IN THE MATTER OF THIBEAUDEAU

[1875-83] Man.R. temp. Wood 149

Manitoba Queen's Bench, Wood C.J., 1877

Attorney and client--Employment of attorney to purchase land scrip--Misconduct--Liability of attorney to summary application.

S. employed T., an attorney, to purchase Half Breed land scrip, and for that purpose gave hime $30. T. purchased the scrip, and drew and got executed an assignment thereof to S. When the scrip became distributable, T. refused to disclose to S. the name of the Half Breed from whom he had bought the scrip, and also refused to produce the assignment. He further procured the Half Breed to apply for and obtain the scrip, which he had afterwards sold without accounting to S.

Held, that the transaction for which T. had been employed was one which required legal knowledge to complete it by drawing a conveyance; that, therefore, he had been employed in his proffessional capacity and was liable to the summary jurisdiction of the Court for misconduct in the transaction.

Held, also, that if he had been in possession of the scrip at the time of the application, the Court would have ordered him to deliver it to S., but on this application he could only be ordered to refund the money originally intrusted to him, with interest, as the loss of the client on the land was unliquidated.

MOTION to compel W. B. Thibeaudeau, an attorney, to deliver to one Sutherland, certain Half Breed land scrip purchased by the attorney for Sutherland with money furnished by Sutherland for that purpose.

There was a conflict of evidence upon the affidavits as to some of the facts, but the undisputed facts were as follows:-- Mr. Thibeaudeau was a solicitor, attorney and barrister.

Mr. Sutherland, the applicant, in or about the month of December, 1875, had a conversation with Mr. Thibeaudeau about purchasing Half Breed land scrip of the face value of $160; and Mr. Thibeaudeau informed him that he could purchase such scrip for him for about $30; and if he (Sutherland) would give him the money he would do so. In pursuance of this conversation Sutherland gave to Mr. Thibeaudeau $30 with which to purchase the scrip. On the 28th day of the same month Mr. Thibeaudeau purchased from a Half Breed by the name of Joseph Comptois, for Sutherland, the Half Breed land scrip to which he (Comptois) as the Half Breed head of a family, was under 37 Vict. cap. 20 (D) entitled, and prepared a formal indenture of assignment of the same from Comptois to Sutherland, the consideration in which was expressed to be $35, and to have been paid to Comptois by Sutherland, which was duly executed by Comptois. Mr. Thibeaudeau subsequently informed Sutherland of this purchase for him, and shewed him the indenture of assignment, which was left in the possession of Mr. Thibeaudeau, with the understanding that when the scrip was issued and distributable, Mr. Thibeaudeau would procure the scrip for Sutherland. In the autumn of the year 1876, the Half Breed land scrip for the Parish of St. Agathe was received for distribution at the Dominion Lands office in Winnipeg; and, understanding that it was necessary in order to draw the scrip, notwithstanding the deed of assignment, to produce at the land office a power of attorney, executed by the Half Breed entitled to the scrip in the presence of a Justice of the Peace and certified to by him, before the month of December, 1876, Sutherland called several times upon Mr. Thibeaudeau at his office to get the name of the Half Breed from whom the purchase of the scrip had been made, so as to enable him to obtain the papers requisite to enable him to draw the scrip. On all these occasions he was informed by Mr. Thibeaudeau that he had lost or mislaid the assignment, and could not find it, and that be had forgotten the name, and could not give it. Subsequently Mr. Thibeaudeau informed Sutherland that the Half Breed, Joseph Comptois, had drawn his scrip and sold it to some other person. On the 20th December, 1876, Mr. Thibeaudeau himself got from the land office this scrip through and by means of Joseph Comptois, whom he procured to go to the land office and draw the scrip, and bring it to him; for doing which he gave him $12. On or about the 20th February, 1877, Sutherland obtained from Mr. Thibeaudeau the indenture of assignment and transfer from Comptois to him of the scrip. Up to this date Sutherland did not know the name of the Half Breed from whom the scrip had been purchased; and it was not until he saw Comptois, who showed and gave to him a receipt which he

had taken from Mr. Thibeaudeau when he delivered to him the scrip, dated 20th December, 1876, and attached to Sutherland's affidavit filed, that he knew or learned the fact that Mr. Thibeaudeau had received the scrip. It appeared Mr. Thibeaudeau always denied having received the scrip. Mr. Thibeaudeau swore that after receiving the scrip from Comptois, he sold it, and that he had not now any scrip in his possession or under his control. Counsel for Mr. Thibeaudeau offered to consent to an order for refunding the money to Sutherland.

Ross, for the motion.

McKenzie, contra.

WOOD, C.J.--The question for me to decide is has the Court summary jurisdiction in this matter? And if so, to hat extent ?

It is a well settled principle that an attorney or solicitor shall not in any way whatever, in respect of any transactions in the relation between him and his client, make gain to himself at the expense of his client, beyond the amount of his just and fair remuneration *(a)Tyrrell v. Bank of London*, 10 H. L. C. 26.. Under no circumstances will an attorney or solicitor be permitted to use the funds of his client in a transaction in respect of which he was to employ them for the client, and himself appropriate the transaction and the gain thereby realized. Such transaction and such gain must belong to the client; and even if done in the name of the attorney or solicitor, and that of the client does not appear, and is not made known, it makes no difference. In all such cases the attorney or solicitor is the trustee of his client. An agent, not an attorney or solicitor, is within the same principle. The difference is in the remedy. In the case of the former, the remedy may be by application to that summary jurisdiction which the Court has over solicitors and attorneys as officers of the Court. In the case of the latter, the remedy would be by suit or action. As respects both, the remedy may be by suit or action. Indeed in almost all, if not all cases, wherein summary applications may be made in respect of the conduct, acts or undertakings of attorneys and solicitors, the aggrieved party may seek satisfaction by suit in equity or action at law.

The Court, therefore, has dealt cautiously with summary applications of this kind, and has narrowed its jurisdiction as far as it could reasonably be done consistent with a proper maintenance of the character of so important a body of gentlemen as solicitors and attorneys, in whom such vast and varied interests are confided, the protection of suitors and the public generally, and the due and proper administration of justice. The Court as a rule has limited its jurisdiction in these applications to admitted facts, or to such facts, although not formally admitted, as necessarily or reasonably arise from admitted premises. I propose to confine myself within those limits.

The question of jurisdiction depends upon the relation which existed between Mr. Thibeaudeau and Sutherland. It is not necessary that any action or suit should have been instituted or instructed, to establish a sufficient relation between them to render Mr. Thibeaudeau liable on this application to the summary jurisdiction of the Court. That is now well settled, and I need cite no authorities in support of the proposition. The principles upon which the Court proceeds in application of this kind are equally well settled *(b) In re Aitkin*, 4 B. & Ald. 47; *De Wolfe* v. ___, 2 Chitty 68: *Ex parte Bondenham*, 8 Ad. & E. 959; *Hughes v. Mayre*, 3 T.R. 275; *Strong v. Howe*, 1 Stra. 621; *Ex parte Grubb*, 5 Taunt. 206; *In re Knight*, 1 Bing. 91; *Ex parte Uxbridge*, 6 Ves. 425; *Ex parte Partridge*, 2 Mer. 500; *Cocks v. Harman*, 6 East 404; *Ex parte Lowe*, 8 East 237; *In re Webb*, 2 D. & L. 932; *In re Fairthorne*, 3 D. & L. 548; *In re Hillyard*, 2 D. & L. 919; *In re Gee*, 2 D. & L. 997; *In re O'Reilly*, 2 P. R. 198; *In re Toms & Moore*, 2 Chy. Cham. 381; *Re Carroll*, 2 Chy. Cham. 323; *Re Cullen*, 27 *Beav*. 51; *Dixon v. Wilkinson*, 4 DeG. & J. 508; *Re Wright*, 12 C. B. N. S. 705; *Re Fenton*, 3 Ad. & E. 404; *Ex parte Cowie*, 3 Dowl. 600.. The rule laid down by Lord Abinger in *In re Aitkin* seems now to be the settled law of the Court. This case was decided in 1820; and, since that time, the rule therein laid down by Lord Abinger has been cited and approved of in the many cases which have subsequently occurred, as well in the Common Law Courts as in the Court of Chancery.

As illustrative of the doctrine laid down by Lord Abinger in that case is the case of *In re Webb* (c) Supra., in which the facts were held by Coleridge, J., not to bring it within the rule laid down in *In re Aitkin*. That learned Judge in refusing the application, said, "While the affidavit states that the applicants employed Webb to act for them as their attorney in the matters relating to the estate, and that they paid the money into his hands as such attorney; they do not state any circumstances to show that he had done any work for them in professional capacity; nor any thing from which it can be inferred that he acted generally as their attorney. The question, therefore, is, whether it is shown that these matters were so connected with his employment as an attorney that the Court will exercise its summary jurisdiction in the way prayed for. Two cases have been cited in support of this application; and these cases have always been considered as carrying the jurisdiction of this Court to its utmost limit. Some Judges, indeed, have thought that the case of *In re Aitkin* went too

far; but although I am disposed to concur in the propriety of that decision, I am not prepared to go beyond it. In that case the attorney had been employed to collect and get in the effects of the deceased party, and there could be no doubt that he was so employed because he was an attorney. The same observations will apply to the case of *Ex parte Bodenham* (*d*) Supra.. I cannot see that the present case resembles either of those decisions in its circumstances. Here any one who was not an attorney, could equally well have paid the money; and there was no necessity for employing a professional person to do so. If the Court were to interfere in a matter of this kind, it would be difficult to say where it could stop."

In *Re Knight* (*e*) Supra. the Court went beyond the rule laid down in *Re Aitkin*. In this case the attorney was in fact employed in no professional matter whatever. He merely acted as an agent in a business and employment that any non-professional person might have been engaged in and performed just as well as an attorney. But the decision is based upon the ground that the attorney was employed in consequence of his professional character--an inference drawn from the facts and circumstances in the case by the Court. In this way alone can it be distinguished from the case *In re Webb*, the facts and circumstances of which appear to be such as might bring it without any extension of the rule of decision in *In re Aitkin* and *Ex parte Bodenham* within the principle of those cases.

In re Murray(*f*) I Russ. 519.. This was an application that a solicitor might be ordered to deliver up all deeds, papers, and writings, and to deliver also his bill of costs, the petitioner submitting to pay what should appear to be justly due to him. The application was resisted on the ground that there was no cause in Court, and that the solicitor's bill of costs being entirely for conveyancing business, and not including any charges in the prosecution or defence of suits or actions, was not in itself taxable. Lord Gifford, the Master of the Rolls, said, "In *Lord Uxbridge's Case*, there was no proceeding in Court: and the only ground of jurisdiction was, that the solicitor had in his hands title deeds belonging to the petitioner. Notwithstanding the two cases cited from East the Court of King's Bench in the matter of *Aitkin* have gone even further than the Court of Chancery did; for there the Court of King's Bench ordered the solicitor not only to give up the deeds which were in his custody, and to deliver a bill of costs, but to account for his receipts and disbursements, and to pay over the balance. In *Partridge's Case*, the circumstance of the possession and detention of deeds and writings was wanting. Upon the authorities, therefore, it appears that the jurisdiction has been exercised: and I am bound to make the order as prayed."

In *Hughes v. Mayre* (*g*) Supra. Mayre had done nothing for Hughes as an attorney or in his professional capacity, as appears by the case, yet Lord Kenyon, C.J., and Grose, J., held that the attorney on the authority of *Strong v. Howe* (*h*) Supra., might be proceeded against summarily, and he was ordered to deliver up deeds and account for moneys, although in this matter he had not acted as the attorney of the Court.

Strong v. Howe (*i*) Supra. is a subsequent case, and in it *Hughes v. Mayre* is cited. The facts of this application are short and simple. Mr. Strong had a mortgage on the estate of Mr. Howe, and he deposited the writings in the hands of his counsel, who, upon a proposal to pay the money, delivered the writings to Mr. Howe, the mortgagor's brother, who was an attorney, and took a receipt from him to redeliver them upon demand. Mr. Howe, the attorney, intrusted them with the mortgagor, who immediately took up £200, and left the writings as a pledge, without the privity of his brother; and upon motion against the attorney the Court made a rule on him to re-deliver the writings at his peril, otherwise an attachment; for they said they would oblige all attorneys to perform their trust, and how hard soever this might he as between him and his brother, yet between him and Mr. Strong, it stood only upon the note, by which he-had engaged to return the writings at all events.

In all applications of this kind the question is--did the attorney, or did he not, act in the particular matter in the character of an attorney? Or did the party engage him in the transaction on the ground of his professional character? If either of these questions be answered in the affirmative, then the Court will hold the attorney liable to be proceeded against summarily (*j*) *In re Fairthorne*, 3 D. & L. 548; *In re Hillyard*, 2 D. & L. 919; *In re Gee*, 2 D. & L. 997..

In the case in judgment I think the business in which Mr. Thibeaudeau was employed, namely, to purchase and take a proper transfer of land scrip, the preparation of the assignment of which necessarily required legal knowledge, was an employment so connected with his professional character as to afford a presumption that his professional character formed the ground of his employment; and that he was so employed by Sutherland in consequence of his being an attorney. I think, on the ground alone that the employment contemplated in it a conveyance or transfer of the land scrip, or rather the right to it, and that this instrument was to be prepared by Mr. Thibeaudeau,

as it in fact was, takes this case out the *ratio decidendi* of *In re Webb* and brings it within the rule of *In re Aitkin*.

But Mr. Thibeaudeau swears he has not in his possession or under his control the land scrip. He has disposed of it. Had he this scrip in his possession or within his power, I should have no hesitation in ordering him, upon payment of any lien he might have on it, to deliver it up to Sutherland. But he has parted with it, and from its nature it cannot be followed. It is said that at the time he disposed of this scrip the market price was $70 or $75; and that now it is worth above $100. How this may be I do not know. Mr. Thibeaudeau says that he is ready to refund to Sutherland his money. He may well offer to do this. Sutherland contends he is entitled to the scrip, or its present equivalent value in cash. From the case made his contention would appear *prima facie* to be well founded. For the assertion of his legal rights in this respect, beyond the refunding to him of the money by him entrusted to Mr. Thibeaudeau, I must leave him to the ordinary remedies provided by law. I cannot deal with them summarily, for the damages are not liquidated. But in regard to his rights to the extent of $30, the amount handed by him to Mr. Thibeaudeau, and the legal interest thereon till paid, I feel no difficulty whatever. An order will therefore go for the payment of this sum within a fortnight from this date. Mr. Thibeaudeau will have to pay the costs of this application(*k*) See *In re Fletcher* et al., 28 Gr. 413.--E. D. A..

Order accordingly.