[HIGH COURT OF AUSTRALIA.]

WOOLF . . . . . APPELLANT;

AND

WILLIS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE, *Sept.* 26, 27, 29.

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

*Practice—Costs—Taxation—Solicitor and Client—Costs increased by misconduct or negligence of Solicitor—Report of taxing officer—Burden of proof—Rules of the Supreme Court of Victoria* 1906, *Order LXV., r.* 27 (38A).

On a report by the taxing officer under Order LXV., r. 27 (38A) of the *Rules of the Supreme Court* 1906 the jurisdiction of the Judge is not disciplinary, but is in the nature of a review of taxation.

Where it is alleged under Order LXV., r. 27 (38A) that costs have been increased by the misconduct or negligence of the solicitor, the onus is upon the client to establish that he has been damnified, and to what extent.

Decision of the Supreme Court of Victoria : *In re the Bill of Costs of Joseph Woolf*, (1911) V.L.R., 375 ; 33 A.L.T., 57, reversed.

APPEAL from the Supreme Court of Victoria.

In January 1911 an action was brought in the County Court at Melbourne by Walter Stephen Willis, by his solicitor Mr. Joseph Woolf, against the Victorian Railways Commissioners to recover £2,000 damages in respect of injuries received by him in a railway accident on 18th July 1910. On 19th April the action was settled on the terms that the Commissioners should pay to Willis £1,042.

On 6th May Mr. Woolf rendered a bill of costs to Willis amounting to £175, and this bill was brought by Willis before

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the Taxing Master for taxation. On 12th July 1911 the Taxing Master, pursuant to Order LXV., r. 27 (38A) of the *Rules of the Supreme Court* 1906, made a report to *à Beckett* J., in which he stated that Mr. Woolf had been guilty of misconduct in omitting to inform Willis of the full details of the attitude of the Commissioners towards Willis's claim, and that the costs had been increased by such misconduct or by unnecessary proceedings. On the report coming on for consideration before *à Beckett* J., both Mr. Woolf and Willis were represented by counsel, and, at the request of counsel for Willis, his Honor referred the report to the Full Court, and also made an order *nisi* calling upon Mr. Woolf to show cause before the Full Court why all costs included in the bill of costs and incurred after 7th March 1911 should not be disallowed as between Mr. Woolf and Willis. The Full Court found that Mr. Woolf had been guilty of negligence in not informing Willis of a certain suggestion made by one Robert Normand, a Clerk to the Crown Solicitor, who represented the Commissioners, on 7th March 1911, and, by a majority, they also held that in consequence of such negligence the costs had been increased. They therefore made absolute the order *nisi* and directed the Taxing Master to proceed with the taxation, and to disallow all costs incurred after 7th March. (*In re the Bill of Costs of Joseph Woolf* (1)).

The material facts are stated in the judgments hereunder.

Mr. Woolf now by special leave appealed to the High Court.

*Irvine* K.C. (with him *Morley*), for the appellant. The onus was on the respondent to prove that in consequence of the non-disclosures complained of he was damnified. He had, therefore, to prove that, if the disclosure had been made, a settlement would have been brought about more advantageous to him than that which actually was made. The respondent has not discharged that onus. [He referred to *Thomas* v. *Palin* (2)].

*Hayes* and *McArthur*, for the respondent. On a report under Order LXV., rule 27 (38A) as soon as a breach of duty is proved the onus is upon the solicitor to show that no harm has arisen to

(1) (1911) V.L.R., 375; 33 A.L.T., 57.

(2) 21 Ch. D., 360, at p. 365.

the client by reason of it. All that the client has to show is that there is some increase of costs, and the solicitor has to justify it. The client gives *primâ facie* evidence that a proceeding was improperly instituted by the solicitor by showing that before it was instituted the solicitor should have made a disclosure to the client. The solicitor then has to show that the proceeding was properly taken in that no harm resulted from it. The peculiar relation between solicitor and client takes the case out of the ordinary category of cases in which the party alleging negligence has to prove damages resulting therefrom. The evidence supports the finding of the Full Court that damage in fact resulted to the respondent. [They referred to *Brown* v. *Burdett* (1); *Godefroy* v. *Jay* (2); *Wardour* v. *Berisford* (3).

*Irvine* K.C. in reply.

*Cur. adv. vult.*

September 29.

GRIFFITH C.J. The question for consideration in this case arises under Order LXV., r. 27 (38A) of the *Rules of the Supreme Court* 1906, which corresponds with the rule of the same number in the English Rules with one exception. It provides, in short, that "if upon any taxation it shall appear that the costs have been increased by unnecessary delay or by improper, vexatious, prolix, or unnecessary proceedings, or by other misconduct or negligence . . . the Taxing Master shall allow only such an amount of costs as may be reasonable and proper," and so on, and under the Victorian rule the taxing officer "may report the matter to the Judge who may make such order as he shall think fit." In the present case, upon taxation of a bill of costs upon the client seeking to take advantage of that rule, the Taxing Master referred the matter to *à Beckett* J., and that learned Judge was asked to refer the matter to the Full Court, which he did by order *nisi* calling upon the solicitor to show cause before the Full Court why all costs included in the bill of costs and incurred after 7th March should not be disallowed.

The matter came before the Full Court in that form, and that Court made an order in which it was stated that:—"This Court

(1) 40 Ch. D., 244, at p. 262. (2) 7 Bing, 413. (3) 1 Vern., 452.

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doth find and declare that the said Joseph Woolf has been guilty of negligence in omitting to inform his client the said W. S. Willis of the suggestion made by Robert Normand (Clerk to the Crown Solicitor) which suggestion . . . was made on 7th March 1911 and that, in consequence of such omission, the costs in an action brought by the said W. S. Willis against the Victorian Railways Commissioners . . . were increased." The order then directed the taxing officer to proceed with the taxation and disallow all costs incurred after 7th March.

The form in which the reference was made to the Full Court is not material. The power exercised by the Full Court might have been exercised by the Taxing Master himself. In reality this is a proceeding upon a taxation. It is only another way of obtaining the view of a Judge during taxation instead of by a review of taxation, and gives an additional ground for disallowing costs. It is not a disciplinary jurisdiction, although the Court by its finding that the solicitor was guilty of negligence suggests that he was being punished for that negligence. The case is really one of taxation and nothing else.

The case put for the respondent was that the appellant, who was his solicitor in a County Court action, concealed from him a fact material to be known before incurring the expense of a commission for the examination of witnesses in Sydney, that if that fact had been disclosed the client would not have agreed to the issue of the commission, and that the expenses of the commission and all subsequent costs were consequently wasted. The case for the respondent was presented to this Court in two aspects, first, negligence or misconduct, and, secondly, that the proceedings were unnecessary. So far as I understand the decision of the majority of the Full Court they thought that the question to be determined was whether the solicitor unduly concealed from his client a matter material for him to know, and that, if that fact was established, the onus lay upon the solicitor to show that no increased expense was occasioned to the client. *Cussen* J., on the other hand, thought that the onus was upon the client to establish the fact of the detriment alleged, and that the respondent had not discharged that onus. Before this Court counsel for the respondent insisted upon the view taken by the

majority. I am quite unable to accept that view. If a party complains of negligence, the onus is upon him to establish not only the negligence, but also that he has been damnified and to what extent. The onus is always upon the party affirming and not upon the party denying. I think, therefore, that the case must be regarded on the footing of an inquiry whether the costs were unnecessary. In such an inquiry, as was very properly put by Mr. *McArthur*, the onus of proof may shift from time to time. The solicitor must prove that he did the work, and, if the fact is denied, that it was necessary and proper to be done. That onus is usually discharged without any difficulty. In the case of a commission to examine witnesses it is sufficient in the first instance to show that the evidence to be taken was material to the client's case and could not otherwise have been obtained or could only have been obtained at greater expense, and that the client knew of and consented to the issue of the commission. All else is a matter of *quantum*. By "necessary" I understand reasonably necessary having regard to the then existing circumstances. In this case the question of onus of proof is of little importance, and the whole facts must be considered. The question is was it reasonably necessary under the circumstances to issue the commission?

On that point the relevant facts are these:—The client had brought an action against the Commissioners of Railways claiming £2000 damages for injuries sustained by him in a railway collision. He was disabled for sometime and went for a long voyage to North Queensland. On his way back he went to a private hospital in Sydney where he stayed for six weeks and was attended by Dr. Jamieson. While there he was examined by Dr. Taylor on behalf of the Commissioners, who duly reported to them his opinion. The result was that the Commissioners offered £500 in full settlement of the claim. That offer was subsequently increased to £750 by a formal proceeding taken under a Statute in the course of the action. If the action had then gone to trial and the client had recovered less than £750, he would have had to pay the costs of both sides. If he recovered no more than £750 he would have got no costs. The client's Melbourne medical adviser, Dr. Stirling, was of opinion that the client had then

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entirely recovered. On those facts alone there was no prospect of his getting more than £750. But Dr. Jamieson, a gentleman of eminence in that branch of medicine in Sydney, was of a different opinion. He thought that the plaintiff would never fully recover his memory or his full mental capacity. Under those circumstances the solicitor says he thought—and I believe him—that it was desirable to issue a commission to Sydney to obtain the evidence of Dr. Jamieson and the matron of the private hospital. A summons for a commission was taken out, and on 7th March Mr. Coffey, a clerk to the solicitor, went to serve the summons on the Crown Solicitor. He served it on a Mr. Normand, who represented the Crown Solicitor, and some conversation took place between them, the substance of which was this;—Normand said that it was a pity the case should not be settled. Coffey said that he thought the client might take £1000. Normand then suggested that, if the solicitor got definite instructions from his client to take £1000, and if the client agreed to submit to a further examination by the railway medical officers, and if they should recommend it, he thought there would be no difficulty about a settlement being arrived at. It was not an offer by Normand of £1000. Very far from it. It was a suggestion that the client should reduce his claim to £1000 and should agree to submit himself to a fresh examination by the Commissioners' medical officers and to be bound by their opinion, with a possibility or, as I think, a strong probability, that they would not recommend an increased offer. Normand said that he thought it was very likely that, if the medical officers recommended an increased offer, it would be made. The client was invited to abandon his claim for £2000 and take his chance of this examination with the very strong probability that the result would be unfavourable to him.

On 13th March the client's wife, the client himself being out of Melbourne, and she attending to his business, had an interview with Coffey, in which she said that the least her husband would take was £1,250 and his expenses. He had then incurred about £250 expenses. Coffey reported this interview to his principal, and said he himself thought the client might take £1,000 and expenses. The solicitor says he then communicated by telephone

with Hawkeswood, who is called the "Claims agent" and who deals with claims for damages against the Commissioners.

The solicitor in his evidence said:—"Coffey rang him up and conversed with him. I listened to what was said. Coffey said: 'Mr. Hawkeswood, I had a talk with Normand as to increase of the offer, the commission has not gone to Sydney yet. Normand spoke of £1,000 gross. Is there anything in it, or are you disposed to make that offer because it might be considered,' or words to that effect. Hawkeswood said: 'No, we won't give any more than £750. The matter must go into Court: no chance, we won't increase the offer.'"

The fact of this conversation on the telephone is recorded in the solicitor's diary in the ordinary course of business, and is also entered in his call book kept under the telephone Regulations. In answer to that Hawkeswood says that he does not recollect the conversation and that therefore it could not have happened. He says he is fortified in that view by the probability that he would have told his confidential clerks if the conversation had taken place, and by the fact that they do not remember it. I cannot see any probability that he would have told his confidential clerks of the conversation said to have taken place. If he had promised to increase the offer it is probable he would have told them, but, when he was asked whether he would abide by the suggestion of Normand and said he would not, I do not see any reason why he should tell his confidential clerks. Therefore that reason seems to me absolutely of no weight. Then as to whether the conversation did take place, it is sworn to by the solicitor, it is entered in his diary, and it is entered in his call book. The learned Judges say they do not believe that any such conversation took place. I think that upon the evidence we are bound to assume that it did take place. That is how the matter stood then.

Then on 25th March the solicitor had an interview with the client and the client's wife on the subject of the issue of this commission to Sydney. He told them that £750 had been offered—which was a fact—but he did not tell them of the suggestion that had been made by Normand on 7th March, nor

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did he tell them of his conversation on the telephone with Hawkeswood. I think it is much to be regretted that he did not, and that it was an error of judgment on his part to say the least of it; but it is not a very surprising one, if the facts are as he swore and as I believe them to be. He told the client and the client's wife that their only chance of getting more than £750 was by getting the evidence of Dr. Jamieson and the other Sydney witnesses. If he had told them of the suggestion made by Normand on 7th March, he must also have told them of the conversation with Hawkeswood to the effect that there was nothing in the suggestion, and he would have given the same advice, namely, that their only chance was to get the evidence of the Sydney witnesses. They told him to issue the commission. It was issued and the evidence was taken. The evidence of Dr. Jamieson was very favourable to the client's claim. The case was listed for trial. On the day for which it was listed for trial a meeting took place between the plaintiff's and the defendants' medical advisers, and the defendants' medical advisers, after consideration of the evidence of Dr. Jamieson, of which they had previously been informed, offered £1,000, which was accepted. Dr. Stirling says that in fact Dr. Jamieson's evidence was the efficient cause of the increased offer being made in his opinion.

Now compare the position before the issue of the commission and that after its return. Before the issue of the commission there was no probability of the plaintiff recovering more than £750, if so much. After the return he recovered £1,000, that is to say, £250 more, and the costs in question, said to have been incurred unnecessarily, are about £160 subject to taxation. Under these circumstances I ask myself the question—were those costs unnecessary? In other words, was it reasonable under the circumstances to issue the commission? It seems to me that only one possible answer can be given, and that is, it was reasonably necessary. Then does the failure of the solicitor to mention the suggestion of 7th March affect that question? The client now wants to keep the extra £250 without paying the £160 extra costs by which it was earned, but thinks that he would have accepted the £1,000 if it had then been offered. But it had not

been offered, and on the facts there was no probability that it would have been offered. Assuming, as we must assume, that the medical advisers of the Commissioners would do their duty, and that the whole business was not a mere game of bluff on both sides, they could not, on the facts discoverable by a new examination, and in view of Dr. Stirling's opinion, have recommended any increase beyond £750. The probability, in my opinion, is so great as almost to amount to a certainty that the client would not have recovered more than £750. I think that under these circumstances it was reasonably necessary to issue the commission. If that is so, the omission to mention the suggestion made by Normand was immaterial.

It was further contended that the £1,000 would probably have been offered in the absence of Dr. Jamieson's evidence. To my mind the probability is so strong as to be almost a certainty that it would not have been offered except on the condition of a fresh examination, the result of which, in the absence of Dr. Jamieson's evidence, would have been adverse to the client. It follows, therefore, so far as we can draw inferences of fact, that the client has obtained £250 as the direct result of the expenditure which he now says was unnecessary. But that which was a *causa sine quâ non* cannot be called unnecessary. If the direct fruit of the expenditure is greater than the expenditure, it is not in any relevant sense unnecessary. But I must not be supposed to suggest that success or partial success as the result of the work is a test of its necessity, or that even if the client had not recovered the extra £250 the expenditure must be held to be unnecessary. That question depends on other considerations to which I need not advert. The conclusion, therefore, to which I come is that the costs were not unnecessarily incurred and that the proper order to have been made was that suggested by *Cussen* J., namely, that the bill of costs should be sent back to the Taxing Master.

BARTON J. I am of the same opinion.

O'CONNOR J. I agree.

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*Appeal allowed. Order appealed from discharged. Order that the bill of costs be referred back to the Taxing Master for taxation.*

Solicitor, for the appellent, *J. Woolf.*

Solicitors, for the respondent, *Major & Armstrong.*

B. L.

Appl *Green* v *Lynch* (1983) 70 FLR 206

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[HIGH COURT OF AUSTRALIA.]

THE KING AND THE COMMONWEALTH . PLAINTIFFS;

AND

THOM SING AND ANOTHER . . . DEFENDANTS.

H. C. OF A. 1911.

MELBOURNE, *Sept.* 22, 26.

GRIFFITH C.J. IN CHAMBERS.

*Practice—Procedure—Prosecution for offence against laws of the Commonwealth—Recognizance, authority of justice of the peace to take—Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 68.

Where a person is charged with an offence against the laws of the Commonwealth committed within a State, the taking of a recognizance is a matter of procedure within sec. 68 (1) of the *Judiciary Act* 1903, in the execution of which a justice of the peace may act, and is not a judicial exercise of jurisdiction within sec. 68 (3).

SUMMONS for liberty to enter final judgment.

An action was brought in the High Court by the King and the Commonwealth against Henry Thom Sing and Lew You to recover £50, being the amount of a bond entered into by the defendants to secure the appearance of one Ah Chin at the Police Court, Launceston, on the adjourned hearing of an information against Ah Chin charging him with being a prohibited immigrant found within the Commonwealth in contravention of the *Immigration Restriction Acts* 1901-1906.