict. ch. 28, sec. 4 (Imp.), which reads as follows:

> 4. An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the

(1) 39 Can. S.C.R. 621.

whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made.

This section of the statute was acted on by the courts in *Henderson* v. *Merthyr Tydfil Urban District Council* (1); and, even before the statute, it had been held in 1867 by Vice-Chancellor Page-Wood, in *Galloway* v. *Corporation of London* (2), that an arrangement of this sort between a solicitor and client was not illegal.

In Ontario, however, the Court of Appeal expressly refused to follow the judgment of the Vice-Chancellor, in *Stevenson* v. *City of Kingston* (3).

Mr. Bethune, for the respondents, contended that where the provincial legislature had expressly authorized an agreement between the solicitor and client such as is found in the present case, this validation of the agreement removed the basis for the Ontario jurisprudence, and that the Ontario cases had no application. This may be quite true so far as the costs in the

(1) [1900] 1 Q.B. 434. (2) L.R. 4 Eq. 90.
(3) 31 U.C.C.P. 333.

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provincial courts are concerned, but in my opinion it can have no application to the costs in the Supreme Court. The legislature of Manitoba cannot legislate regarding the Supreme Court of Canada, either in respect to its jurisdiction or as regards any other powers conferred upon it by the Parliament of Canada. As far back as *Clarkson* v. *Ryan* (1) the Supreme Court held that the provincial legislature of Ontario had no power to limit appeals to the Supreme Court; and quite recently, in the *Crown Grain Co.* v. *Day* (2), the Judicial Committee of the Privy Council held that the section of the Manitoba statute which provided that in a case of mechanic's lien the judgment of the Court of Appeal should be final and conclusive, was not effective to prevent an appeal to the Supreme Court, the Committee saying that this enactment was in direct conflict with the general provisions of appeal in the Dominion Act, and that if such legislation were valid it would virtually defeat the main purpose which the Parliament of Canada had in view in establishing the Supreme Court.

The "Supreme Court Act," by section 53, provides:

> The court may in its discretion order the payment of the costs of the court appealed from and also of the appeal or any part thereof, as well when the judgment appealed from is varied or reversed as when it is affirmed.

I must hold, therefore, that, so far as the Supreme Court is concerned, the judgment of Mr. Justice Maclennan in the case above cited, of *Hamburg-American Packet Co.* v. *The King* (3), has declared that in an appeal to the Supreme Court, costs are awarded to the successful party as an indemnity, and that if there is

(1) 17 Can. S.C.R. 251. (2) [1908] A.C. 504.
(3) 39 Can. S.C.R. 621.

an agreement between the client and the solicitor whereby the client will not be called upon to pay the costs of the solicitor in this court, such client, if successful, cannot tax such costs against the unsuccessful party to the appeal, and that the provision of the "Winnipeg Charter," even if applicable to costs in the provincial courts has no application to costs in this court.

C. J. Bethune for the motion by way of appeal.

F. A. Magee contra.

His Lordship delivered judgment, as follows:

MACLENNAN J.—The appellant Ponton brought an action against the City of Winnipeg to recover certain lots of land sold by the city for taxes, and bought in by the city. He was unsuccessful in the courts below, and his appeal to this court was lately dismissed with costs.

On the taxation before the registrar the appellant objected that the respondents ought not to be allowed anything but disbursements.

This objection was founded upon a statute of the Province of Manitoba, and the terms of a contract between the respondents and their solicitor, Mr. Hunt.

The statute referred to is section 468 of the "Winnipeg City Charter," and is as follows:

> Where an attorney or solicitor is employed by the city, whose remuneration is wholly or partly by salary, annual or otherwise, the city shall, notwithstanding, have the right to recover and collect lawful costs, in all suits and proceedings, in the same manner as if such attorney or solicitor were not receiving such salary, whether such costs are, by the terms of his employment, payable to such

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attorney or solicitor as part of his remuneration, in addition to his salary or not.

The contract between the city and Mr. Hunt was by a by-law in the following terms:

1. Theodore Alexander Hunt, of the City of Winnipeg, solicitor, is hereby appointed solicitor to the corporation of the City of Winnipeg at a salary of $3,600 per annum, and, in addition to the said salary the said T. A. Hunt shall be entitled for his own use to such lawful costs as the said corporation of Winnipeg may recover in actions and proceedings, which costs except disbursements which may have been paid by the city shall be paid to the said city solicitor.

2. The said solicitor shall devote his whole time to the duties of his office and shall perform the duties in respect of said office prescribed by by-law No. 1596 and any amendments thereto passed or to be passed by the council.

The learned registrar has given effect to the objection in a very full and careful opinion, which he rests mainly upon my judgment in *The Hamburg-American Packet Co.* v. *The King*(1).

This is an appeal from the decision of the learned registrar, and was very ably argued before the learned Chief Justice and myself by Mr. Bethune, for the appellant, and Mr. Magee, for the respondent.

It is to be observed that the *Hamburg-American Packet Co.'s Case*(1) was very different, and there was no statute or contract such as in the present case.

The city by-law No. 1596, referred to in the contract with Mr. Hunt, was not brought before the registrar or before us, and I assume that any additional duties on the part of Mr. Hunt, prescribed thereby, are only such as are usually performed by a solicitor.

The statute and agreement are confined to attorneys and solicitors and their duties and services, and have no relation to counsel or counsel's services.

(1) 39 Can. S.C.R. 621.

In Manitoba the offices of barrister and attorney or solicitor are distinct, although the same person may be an attorney or solicitor and also a barrister, and Mr. Hunt is both a barrister and an attorney and solicitor.

The salary provided by the agreement, therefore, does not extend to services rendered by Mr. Hunt, as counsel, and he appeared as counsel in the case both in this court and below, and there is no ground on which the usual counsel fees may not be claimed by Mr. Hunt against his clients, and recovered by the city as part of the costs awarded to them by this court.

How then does it stand with regard to charges for services as a solicitor, for the question is confined to them, the city's right to recover counsel fees whether to Hunt or any other counsel, as well as disbursements being clear and undoubted?

In considering this question it must be borne in mind that costs awarded, whether here or below, at all events under the English system, are the costs of the party, and are awarded to him and not to the solicitor. If the solicitor is acting gratuitously his client can recover no costs, as in the case of an action *in formâ pauperis,* simply because the client has incurred none, and if the solicitor by agreement with his client is to receive a fixed sum, irrespective of any particular litigation, or of its result, it cannot be said that the client has incurred any liability to him in that litigation. He has neither paid anything, nor incurred any liability to pay anything, by reason of it for services. And, if not, and if the solicitor could demand nothing for his services, in case his client was unsuccessful, it cannot be said that the client has incurred any costs, as the result of it, except disbursements.

The relation of solicitor and client is one of con-

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tract, and must be governed by the law of the province in which the contract is made, and not of the province in which the services are rendered. It follows that the solicitor's right against his client to costs incurred in this court, as well as in the lower courts, must be governed by the law of Manitoba, and that the statute and contract are applicable to the costs awarded by this court in the appeal.

The only costs in question on this appeal also are those incurred in the appeal to this court alone, the costs in the lower courts being payable by virtue of the orders made below which were merely affirmed by this court.

The only question before us, therefore, respects Mr. Hunt's services as a solicitor in this appeal. Is he now for the first time to be at liberty to make out a bill for his services, not against his client, but against Ponton, a bill for which he clearly had no claim against his client or against any one, until the moment when this court pronounced judgment in the city's favour with costs.

The question depends wholly upon the statute. What says it? It is that, in such a case, the city shall recover *lawful costs* in suits in the same manner as if the solicitor was not receiving a salary, and whether such costs are payable as part of his remuneration, or in addition to his salary or not.

The obscurity in the language is in the use of the word *costs*. The costs of a client in an action are the sums which he has paid or which he owes, to his solicitor, or his counsel, or to witnesses or others for services rendered therein. The statute says that the city, although employing a solicitor at a salary may still recover and collect lawful costs in all suits, that is, as

I understand it, may recover and collect from the opposite party in an action sums, as above defined, which it may have lawfully paid or which it may lawfully owe for services. The sums owing, paid to counsel or for disbursements, answer the description in the statute, lawful costs. But it did not require the statute so far as those costs are concerned to enable the city to recover them, and the question is can the statute and agreement be made to apply to services which the solicitor was bound to perform in consideration of his salary and without further remuneration. He was entitled to his salary even if this action had never been brought. How then can it be said that his services in this action have cost his clients anything? He issues a writ or enters an appearance, could he claim anything for that, except disbursements? Up to the very last moment before judgment does his client owe anything but disbursements? If the judgment is against the client, or is in his favour but without costs, does the client owe anything for his services, or if the party ordered to pay is insolvent must the client pay? The answer to these questions must be in the negative. If so how can the mere fact that the action is dismissed with costs, make the city a debtor for services for which up to that time they owed nothing, and for which, if they had failed, or had succeeded, but without an award of costs, they would never have owed anything? And what the statute and agreement say is, that what he may recover is *lawful costs.*

It seems to be clear then that the costs sought to be allowed here are not in any proper sense costs, what the statute calls legal costs, that is costs of the client, and it being also clear that both counsel fees and disbursements could and might be taxed and allowed

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independently of the statute and without its aid, it follows that unless the costs in question can be allowed the statute has no effect or operation whatever, is altogether nugatory, and the sole question is whether we can give it effect or operation on the principle *ut res magis valeat quam pereat.* Can we say that the legislature *must* have intended the allowance of the costs in question by the expression lawful costs, followed by the words *in the same manner as if such attorney or solicitor were not receiving such salary.*

Upon the whole after much consideration I think that we may without violating any principle of the construction of statutes hold that the words of the enactment mean costs *which would have been lawful,* that is recoverable by the city, if the attorney or solicitor were not receiving a salary.

It is an old rule that every statute is to be expounded according to the intent of them that made it —Maxwell on Statutes (4 ed.) 427 and references— and I think we can see, although perhaps dimly, that the intention of the statute in the absence of any other effect which can be given to it, is such as I have indicated.

For these reasons I think the judgment of the learned registrar should be reversed and that the costs in question should be allowed on the taxation.

Motion allowed with costs.