MOHAMMED ATIQ AND ABDUL SHAKUR *v.* RICE AND STUART

[Appellate Jurisdiction (Hyne, C.J.) May 7th, 1954]

Solicitor's and Barrister's fees—whether taxation a condition precedent for a solicitor to sue for costs—s. 26 of the Supreme Court Ordinance—Rule 4 of Order XXXVII.

An action being contemplated, the appellants paid the sum of five guineas to a member of the respondent firm, Messrs. Rice and Stuart, as a result of which certain work was done. Subsequently the appellants representing a religious body agreed to pay the respondent firm a retaining fee of £100. A sum of £35 was paid on account but was subsequently returned to the appellants. It was agreed on 17th March, 1951, when the appellants paid this sum, that the balance should be paid before the action came on for hearing and in any case before 30th June, 1951.

The respondents sued the appellants for the sum of £94/15/-, giving credit for the sum of five guineas previously paid. The trial Magistrate gave judgment for the former sum in favour of the respondents.

On appeal against the Magistrate's decision.

HELD.—(1) That where solicitors and counsel are acting as solicitors taxation is a condition precedent to the recovery of fees by way of legal proceedings.

(2) That if solicitors and counsel are acting solely and simply as barristers then by virtue of common law provisions they cannot sue for their fees.

Cases referred to:—

Bell v. Girdlestone [1913] 2 K.B. 225.
Cubison v. Mayo [1896] 1 Q.B. 246.
Martin v. Singer (1929) N.Z. Rep. 301.

J. Falvey for the appellants.

P. Rice for the respondent firm.

HYNE, C.J.—It is, of course, well-known that in English law no practice in the least degree resembling partnership is permissible between counsel (3 *Halsbury, Vol. III, page* 59). In this Colony, however, persons practice as both barristers and solicitors and, inasmuch as solicitors may act in partnership, so automatically will barristers. Indeed, that barristers can and do act in partnership appears to be recognized in Order XXXVII, Rules 1 and 13 of the Magistrates' Courts Rules. Reference is made in these Rules to the word " practitioner ", and in Rule 13 " practitioner " includes barrister, solicitor and notary public. Rule 1 says that a bill of costs shall be signed " by such practitioner, or, in the case of a partnership, by any of the partners ". It seems clear, therefore, and in actual practice it is a fact that barristers do act in partnership in this Colony. I do not think it can be held that the fee is not a barrister's fee on this ground.

Mr. Falvey submitted that barristers' fees are subject to taxation in Fiji, and he referred to Order XXVII of the Magistrates' Courts Rules and section 26 of the Supreme Court Ordinance.

Mr. Rice based his arguments largely on the provisions of Order XXXVII of the Magistrates' Courts Rules, and he referred at some length to Rule 1.

The rules in Order XXXVII of the Magistrates' Courts Rules are, to a considerable extent, based on section 37 of the Solicitors Act, 1843, and, inasmuch as they are so based, Mr. Rice contended that the case of *Bell v. Girdlestone* [1913] 2 K.B. p. 225, applies. In this case the learned Judges also considered section 118 of the County Courts Act, 1888, which prevents a solicitor from recovering from his client costs incurred unless they shall have been allowed on taxation. The concluding portion of this section reads as follows:—

> " All costs and charges between solicitor and client shall, on the application either of the solicitor or client but not otherwise, be taxed by the Registrar of the Court in which such costs and charges were incurred, but his taxation may be reviewed by the Judge on the application of either party and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force, unless the Registrar shall be satisfied that the client has agreed in writing to pay them, in which case they may be allowed ; and no solicitor shall have a right to recover from his client any such costs or charges unless they shall have been allowed on taxation."

The learned Judges held that the last words " unless they shall have been allowed on taxation " do not make taxation a condition precedent to the solicitor's right to sue for his costs, even if the time within which the client is entitled to taxation has not expired. In the course of their judgment the Judges referred to the case of *Cubison v. Mayo* (1896), 1 Q.B., 246, the headnote of which is to the following effect:—

> " The provision of section 118 of the County Courts Act, 1888, which prevents the recovery by a solicitor from his client of costs incurred in a County Court, unless they have been allowed on taxation, only relate to cases in which there is an application for taxation. Therefore the solicitor may recover such costs without taxation where there has been no application for it, and the client is no longer entitled to taxation."

With great respect I agree that, on the wording of section 118, this sets out the true position so far as the English Act is concerned because in section 118 costs are to be taxed on the application of the solicitor or client, *but not otherwise*. There is no such provision in our Ordinance which merely says that *taxed* costs may be sued for.

Mr. Rice argued that while provisions existed under section 26 of the Supreme Court Ordinance, taxation is, by reason of the cases cited, not a condition precedent to suing for costs. Section 26 of the Supreme Court Ordinance reads as follows:—

> " Every barrister shall be entitled to practise also as a solicitor and proctor and every solicitor shall be entitled to practise also as a barrister and advocate and to sue for and recover his taxed costs as such."

As I understand section 26 of the Supreme Court Ordinance it does not intend to take away the common law right of solicitors to sue for costs and fees, but it makes special provision for cases where barristers act as solicitors and solicitors act as barristers. Barristers cannot at common law sue for fees and, but for this section, this disability would, in my opinion, follow them when acting as solicitors. Similarly, if a solicitor acts as a barrister then, since he is a barrister, he would, but for this section, be disentitled to sue for fees. The section therefore preserves a solicitor's common law rights even though he does practise as a barrister.

This is the substantive law.

The Magistrates' Courts Rules are made under the authority of section 67 of the Magistrates' Courts Ordinance and in paragraph (6) of section 67 of this Ordinance provision is made for the making of rules for fixing the tables of fees and costs recoverable by practitioners for their services on taxation.

Order XXXVII of the Magistrates' Courts Rules is an attempt to incorporate in our legislation the provisions of the Solicitors Act of 1843, to which I have referred, and to create machinery whereby practitioners may sue for and recover their fees and costs. Rules, being subsidiary legislation, cannot derogate from substantive law. The rule making section of the Magistrates' Courts Ordinance authorized the making of rules to enable practitioners to recover fees and costs by legal process, *on taxation,* while the Supreme Court Ordinance, which provides for the admission of barristers and solicitors clearly provides, in section 26, that it is *taxed costs* which may be sued for. In other words, as I see it, both the Magistrates' Court Ordinance and the Supreme Court Ordinance envisage taxation as a condition precedent to suing for fees and costs.

Rule 4 of Order XXXVII of the Magistrates' Courts Rules, based on the language of the Solicitors Act, 1843, directs that there shall be no reference to taxation, except under special circumstances, after judgment has been obtained in any suit for the recovery of the demand or after the expiration of twelve months after any bill has been delivered. It would seem, therefore, that under the Rules costs may be recovered without antecedent taxation. This conflicts, as I see it, with the Ordinances, and therefore, as the Ordinances and the rule cannot be reconciled, the provisions of the rule must give way to the Ordinances.

The Ordinances being as they are and containing no provisions analogous either to the Solicitors Act or the County Court Act, 1888, I am unable to accept Counsel's submission based on *Bell v. Girdlestone* and *Cubison v. Mayo* that the word " taxed " used in section 26 means " if the client elects to tax within the month ".

The question also to be considered is whether this fee in respect of which the respondent obtained judgment is a fee within the meaning of fees and costs recoverable on taxation. I think that it can be held to be such a fee, for although the amount was a fixed fee, it would, I think, still be open to the Registrar to determine, having regard to the complexity of the work, whether it was reasonable to pay such a fee to counsel.

The respondent has cited in support of his contention that a barrister's fee is not liable to taxation the New Zealand case of *Martin v. Singer,* decided in the Supreme Court of New Zealand in 1929 (1929 *N.Z. Law Reports p.* 301). This was an application on behalf of one, Alexander Henry Martin, for an order referring to the Registrar for taxation a bill of costs rendered by Mr. Singer, a solicitor of Auckland. The services were, however, rendered by Mr. Singer not as solicitor but as counsel. At page 302 the learned Judge said: "The Law Practitioners Act, 1908, does not in terms make provision for the taxation of fees of a barrister but rather for the taxation of the fees or charges of a solicitor. Section 28 provides that no solicitor shall commence or maintain any action for the recovery of any fees, charges or disbursements for any business done by him until the expiration of one month after the delivery of the signed bill. Section 29 provides for a reference of the bill of costs to taxation upon the application within such month, of the party chargeable by the bill whether the business contained in such bill, or any part thereof, has been transacted in any Court or not. Section 30 provides for reference after one month or, under special circumstances, not more than twelve months after the delivery of the bill. The fees and charges so taxable are fees and charges of a solicitor acting as such. The learned Judge went on to say: "The Act does not provide machinery for the taxation of the fees and charges payable to a solicitor for services rendered not as a solicitor but in some other capacity."

On the principle enunciated in certain cases to which he referred, he held that inasmuch as the fee charged as a barrister is a charge payable to a solicitor for services rendered in some other capacity, the fee was not liable to taxation.

I am unable to agree that this case is authority for the contention that the fee to be paid by the appellants is not liable to taxation.

The learned Judge decided the case on law which, as he said, made no provision in terms for the taxation of the fees of a barrister.

Section 26 of the Supreme Court Ordinance clearly provides that a solicitor acting as a barrister is entitled to sue for taxed costs ; that is to say, our legislation does provide in express terms for taxation.

Martin v. Singer, therefore, has in my opinion no bearing on the case before me on appeal.

The question further arises whether the retainer is a barrister's fee. The learned Magistrate found as a fact that it was a barrister's fee and I agree with his ruling on 16th February that the agreement signed by the two defendants retained the respondents to act solely in the then approaching action. I think, too, that the fee should be regarded as a barrister's fee. It is well established that at common law a barrister cannot sue for his fees, and English common law is in force in this Colony. If, therefore, the respondents were acting solely in the capacity of barristers without any reference at all to their being solicitors acting in the capacity of barristers then, by reason of the application of common law principles, they are precluded from suing for this fee. If, on the other hand, they come within the scope of section 26 of the Supreme Court Ordinance, and in their capacity as solicitors practise also as barristers and advocates, they cannot sue for this fee without submitting it to taxation. If they were acting in this last mentioned capacity taxation is in my view a condition precedent to suing.

It follows, therefore, if the respondents were acting solely and simply as barristers, that, by reason of common law provisions, they could not sue. If, on the other hand, they were solicitors practising for the time being as barristers, they cannot recover the fee by legal process as taxation is a condition precedent and there was no taxation.

Appeal allowed.