

Privy Council Appeal No. 80 of 1920.

F. G. Stephens and another - - - - - *Appellants*

v.

Bertram Gray Allen, since deceased - - - - - *Respondent*

FROM

HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 20TH OCTOBER, 1921.

Present at the Hearing :

LORD BUCKMASTER.

LORD ATKINSON.

LORD CARSON.

[*Delivered by* LORD BUCKMASTER.]

There are two questions raised upon this appeal, one as to the effect of taking out of Court money that has been paid in full satisfaction of a claim, and the other as to whether or no the respondent, who is a solicitor, has been guilty of negligence in his professional conduct of the appellants' business.

The case arises in this way. The appellants are a firm of builders who carry on business at Nairobi in the East African Protectorate. On the 27th November, 1911, they entered into a contract with a company incorporated under the English Companies Act under the name of the East Africa and Uganda Corporation, Ltd., for making certain additions and alterations to the Norfolk Hotel at Nairobi. Disputes arose between the appellants and the Company with regard to the payment for the work which they did, and attempts were made to get the matter settled by reference to arbitration. The respondent was instructed and retained by the appellants as solicitor to act for them in connection with these disputes, and, after various abortive attempts to get the Company to agree to arbitrators and to proceed

to arbitration in the usual way, an agreement was in fact executed between the appellants and the attorney of the Company agreeing that the matter should go to arbitration. An arbitration was accordingly held, and on the 3rd August, 1914, a sum of Rs. 30,288 was awarded to the appellants. The Company then proceeded to move the High Court to set aside the award upon the ground that the agreement to refer the dispute to arbitration was not under their seal, but had been made by their attorney, who was unable to bind them in such a matter. On the 26th November, 1914, Mr. Justice Bonham Carter, by whom the application was heard, decided that this contention was right, and he ordered the award to be set aside. On the 20th September, 1916, the respondent and his partner issued a plaint in the High Court against the appellant, Frederick Tate, as the principal partner in the appellants' firm, claiming payment of a sum of Rs. 4,149 for professional services rendered to the appellants, including their services in connection with this arbitration. In the defence to that case the appellant picked out certain items in respect of which he admitted that he was liable, brought forward certain claims for payments made to the Company for costs as the result of the abortive litigation, paid into Court a sum of Rs. 772 made up in respect of matters for which he admitted liability, as to the balance of the claim said that the respondent's services had been of no value owing to his negligence; he further stated that payments had been made and unascertained damages incurred by reason of the respondent's negligence in not obtaining the seal of the Company to the agreement to refer, and that the right to sue in respect thereof was reserved. The payment into Court was made under Rules 376 and 377 of the Rules of Civil Procedure. Rule 376 provides that in a suit to recover a debt or damages the defendant may deposit in Court such sum of money as he considers a satisfaction in full of the claim; notice has to be given of that deposit to the plaintiff. Rule 377 then provides that upon the plaintiff receiving such notice two courses are open to him; either he may accept the amount in satisfaction in part of his claim and prosecute his suit for the balance, or he may accept the amount in satisfaction in full of his claim and present to the Court a statement to that effect. In this case the respondent took the latter of the two alternatives, and sent a notice to the Registrar in these terms: "Take notice that the plaintiffs accept the sum of Rs. 772/50 paid into Court by the defendant, in full satisfaction of their claim. Dated this 20th day of October, 1916," and judgment was entered accordingly. The appellants subsequently instituted the proceedings out of which this appeal has arisen, claiming that the respondent had been guilty of negligence in permitting the agreement to be acted on without seeing that it was under the seal of the Company, and claiming a large sum of damages consequent upon that neglect. Both Maxwell, J., before whom the case was first heard, and the Court of Appeal for Eastern Africa have decided that the action cannot be maintained, and from the decree of the Court of Appeal this appeal has been brought. The appellants have throughout

consistently but unsuccessfully contended that so far as negligence was concerned it was not open to the respondent to dispute it, the fact that he had taken the money out of Court in the circumstances mentioned being alleged to constitute a complete estoppel upon the question. Their Lordships are unable to take that view. There is no doubt that estoppel can be proved by a judgment given by consent as by a judgment given after opposition. In either case the estoppel consists of the establishment by order of the Court either by an agreed statement by the parties or by the adjudication of the Court upon the controversy being fully heard.

In the present case all that happened was this. In a general claim for a large sum of money due in respect of professional services a defence was put forward explaining why the defendant refused to accept liability for a sum in excess of Rs. 772, and that sum was paid into Court in satisfaction of the entire claim. The plaintiff accepted the sum in such satisfaction, but he never accepted it in any form that contained an admission that he had been negligent or that he accepted the calculations by which the defendant had arrived at the amount. So far as the plaintiff was concerned all to which he was bound to look was whether the money in Court was the sum that he was prepared to take in satisfaction of his claim, and he might have been influenced by many circumstances in making that decision. The matter can, in their Lordships' opinion, be made more clear if it be remembered that it would have been open to the defendant to have pleaded alternatively with regard to the items that he disputed. If taking out a sum paid in under those circumstances be regarded as constituting an estoppel of the grounds of the defence which the defendant has put forward, it would follow that the plaintiff would be estopped from denying alternative defences which might perhaps be even inconsistent with themselves. In their Lordships' opinion the acceptance of the amount under the words of the Rule as satisfaction in full of the plaintiff's claim did not amount to an admission of the grounds of defence set up by the defendant, and the defendant is consequently not estopped from raising in the present proceedings the plea that he was guilty of no negligence at all. The appellants further rely upon Section 13 of the Code of Civil Procedure, which prevents the Court from trying any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, but this cannot assist them, for if the matter was formerly in issue the present suit could not be maintained, and if it were not the section would not apply. It is then urged that if the matter is open the defendant's act was one of clear negligence, and that their Lordships ought to reverse the finding both of the High Court and of the Court of Appeal, who have held that there was no negligence in fact. In any circumstances their Lordships would be extremely unwilling to take such a course. The question of negligence with regard to the performance of a solicitor's duty must to some extent be

affected by the local conditions and the local circumstances, as to which their Lordships might not be perfectly informed. In the present case the negligence is alleged to be due to the ignorance of the provisions of an Act of Parliament. It may well be that in Nairobi this Act of Parliament has practically never been heard of in judicial proceedings; it is impossible for their Lordships to know; but the question as to whether a solicitor is negligent or not in omitting to give effect to a statutory provision cannot be disentangled from the consideration of whether the statute that is involved is one which is of constant and common occurrence in practice or whether it is one unfamiliar and remote. With those circumstances their Lordships are unable to deal.

Finally the learned Judges in the Court of Appeal have themselves expressed some doubt as to whether the judgment which held that the agreement needed to be made under seal was correct, and at least one learned Judge has used language from which it is not improper to infer that in his opinion the judgment that so held was questionable. In these circumstances it would in their Lordships' opinion be wrong to hold that a solicitor was guilty of negligence in taking a course which commends itself to the learned Judges in the Court of Appeal as reasonable, and one which on the whole may have been correct.

Their Lordships express no opinion as to whether the view of the Court of Appeal upon this point is accurate or no; it is sufficient for them to say that the decision that the defendant was not guilty of negligence is one with which their Lordships will not interfere.

*In their Lordships' opinion this appeal ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.



In the Privy Council.

F. G. STEPHENS AND ANOTHER

v.

BERTRAM GRAY ALLEN, SINCE DECEASED.

DELIVERED BY LORD BUCKMASTER.

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