

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
The Queen v. Doutre from the Supreme Court
of Canada, delivered 12th July 1884.*

Present :

LORD WATSON.
SIR BARNES PEACOCK.
SIR ROBERT COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

On the 1st October 1875, the Government of Canada addressed and sent to the Respondent, Joseph Doutre, a letter, signed by Mr. Bernard, the Deputy Minister of Justice, in the following terms :—

“ Sir,—The Minister of Justice desires me to state that the Government being desirous to retain Counsel to act for them upon the proceedings in connection with the Fishery Commission to sit at Halifax under the Treaty of Washington, he will be glad to avail himself of your services as one of such Counsel, in conjunction with Messrs. Samuel R. Thomson, Q.C., and Robert L. Weatherbee, barrister, of Halifax. The Minister will be glad to know whether you are willing to act in that capacity, and in that case to place you in communication with the Department of Marine and Fisheries upon the subject.”

Upon receipt of this letter, the Respondent wrote, in reply, that he would act as requested.

The Respondent is a member of the Quebec section of a body of legal practitioners incorporated by Cap. 72 of the Consolidated Statutes of Lower Canada, under the title of the “ Bar of “ Lower Canada.” By the terms of the statute,

each member of the Bar is admitted to practise as "advocate, barrister, attorney, solicitor, and "proctor at law;" and no person, except a member of the Bar, duly admitted, is entitled to conduct business, in any of these capacities, before the Courts of Lower Canada. Every member of the Bar must be registered in the district where he intends to practise; and he becomes answerable for his conduct to the Council of that district, being liable, in case of his offending against professional rule or etiquette, to censure or to suspension from office for any period not exceeding a twelvemonth.

It is not matter of dispute that, according to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover a *quantum meruit*, in respect of professional services rendered by him, and that he may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the Bar. But it is asserted for the Appellant that, by the law of Ontario, the province in which Ottawa, the seat of Government, is situated, a Counsel cannot sue for his fees, and that he is under the same disability according to the law of Nova Scotia, where, according to Article 23 of the Treaty, the Commission was to meet. In support of that contention, Counsel for the Appellant referred to the opinion of C. J. Harrison in *McDougall v. Campbell* (41 U. C. Q. B., 332), as correctly expressing the law of Ontario; but they mainly relied upon the proposition that, in those provinces of the Dominion where the common law of England prevails, members of the Canadian Bar can neither have action for their fees nor make a valid agreement as to their remuneration unless that right has been conferred upon them by statute. In these circumstances, it was maintained that the right of the Respondent to

sue for his fees must depend either upon the law of Ottawa, the *locus contractus*, or upon the law of Nova Scotia, the *locus solutionis*, and that in neither case was any suit competent to him.

Were it necessary to decide all the points thus taken by the Appellant, questions of much nicety would arise. It is by no means clear either that Ottawa was the *locus contractus*, or that Nova Scotia was, in a strict sense, the *locus solutionis*. It is at least a plausible view of the case that the contract was completed in Quebec at the moment of time when the Respondent posted his letter accepting the employment offered him by the Minister of Justice. On the other hand, although the Commission was to sit at Halifax, it is perfectly plain that the work expected of the Respondent, and actually performed by him, was by no means confined to advocacy of the Dominion claims during the sittings of the Commission. His employment was not limited to what would, in this country, be considered the proper duties of a Counsel, but embraced the work of an agent or solicitor; in point of fact he was employed to prepare the case of the Dominion Government, as well as to plead in their behalf. That such was the understanding of both parties may be inferred from the known professional status of the Respondent, as well as from the fact that, in pursuance of the so-called retainer of the 1st October 1875, the Respondent had papers sent him, and was engaged at Quebec during eighteen months, with occasional visits to Ottawa, in collecting and putting in shape materials for framing and supporting the claim which was to be urged before the Commission.

Then, as regards the other questions of law raised by the Appellant, there is much difficulty. Their Lordships are willing to assume that the law of England, so far as it concerns the

right of the Bar of England to sue or make agreements for payment of their fees, was rightly applied in the case of *Kennedy v. Brown* (13 C. B., N. S., 677); but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Chief Justice Erle. It appears to them that the decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy. Even if these considerations were admitted, their Lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law.

But it is unnecessary, in the view which their Lordships take of this case, to decide any of these questions which were raised by the argument for the Appellant. The right of the Respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given, or upon the law of the locality within which it was to be performed. When an advocate or other skilled practitioner is, by law and the custom of his profession, entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, express or implied, be held to have employed him upon the usual terms according to which such services are rendered. That is the implied condition of every contract of employment which is silent as to remuneration; and it is a condition dependent upon the professional

status and rights of the person employed, and not upon the law of the place where his services are to be given, so long as he is employed in his professional capacity. A member of the Bar of England, in accordance with the law of that country and the rules of the profession to which he belongs, renders and professes to render services of a purely honorary character. If, in his professional capacity as an English barrister, he accepted a retainer to appear and plead before Commissioners or Arbitrators in a foreign country, by whose law Counsel practising in its regular Courts were permitted to have suit for their fees, that would not give him a right of action for his honoraria. His client would have a conclusive defence to such an action, on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of that Bar are understood to practise.

The Respondent is a member of the Quebec section of the Bar of Lower Canada, and it was in that capacity that he was retained by the Government as one of their Counsel before the Fisheries Commission. The Respondent has the rank of Queen's Counsel conferred on him by patent; but that circumstance does not appear to their Lordships to affect the present case. It gave him a certain precedence in a question with other members of his Bar, but it made no change upon the duties and obligations incumbent on him as a practising member of the Bar, or upon his privileges as such, including the right to sue for his fees. The retaining letter of 1st October 1875 makes no mention of fees, and their Lordships are accordingly of opinion that it must be held to have been an implied condition of the employment thereby offered that the Respondent was to be remunerated for his services upon the same terms on which these services were rendered

to clients in Quebec. The Respondent was engaged and undertook to go to Halifax as a Quebec Counsel, subject to the same rules of his Bar, by which his conduct as a lawyer was regulated in Quebec, and it would be a strange result, if, retaining his *status* and performing his work as a member of the Quebec Bar, he was, nevertheless, to be stripped of the privileges attaching to that *status* as soon as he entered the Province of Nova Scotia.

A few weeks after his acceptance of the letter of 1st October 1875, the Respondent received a retaining fee of 1,000 dollars; and thereafter the subject of Counsel's remuneration does not appear to have been considered until May 1877, when it was discussed, at Ottawa, in the course of one or two personal interviews between Sir Albert Smith, Minister of Marine and Fisheries in the Government of Canada, and the Respondent. The parties are widely at variance in regard to what actually passed on the occasion of these interviews. The allegation made by the Respondent in his petition is,—

“ That, on the eve of his leaving his home for Halifax, to wit, in May 1877, your petitioner made with the Department of Marine and Fisheries a temporary and provisional arrangement, under which your petitioner should be paid one thousand dollars a month for current expenses while in Halifax, leaving the final settlement of fees and expenses to be arranged after the closing of the Commission.”

On the other hand, it is alleged in the defence filed for the Appellant,—

“ That the arrangement made with the suppliant, referred to in his petition, under which he was to be paid one thousand dollars a month while in Halifax, was not a temporary and provisional arrangement as alleged, but that the said one thousand dollars a month was, with other moneys previously paid to the suppliant, to be accepted by him in full for his services and expenses.”

The Commission met at Halifax on the 16th June, and brought its labours to a close on the 23rd November 1877, having sat, with occasional

adjournments, for a period of five months and seven days. In addition to the retaining fee already mentioned, the Respondent received a refresher of 1,000 dollars, and also six monthly payments of 1,000 dollars each, during the sitting of the Commission, making a sum total of 8,000 dollars. According to the Respondent, these sums were paid him to account of his remuneration, the precise amount of his fees and expenses being left for adjustment subsequently. According to the Appellant, they were paid to and received by the Respondent as in full of his whole claim for fees and expenses. Both parties are agreed that, in May 1877, it was arranged that these sums (to the extent of 7,000 dollars) should be paid to the Respondent; but they differ as to the footing upon which they were to be paid.

Being of opinion that, by the terms of his employment in 1875, the Respondent was entitled to a *quantum meruit* in respect of the services which might be required of him, their Lordships think that it lies with the Appellant to make out that the Respondent's original right to remuneration was varied by subsequent agreement; and they have also come to the conclusion that the Appellant has failed to establish the existence of such an agreement. The evidence upon this point, which need not be referred to in detail, is very unsatisfactory. It is abundantly plain that the impression honestly derived by Sir Albert Smith, from his interviews with the Respondent in May 1877, was, that the Respondent had agreed to accept a refresher of 1,000 dollars, and a payment of the same amount monthly, during the sittings of the Commission, as in full of all claims for remuneration. But in order to alter the then existing rights of the Respondent, it is not enough for the Appellant to show that such was the impression created in the mind of Sir

Albert Smith; he must also prove that the terms of the arrangement, as understood by Sir Albert Smith, were understood in the same sense, and were assented to by the Respondent. But the Respondent swears distinctly that he understood and believed the arrangement to be provisional merely; that its object was to fix the sums which were to be paid him to account, leaving the balance payable to him for after adjustment, and there are circumstances proved in the case which seem to establish beyond question that the Respondent, at the time, sincerely entertained that belief. Then the evidence of Mr. Whiteber, the Commissioner of Fisheries for Canada, and the only third party present at these interviews, is not only very inconclusive, but what he does state, as to the language actually used by the principal parties to the arrangement then made, tends to support the Respondent's understanding of its terms. In that state of the evidence, their Lordships are unable to hold that the Appellant has satisfied the *onus* incumbent on him of proving the new arrangement alleged in his defence.

In the Courts below, whilst the learned Judges were equally divided as to the result of the case, there was a remarkable diversity of judicial opinion in regard to the law applicable to its decision. The cause was tried before Mr. Justice Fournier, who, on the 12th January 1881, gave judgement in favour of the Respondent, and fixed the amount of fees and expenses still remaining due to him, in remuneration of his services, at 8,000 dollars; and it is not maintained that the amount awarded by the learned Judge is excessive, if the Respondent has a right of action, and that right is not barred by the alleged arrangement of May 1877. The cause was then taken, by appeal, before the Supreme Court of Canada, who gave their

judgement upon the 13th May 1882. Chief Justice Ritchie and Justices Strong and Gwynne were in favour of allowing the appeal; but Mr. Justice Fournier, who was a member of the Full Court, adhered to the view which he had taken as Judge of First Instance, and Justices Henry and Taschereau, in substance, agreed with him. In consequence of this equal division of opinion in the Supreme Court, the order appealed from was confirmed, and the appeal dismissed with costs.

Their Lordships do not consider it necessary to notice the great variety of reasons assigned by the learned Judges of the Supreme Court, in support of the views which were severally adopted by them, with the exception of one point raised in the judgement of Mr. Justice Gwynne.— That point is deserving of notice, for this reason, that if the opinion of the learned Judge, which is based upon the provisions of the Petition of Right Act for Canada, be well founded, the Respondent, though he might have suit for recovery of his fees from any subject, could not recover them, by petition, from the Crown. By a pardonable error, Mr. Justice Gwynne refers to the Act of 1875, instead of the “Petition of Right Canada Act, 1876” (39 Vict., cap. 27), which repealed the statute of the previous year. Section 19 (3), which is identical in expression with the similar section of the repealed Act, provides that:—

Sect. 19. “Nothing contained in this Act shall:—

- (3.) “Give to the subject any remedy against the Crown
(a) in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force there prior to the passing of the Imperial Statute 23 & 24 Vict., cap. 34.”

The learned Judge seems to hold that these provisions place a Quebec lawyer on precisely the same footing as an English barrister, so far as

regards his right to proceed against the Crown for recovery of his fees. But it appears to their Lordships that the process of reasoning by which the learned Judge arrives at that conclusion confounds two things which are essentially different, "right" and "remedy." The statute does not say that a Quebec lawyer shall, in all cases, have only the same right, against the Crown, as a member of the English Bar. What it does enact is, that no subject in Canada shall be entitled to the "remedy" provided, unless he has a legal claim, such as could have been enforced by Petition of Right in England, prior to the Imperial Act of the 23rd and 24th Victoria. It is impossible to hold that a member of the Quebec Bar who, by law and practice, is permitted to sue for his fees, when he seeks his remedy against the Crown, under the Canadian Act of 1876, has no such legal claim, and that he sues under circumstances similar to those in which an English barrister is placed, who, neither by the usage of his profession, nor the law of his domicile, can maintain any action for his fees.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgement of the Courts below, and to dismiss the appeal, with costs.
