

KEKEWICH
J.

In re MARGETSON AND JONES.

[1897 M. 665.]

1897
June 15.
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Costs—Solicitor's Lien—Taxation—Compromise by Party without Knowledge of Solicitor—Practice—Affidavits—Applicant reading Respondent's Affidavits before his own.

Parties to litigation are at liberty to compromise without the intervention of their solicitors, provided they do so honestly and without any intention to cheat the solicitors of their costs.

P. having retained M. as his solicitor for the taxation of a bill of costs delivered by J., P.'s former solicitor, obtained the common order for taxation. Before the taxation was completed, J., without M.'s knowledge, and with the intention of stopping the taxation and so defeating M.'s lien for his costs, paid P., who was in distressed circumstances, a small sum in settlement of the taxation, which consequently dropped:—

Held, that M. was entitled to an order against J. for taxation and payment of the costs incurred by P. to him, M., up to the time when the taxation against J. dropped.

Price v. Crouch, (1891) 60 L. J. (Q.B.) 767, followed.

An applicant is at liberty to read the respondent's affidavits notwithstanding the objection that on his own affidavits no case is made requiring an answer.

ADJOURNED SUMMONS.

In January, 1896, Mr. Leonard C. Margetson, a solicitor, was consulted by Mr. and Mrs. Pugh upon a bill of costs amounting to upwards of 300*l.*, which they said they had been induced to sign and agree to by a Mr. Herbert Stanley Jones, who had acted as their solicitor in certain matters arising out of a settlement made by Mrs. Pugh in 1890. Mr. Margetson advised Mr. and Mrs. Pugh that the bill was grossly excessive, and on March 9, 1896, acting on their written retainer, issued in their names a summons asking for the common order for taxation of the bill and delivery-up of papers by Mr. Jones. The summons was adjourned to Kekewich J., and on July 10, 1896, Mr. Jones, who had previously resisted the taxation, consented to the order being made. The order was duly passed and entered on July 28, 1896, and thereupon the bill was lodged for taxation; but Mr. Margetson received an intimation from

the Taxing Masters' Office that the taxation, as it did not affect funds in court, could not be proceeded with until after the Long Vacation.

On September 9, 1896, Mr. Margetson, not having received notice of the filing of any affidavit by Mr. Jones verifying the papers to be handed over under the order, wrote to him asking whether such an affidavit had been filed, and received a reply from Mr. Jones, dated the same day, expressing his surprise at the receipt of the letter, adding that it appeared from a declaration made by the Pughs that Mr. Margetson's retainer had been long since determined and the matter subsequently settled. Mr. Margetson then, on September 12, wrote to his client, Mr. Pugh, asking him whether it was the fact that the matter had been settled, but Mr. Pugh did not reply to or take any notice of that letter; whereupon Mr. Margetson withdrew the bill from the Taxing Office.

On October 23, 1896, Mr. Margetson delivered to the Pughs a bill of costs, amounting to 57*l.* 18*s.* 10*d.*, for business in relation to the taxation of Mr. Jones' bill, and at the same time inquired of them under what circumstances they had arranged the settlement with Mr. Jones of a matter upon which they had consulted him, Mr. Margetson; when they informed him that it was the fact that the matter had been arranged upon payment of 25*l.* which they had felt themselves obliged to accept under the stress of circumstances in which they were placed.

It further appeared from their statements to Mr. Margetson that in the latter part of the month of August, 1896, they received a communication from a clerk of Mr. Jones suggesting a call upon Mr. Jones with a view to a settlement of the taxation proceedings; and being at the time in urgent want of money they accordingly called at Mr. Jones' office, and were then and there induced by him to accept 25*l.* in settlement of the matter. They also stated that they had in fact signed a declaration withdrawing Mr. Margetson's retainer, but had done so at Mr. Jones' instance, he having himself prepared it. They further admitted to Mr. Margetson that his retainer had not really been determined or withdrawn, but that they had made the declaration simply under pressure from Mr. Jones.

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Mr. Margetson then took out the present summons, which was intituled "In the matter of an application by Leonard C. Margetson, the solicitor retained by and acting for the applicants in a matter intituled 'In the matter of Herbert Stanley Jones, one of the solicitors of the Supreme Court.'" The summons asked that the proper costs and charges of Mr. Margetson in the said proceedings intituled "In the matter of Herbert Stanley Jones" should be ordered to be taxed and paid by Mr. Jones to the applicant; or, in the alternative, for an order that the applicant might be at liberty to continue the said proceedings for the purpose of recovering and obtaining his costs and charges from Mr. Jones.

The application was supported by an affidavit by Mr. Margetson and his clerk detailing the circumstances shortly above stated; and Mr. Margetson further deposed that the settlement with the Pughs was effected without his knowledge, and without any application or communication being made to him as to whether any costs were owing to him by the Pughs; and that, to the best of his belief, Mr. Jones took advantage of the Pughs' poverty and distress to induce them to accept a much smaller sum than would have probably been taxed off his, Mr. Jones', bill, and induced them, in consideration of an immediate payment of 25*l.*, to collude with him so as to deprive him, Mr. Margetson, of his lien for costs, and to release Mr. Jones from his probable liability therefor.

Mr. Margetson further deposed that he had recovered judgment in the Mayor's Court against the Pughs for the amount of his bill, but that from his knowledge of their impecuniosity it would be useless to attempt to enforce it.

In reply to Mr. Margetson's affidavit, Mr. Jones filed a short affidavit admitting the interview with the Pughs and the payment to them of the 25*l.*, and that the substance of what passed at his interview with them was embodied in the declaration made by them, and which he exhibited to his affidavit. The declaration stated, in effect, that the Pughs had withdrawn their retainer to Mr. Margetson and had voluntarily approached Mr. Jones to have all further proceedings stayed, each party paying his own costs; that they confirmed their former agree-

ment with Mr. Jones as to his costs sought by the taxation proceedings to be set aside; that as they were in necessitous circumstances he had offered to contribute a sum of '25*l.* towards their costs of those proceedings, but that such offer was not in the nature of a bargain and not as an inducement to settle the proceedings, which they had no intention of continuing. Mr. Jones also in his affidavit stated that he had been fully prepared to support his bill on taxation, and that it was wholly untrue that he induced the Pughs to accept a much smaller sum than would have been taxed off, or that he had induced the Pughs to collude with him so as to deprive Mr. Margetson of his lien (if any) for costs, or that there was in fact any collusion at all in the matter.

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Warrington, Q.C., E. S. Ford, and Courthope-Munroe, for Mr. Margetson. First, Mr. Margetson has a lien for his costs as solicitor to the Pughs on what may be recovered in the taxation proceedings against Mr. Jones; and secondly, Mr. Margetson may, in order to obtain those costs, go on with those proceedings. The evidence in support of this application is conclusive as to our right to an order, but we are content to rely on Mr. Jones' own affidavit and the facts stated in the declaration by the Pughs which he himself exhibits, and therefore we will read that affidavit first.

[*Ribton*. You have no right to refer to my evidence until it is put in. You must read your own evidence first of all, and give me the opportunity of submitting that you have made out no case.

KEKEWICH J. I am not going to shut out any of the evidence. It is competent for the applicant's counsel, if they find the respondent's affidavit is in their favour, to read it first; and I so hold, unless any authority can be cited to the contrary.]

Taking, then, the facts upon Mr. Jones' affidavit alone, we submit that no case has been made out for depriving Mr. Margetson of his ordinary lien as solicitor on the profits of the litigation, and that, although it may seem unusual for a solicitor to be allowed to go on with litigation merely for the

KEKEWICH J. purpose of getting his costs, he is, in this case, entitled to do so. We say that there has been a collusion at the instigation of Mr. Jones to deprive Mr. Margetson of his costs, and it has been held that where a plaintiff and defendant compromise an action with the knowledge that they are so acting as to deprive the plaintiff's solicitor of his costs, that solicitor is entitled to an order for payment of his taxed costs of the action by the defendant, or for continuance of the action for the recovery of those costs : *Price v. Crouch* (1) ; and that is the relief we now ask for.

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Ribton, for Mr. Jones. *Price v. Crouch* (1) is inconsistent with *The Hope*. (2) In the absence of collusion to deprive a solicitor of his lien for costs, it is quite competent for the parties to litigation to compromise with one another without the intervention of their respective solicitors ; though I admit that is not allowed where there is such collusion : *Ross v. Buxton*. (3) No doubt Mr. Jones made a compromise behind the back of Mr. Margetson, but there was no collusion. Collusion can only be inferred where an agreement has been entered into between two parties with the knowledge that they are doing an unfair thing in depriving a third party of his rights. Here at least the Pughs had no such knowledge : they were only too glad, in their embarrassed condition, to settle their litigation. To establish collusion, the evidence must be clear : here I submit it is not ; and the applicant has not ventured to cross-examine my client.

KEKEWICH J. It is a professional rule that where parties to a dispute are represented by solicitors neither of those solicitors should communicate with the principal of the other touching the matters in question. That is a rule binding the profession as gentlemen, but it is also highly consonant with good sense and convenience, because otherwise solicitors cannot really do their duty, and it is impossible for business to be properly conducted unless the solicitors have the full confidence of their clients and are enabled to communicate the one with the other

(1) 60 L. J. (Q.B.) 767.

(2) (1883) 8 P. D. 144.

(3) (1889) 42 Ch. D. 190, 201.

upon that footing. But the Courts have uniformly held, with-
 out in the least degree impeaching the propriety and advantage
 of that rule, that if the solicitor for the one party meets the
 principal on the other side and a bargain is made, that bargain
 is good. It cannot be said that the principal's authority is gone,
 because such a thing as that is impossible; and therefore,
 whether there is a litigation pending or not, if the solicitor for
 the defendant meets the plaintiff and effects a compromise with
 him, that compromise is binding upon the plaintiff or the
 defendant, as the case may be, notwithstanding that up to that
 time he had been represented by a solicitor. That is as con-
 sonant with common sense as the rule itself; but what the
 Court has also said is that it must be done honestly and in a
 straightforward way to get rid of the litigation for the sake of
 peace, and not with a view to depriving the solicitor of his
 costs. If the one solicitor meeting the party on the other
 side, or the two parties compromise knowing of the lien of the
 solicitor and intending to defeat it, that shall not be allowed;
 and the only question, therefore, is whether that was the inten-
 tion. That runs through all these cases, as in *The Hope* (1),
 where Lindley L.J. says: "There is no rule that the parties
 may not compromise an action without the intervention of
 their solicitors. They must, however, do so honestly, and not
 intend to cheat the solicitors of their proper charges." The
 word "cheat" is not a bit too strong: the Master of the Rolls
 also uses it.

The question is whether I have here such evidence as satisfied
 the Court in *Price v. Crouch*. (2) This leads me to make a
 remark on a point urged by Mr. Ribton. He says that if an
 applicant does not make out his case on the affidavits which he
 files in support of his application, and if the respondent is ill-
 advised enough to answer those affidavits which, in that view,
 need no answer at all, then the applicant is not entitled to read
 the affidavit which has been filed against him and presumably
 proves his opponent's case, but is bound to read his own
 affidavits independently, and thus give the respondent the
 opportunity of submitting that no case has been made out

(1) 8 P. D. 144.

(2) 60 L. J. (Q.B.) 767.

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against him. I challenged Mr. Ribton to find some authority for that, but he says it is such ordinary practice that there is and can be no authority needed for it, and none was produced. It is very curious, if I may be allowed to say so, that if there is such a practice, it never came under my notice during the many years I was in practice at the Bar. It is for the applicant to make out his case, and if he does not his opponent need not file any affidavit at all. Even assuming that the affidavit of the applicant here is weak in making out his case, still I am clearly of opinion that the affidavit in answer does make out his case. I must read the evidence of Mr. Jones himself in which he says that the substance of what passed between himself and the Pughs is embodied in the declaration which he makes an exhibit to his affidavit. Then what passed? Mr. Jones had an interview with the Pughs, and the result of it all was that, knowing they were in necessitous circumstances, he paid them 25*l.*, not as a kind of bargain to stop the taxation, of which he said he was not afraid, but having that inevitable result. Whether there was a bargain or not, I take it that both parties perfectly well knew that when once the 25*l.* was paid the taxation would be dropped, and that Mr. Jones would be free from any anxiety occasioned by the order. There is evidence that Mr. and Mrs. Pugh were in poor circumstances and they were no doubt overpersuaded by Mr. Jones; but I must take them to have known the ordinary consequences of their acts, and that they were accepting 25*l.*, as they say themselves, towards their costs. Mr. Jones, on the other hand, knew of their difficulties, and, although paying the money towards their costs, he must be taken to have known as a solicitor, and being well acquainted with these old clients of his, that the money would not find its way into Mr. Margetson's pocket in reduction of his costs. It seems to me that, without any such cross-examination as Mr. Ribton invites, and which the applicant is wise in not entering into, I have a distinct case of a cheat, and that what was done on the part of Mr. Jones was done with the intention of cheating Mr. Margetson of his costs. I cannot quite acquit Mr. and Mrs. Pugh, but I think that they were persuaded by Mr. Jones to do what

they did. I have no doubt they did not realize the impropriety of what they were doing. The case seems to me to come within the decision in *Price v. Crouch*. (1) The only question is as to the form of the order. It seems to me that the first alternative asked for by the summons is right. There is an apparent anomaly in allowing Mr. Margetson to continue proceedings which he cannot proceed with in the name of his clients and which they themselves have stopped, they having withdrawn the retainer. In order to continue the proceedings here costs would be incurred, and Mr. Margetson has no right to incur costs except with a view of recovering the costs already incurred. I think the proper order to make is that the costs incurred by Mr. Margetson up to the time when the taxation stopped should be taxed and paid by Mr. Jones. Such taxation is necessary for ascertaining those costs, and no further costs need be incurred. Then of course Mr. Jones must pay the costs of this application.

I may add that, should Mr. Jones wish to go on with the taxation proceedings, he has precluded himself from doing so by paying the 25*l*.

Solicitors : *Leonard C. Margetson ; H. Stanley Jones.*

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G. I. F. C.

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