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CAMERON v. IRWIN.

Villeneuve Smith for the respondents, was not heard.

GRIFFITH C.J. The question is entirely one of fact. Special leave will be refused, and the motion will be dismissed with costs.

Special leave refused.

Solicitors, for the appellant, *Gillott, Bates & Moir* for *Haynes, Robinson & Cox*, Perth, for *Keenan & Randall*, Kalgoorlie.

Solicitor, for the respondents, *Horace B. Joseph.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McLAUGHLIN . . . . . APPELLANT;
DEFENDANT,

AND

FREEHILL . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *April* 22, 23.

Griffith C.J., Barton and Isaacs JJ.

Solicitor and client—Retainer by lunatic—Costs of proceedings to set aside lunacy order—Necessaries—Action by solicitor for costs—Pleadings—Res judicata—Amendment.

M. who had been declared insane by the Supreme Court, retained a solicitor to act for him in an application to have the lunacy order set aside. Before making the application the solicitor obtained an order from the Court directing that his costs of the application should in any event be paid by the committee out of M.'s estate. The application was then made and dismissed, and the previous order as to the solicitor's costs was embodied in the order dismissing the application. Before the costs had been paid M. recovered his sanity, and having been declared sane by the Court and having had the management of his estate restored to him, refused to pay the costs.

The solicitor brought an action against M. to recover the costs, and, the only material defence being a plea of never indebted, obtained a verdict for the amount claimed.

Held, that the costs were necessaries, and that the solicitor was entitled to recover them from M. The fact that he had obtained an order for the payment of the costs out of M.'s estate did not show that in doing the work he had not relied upon the implied common law obligation of the lunatic to pay for necessaries supplied to him, nor did the order operate as *res judicata* as between him and M., not having been made in a proceeding in which they were independent parties.

Held, further, that the latter defence was not open on the pleadings, and, the sole question at the trial having been whether the costs were necessaries or not, an amendment should not be allowed after trial.

Decision of the Supreme Court: *Freehill* v. *McLaughlin*, (1907) 7 S.R. (N.S.W.), 253, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

The appellant was on 7th August 1902 declared by the Supreme Court in its lunacy jurisdiction to be an insane person and incapable of managing his affairs, and a committee of his estate was appointed. He, thereupon retained the respondent as his solicitor to make an application to the Court to have the order declaring him insane set aside, on various grounds. Before making the application the solicitor applied for and obtained an order that his costs of the application should in any event be paid by the committee out of M.'s estate. The application was dismissed with costs on 18th November 1902, and the Court ordered that the costs of all parties to the application be taxed by the Master in Lunacy as between solicitor and client and certified, and that the costs of the applicant so certified be paid by the committee of the appellant's estate to the respondent. The appellant subsequently recovered his sanity, and was declared by the Court to be sane, and the management of his estate was restored to him. The costs not having been paid by the committee, the respondent called upon the appellant to pay them, but as he refused to pay them, the respondent brought an action to recover them. The only material plea was never indebted.

The case came on for trial before *Pring* J. and a jury, who found a verdict for the plaintiff.

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The appellant moved the Full Court to set aside the verdict on the ground that any claim the respondent had against his estate for work done as solicitor had merged in the order of the Court, which had the effect of a decree of the Court of Equity, and that there was no evidence of any necessaries supplied by the respondent, and even if the services rendered were necessaries, they were not rendered so as to create any legal obligation on the part of the appellant to pay them.

The Full Court refused the application: *Freehill* v. *McLaughlin* (1), and from their decision the present appeal was brought.

After the institution of the appeal the respondent died, and on the application of the appellant the High Court allowed the names of the executors of the respondent's estate to be substituted for that of the respondent.

[Reference was made to *High Court Procedure Act* 1903, sec. 39; *Quick & Groom, Judicial Power*, p. 268; Order XI., r. 2, of the High Court Rules; sec. 5, r. 1, of the rules of December 1907; *Stamp Act* (N.S.W.), No. 27 of 1898, sec. 54.]

Cullen K.C. and *Watt*, for the appellant. Assuming that the work done was necessaries, as the jury found, the circumstances under which it was done exclude any liability on the part of the appellant to pay for it. The respondent never looked to the appellant for payment. He relied, not upon the implied obligation of a lunatic to pay for necessaries supplied to him, but went to the Court and obtained an order that the costs should be paid out of the estate.

[GRIFFITH C.J.—Was not the existence of the obligation the foundation of the order of the Court? Otherwise what justification was there for ordering that the costs be paid out of the estate?]

The foundation is the protection of the lunatic. The Court is empowered by the *Lunacy Act* 1898, sec. 113, to make such an order so that the lunatic may not lack legal assistance in any necessary proceedings. But it is quite distinct from the legal liability for necessaries. That arises after the services are rendered, whereas the order is made before. It is not open to

(1) (1907) 7 S.R. (N.S.W.), 253.

the solicitor to say afterwards that he relied upon the implied contractual obligation. The costs were taxed under the order and the respondent still has his rights against the committee. [They referred to *In re Rhodes*; *Rhodes* v. *Rhodes* (1); *Beall* v. *Smith* (2); *Erskine* v. *Erskine* (3).]

[ISAACS J. referred to *In re Meares* (4); *In re Cumming* (5).]

Even if there would otherwise have been a liability on the part of the appellant it is merged in the order of the Court.

[GRIFFITH C.J.—That is, transmuted into *rem judicatam*. What possible foundation is there for such a defence? There was no decision in a *lis* between the appellant and the respondent.]

The order is equivalent to a judgment between the parties. It is to have the same effect as an order in the Court of Equity for the payment of money. It was a substitution of the liability of the committee for that of the lunatic himself.

[ISAACS J. referred to *Howard* v. *Earl Digby* (6).]

Gordon K.C., *Harvey* and *Carlos*, for the respondent, were not called upon.

August 23.

GRIFFITH C.J. This is an action by a solicitor for recovery of costs due to him, as he alleges, as solicitor for the appellant. The appellant had been declared by the Supreme Court of New South Wales to be an insane person. He naturally desired to have that order set aside, and consulted the respondent for that purpose. Now, it is settled that work done for the benefit of an insane person, although he is incompetent technically to make a contract, may nevertheless be regarded as something in the nature of necessaries. Consequently an action will lie against him, as it will in some other cases, for necessaries. The only plea to the action was never indebted, but there was a counterclaim for negligence, on which nothing turns, as it was abandoned. The only question left to the jury was whether the work done by the plaintiff for the defendant was necessaries, and the jury found a verdict for the plaintiff. Application was then made to the Supreme Court for a new trial, or nonsuit, and a rule

(1) 44 Ch. D., 94.
(2) L.R. 9 Ch., 85.
(3) 21 N.S.W. L.R. (Div.), 1.
(4) 10 Ch. D., 552.
(5) 1 D.M. & G., 537.
(6) 2 C. & F., 634.

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nisi was granted and afterwards discharged. The Court thought that the only question was whether the jury were justified in coming to the conclusion that the work was in the nature of necessaries. It is not contested here now that they were justified in doing so, and that the respondent is consequently entitled to succeed in the action, unless, although the work was of such a nature as to be necessaries, the other circumstances of the case negative the idea of any contractual or quasi-contractual obligation between the parties.

Let us consider for a moment what was the relative position of the parties. The application to set aside the order, which is alleged by the plaintiff to have been necessary, might have been successful or unsuccessful, and the question whether the work done was or was not necessary might possibly have depended on the result of the application. The application was successful, and this work was necessary. The plaintiff is therefore entitled to recover the money in some way. If the lunacy had continued he would not have been entitled to recover the money directly against the lunatic's estate, because that was in the hands of a committee, and the only course open to him would have been to invoke the aid of the Court, through the committee, and he might or might not have been successful in obtaining an order for payment of the debt. Under those circumstances the solicitor very sensibly made application to the Court, with the knowledge of the committee, for an order that any costs he might incur in the contemplated proceeding might be paid out of the estate, and the Court made that order, which was, in effect, an intimation or assurance from the Court that, whatever might be the result of the application, when the time came to consider whether the costs incurred ought to be paid out of the estate, the Court would consider that they should be granted. I fail to see how that can alter the character of the transaction as between the plaintiff and the defendant. It seems to me to be quite a collateral matter.

Dr. *Cullen* contends that there was no intention on the part of the solicitor that the costs should constitute a debt due by the defendant to him. There was no direct evidence on the point, and it does not appear to have been considered by the jury

I agree with what was said by *Lopes* L.J., *In re Rhodes*; *Rhodes* v. *Rhodes* (1):—"I do not think that unless the intention of the party making the payment was that it should constitute a debt, any obligation could be implied against a person under disability." But the obligation implied against a person under disability is *obligatio quasi ex contractu*. Here there was *prima facie* an implied obligation or contract. There is nothing to show that there was any intention on the part of the solicitor —when he did the work—that he would not look to the defendant for payment. If the defendant continued insane, of course he would have to look to the estate, but if he recovered he would look to him. The first application was unsuccessful. Subsequently another application for a declaration that the appellant was sane was granted, and the Court ordered, amongst other things, that the present appellant's taxed costs should be paid by the committee of the estate to his solicitor, the plaintiff in the action. It is suggested that that amounts to an order of the Court as between the appellant and his solicitor that the debt should not be paid by the appellant to his solicitor, and that any previous contractual obligation was merged in that order.

We are all familiar with the rule that an obligation may be merged in a judgment. That is purely a technical rule, but the application of the rule implies litigation between parties. The order in this case is an order made on the defendant's application that his costs should be paid out of his estate to his solicitor. In my opinion, that did not affect any contractual obligation between the appellant and his solicitor any more than an order made in an action for the administration of a trust, or of the estate of a deceased person, that the plaintiff's costs shall be paid out of the estate. The order may be to pay them to the plaintiff, or it may be that they are to be paid to his solicitor. In either case the direction operates as an authority to pay the money to the person designated, but it does not operate as a judgment between the plaintiff and his solicitor. The doctrine advanced, therefore, seems to me to have no application at all to the present case. Moreover, no such defence is pleaded. Application was made to

(1) 44 Ch. D., 94, at pp. 103, 104.

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the Full Court, and removed to this Court, to be allowed to plead *res judicata*, but that application was refused. In this case it would be most unreasonable to allow such an amendment. The debt is not denied, and the objection taken is purely formal. Therefore I think the appeal should be dismissed.

BARTON J. I agree with what has fallen from the learned Chief Justice, and I do not think it necessary to add anything further.

ISAACS J. I agree that this appeal should be dismissed. It is not disputed that the claim of the respondent was for necessaries. It also is not denied that the appellant did receive, and had full benefit of, the work done and the money that has been expended, and which forms part of the respondent's claim. In *In re Meares* (1) *James* L.J. said—and the same applies to money expended and work done of which a lunatic has had the benefit :—" In *Williams* v. *Wentworth* (2) the Court held that in the case of money expended for the necessary protection of the person and estate of a lunatic, the law would raise an implied contract, and give a valid demand against the lunatic or his estate." That seems to me to be quite applicable to this case. Here the respondent did what is described in *In re Cumming* (3). He applied to the Court and obtained security for reimbursement of his costs from the defendant, a lunatic. The Court acceded to the application, because the costs incurred in defending the interests of the lunatic would be as described in *Howard* v. *Earl Digby* (4), where Lord *Brougham* L.C. said :—" In the eye of that Court, be it a Court of Law, or a Court of Equity, or the Chancellor sitting in lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the Court."

Therefore, his plea of never indebted fails absolutely. The only other plea was negligence, causing damages, pleaded by way of a set-off, or counterclaim. That, too, has failed, and is not now urged. That is an end of the case it seems to me.

The question of merger, so-called, has been raised. I do not

(1) 10 Ch. D., 552, at p. 553.
(2) 5 Beav., 325.
(3) 1 D. M. & G., 537.
(4) 2 C. & F., 634, at p. 663.

understand how it applies exactly in the way of merger, but it has not been raised properly in the pleadings. Leave to add it was refused, and, in my opinion, properly refused. But I am also of opinion that if it had been raised formally it would not, for the reasons given by the learned Chief Justice, have been successful. On these grounds I think the appeal should be dismissed.

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Appeal dismissed with costs.

Solicitor, for the appellant, *J. H. McLaughlin.*
Solicitors, for the respondent, *Freehill & Donovan.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

ROBERT MYLNE GOW AND EBENEZER CHARLES CHAMBERS (TRADING AS R. M. GOW & Co.) APPELLANTS;

AND

THOMAS EDWARD WHITE . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Insolvency—Fraudulent preference—Payment—Good faith—Insolvency Act 1874 (*Qd.*) (38 *Vict. No.* 5), *secs.* 107, 108.

H. C. OF A. 1908.

BRISBANE, *April* 29, 30; *May* 2.

Griffith C.J., Barton and O'Connor JJ.

The mere fact that a debtor, who is unable for the moment to pay all his debts as they become due, makes a payment to a creditor, is not conclusive evidence that the payment is a fraudulent preference within sec. 107 of the *Insolvency Act* 1874 (Qd.).

Stewart & Walker v. *White*, 5 C.L.R., 110, explained.

Payments by a debtor within six months of his insolvency of fortnightly sums of money in pursuance of a prior valid agreement with his creditor for the compromise of an existing debt :