1950

Jan. 12
Jan. 25

BETWEEN:

GAR WOOD INDUSTRIES INC.,.....PLAINTIFF;

AND

SICARD LIMITEE,.....DEFENDANT.

Practice—Costs—Discontinuance of action by plaintiff—Rules 107 and 263—Costs to be taxed on the basis of tariff in force at time of discontinuance of action—Disbursement properly incurred in preparation for trial allowed.

Held: That where an action has been discontinued the defendant's right to tax its costs arose upon the filing of the notice of discontinuance and that right was to tax such costs upon the basis of the tariff then in force, and it is not open to the taxing officer to take into consideration an amendment to the Rules made on a later date, unless such amendment is clearly retroactive in its terms.

2. That a disbursement of a reasonable amount incurred for services rendered in preparation for trial and not done prematurely or from an excess of caution is a proper item for taxation on discontinuance as well as after trial.

APPEAL from the decision of the Registrar upon taxation of defendant's bill of costs.

The appeal was heard before the Honourable Mr. Justice Cameron at Ottawa.

C. A. Geoffrion for plaintiff.

H. Gérin-Lajoie, K.C. for defendant.

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CAMERON J. now (January 25, 1950) delivered the following judgment:

In this matter I am asked to review the taxation of the defendant's costs pursuant to Rule 263. Proceedings were instituted by the plaintiff on March 5, 1946, claiming infringement of two patents, an injunction, damages and costs. By order dated November 16, 1948, the matter was set down for trial at Montreal on March 1, 1949. However, on February 23, 1949, the plaintiff gave notice of its application for an order granting leave to wholly discontinue the action; and on February 24 such an order was made by consent, "subject to the payment by the plaintiff of defendant's costs to be taxed herein, and without any other condition being attached to such discontinuance."

On March 4 the plaintiff's solicitors gave notice, pursuant to the order of February 24, that the plaintiff wholly discontinued the said action subject to the payment of the defendant's costs.

The taxation was commenced before the Registrar on September 16, 1949. The bill of costs as submitted contained twenty-two items in all and the main contest on the taxation appears to have been in reference to an item of disbursements—Item 21—which was as follows:

21. Paid by defendant to MM. Marion & Marion, Patent Attorneys, for research work carried on at the Patent Office at Washington in connection with Canadian patents Nos. 388, 439, 418 and 773, and also for work related to the defence of the action: $1,869.12.

The taxing officer on that date reserved his finding and on December 19 completed the taxation, the total amount allowed being $2,513.62, included in which was the whole of Item 21. It is from the allowance of Item 21 that the plaintiff now appeals.

Rule 107 lays down the procedure to be followed upon discontinuance of an action. The first and fourth paragraphs of the Rule, as amended, are not here applicable. Paragraphs 2 and 3 thereof are relevant, the latter being an amendment of *October 31, 1949*. These two paragraphs are as follows:

Rule 107

Para. 2. Save as in this Rule otherwise provided, it shall not be competent for the Attorney-General, petitioner or plaintiff to discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before or after the hearing or trial, upon such terms as to costs,

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and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint struck out.

Para. 3. Costs of all work reasonably, and not prematurely done in preparing pleadings, evidence, briefs, etc., down to Notice of Discontinuance shall be allowed on taxation, subject to review by a Judge in Chambers.

Mr. Geoffrion for the appellant submits that the amendment to the Rule was not retrospective and could not be taken into consideration on the taxation; and that prior to such amendment the tariff of costs contained no provision for payment of such costs upon discontinuance. Mr. Lajoie opposes both these contentions.

I shall consider first the question as to whether the amendment to Rule 107 could be taken into consideration by the taxing officer. It is the general rule of law that *statutes* are not to operate retrospectively. *There is nothing in the amendment which by express enactment or necessary implication from the language used requires a departure from that general rule.* The basis of that general rule is that statutes should be interpreted, if possible, so as to respect vested rights.

The general principle, however, seems to be that *alterations* in *procedure* are retrospective unless there be some good reason against it (Maxwell on Interpretation of Statutes, 9th ed., p. 233).

In Craies on Statute Law, 4th ed., p. 337, it is stated, "But there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions unless a contrary intention is expressed or clearly implied."

In *Earle et al.* v. *Burland et al.* (1), it was held by Street, J., that the quantum of costs, as well as the right to them, is ascertained at the time of judgment and the quantum cannot, without the clearest words, be altered by a subsequent change in the tariff, or by the creation of a tariff which had no existence until after the judgment.

Reference may also be made to *Delap et al.* v. *Charlebois et al.* (2). In that case judgment was given by the Court of Appeal in 1895, dismissing the appeal and ordering the defendants to pay the costs of the appeal. The defendants appealed to the Supreme Court and obtained a decision in their favour, against which the plaintiff successfully

(1) 8 O.L.R. 174. (2) 18 Ontario Practice Reports, 417.

appealed to the Privy Council. In the Privy Council in 1898 the judgment of the Court of Appeal was sustained and restored, so far as the costs were concerned. In 1896 Item 155 of the Tariff of Costs had been repealed and another item substituted therefor.

In that case, Street, J., said at p. 419:

The plaintiffs have appealed from this ruling, and I am of opinion that the appeal should be dismissed, for the following reasons. The remuneration of a solicitor for the professional services rendered by him is fixed by tariff, and each particular service as it is performed entitled him to charge to his client the particular sum authorized by the tariff then in force for the particular service performed. Before I could hold that a solicitor who performs, in 1894, a service for which he is entitled under the tariff then in force to charge his client $1, becomes entitled to increase his charge for that service performed in 1894 to $2, because before he taxes his costs a new tariff has come into force, I should require to have my authority for so holding very clear indeed. It is argued that the authority for so holding is very clear indeed, because, all the tariffs previously existing having been abolished, the taxing officer must be governed by the one in force, to which he is referred to the exclusion of all others.

But the provisions of the Interpretation Act are, by Rule 5, made applicable to the Rules, and sec. 50 of that Act, which is indeed only declaratory of an accepted rule of construction, declares that the repeal of an Act shall not affect any rights existing or established under the repealed Act before the date of the repeal: see *Butcher* v. *Henderson*, (1868) L.R. 3 Q.B. 335. A solicitor, therefore, who performed services for his client before the Rules of September, 1897, came into force, retains, notwithstanding the repeal of the tariff under which they were performed, his right to be paid at the existing tariff rate, but at no higher rate, for what he did for his client; and the client's liability is not increased by the subsequent tariff for the work done for him under the earlier one. This seems to me to be the only reasonable and proper rule to be applied, and I am not surprised to learn from the taxing officer that it is the principle which has been applied at Osgode Hall during the many years over which his experience extends. The same principle must be applied to the portion of the tariff which relates to counsel fees, as to the portion of it which relates to the allowance to solicitors.

In *re Solicitors* (1), Meredith, C.J.C.P., considered the question of retrospectivity of an amended tariff of costs. He distinguished the case of *Delap* v. *Charlebois* because he thought that the note to the amended tariff, which he was considering, indicated that the latter had a retrospective effect and was applicable to all services rendered before as well as after such rules came into force.

At p. 626 he said:

Whether a statute, or Rule, is or is not retrospective, is, of course, a question of intention; it must be given effect according to its true meaning; and the character of the enactment or Rule, as well as other

(1) 6 O.W.N. 625.

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circumstances, may be very helpful in reaching a true interpretation. Generally statutes and Rules respecting procedure are considered retrospective, in criminal as well as civil proceedings: see *Rex* v. *Chandra Dharma*, (1905) 2 K.B. 335.

My impression has always been that "costs are practice"; and I have some memory of an ancient decision in those words. The first work on the subject at hand, I now find, deals with it in these words: "Statutes governing costs are Rules of practice, and the power to award them, and the amount and items to be awarded, depend upon the statute in force, not at the commencement, but at the termination, of the controversy, or when the right to costs accrues. In the absence of any provision to the contrary, statutes regulating costs are usually held to apply to pending suits."

In my opinion, the defendant's right to tax its costs arose upon the filing of the Notice of Discontinuance and that right was to tax such costs upon the basis of the tariff then in force. The services that were rendered and the disbursements that were made were concluded before the tariff was amended. When the discontinuance was filed the proceedings were at an end and only an incidental matter—the taxation of costs—remained to be completed. But even if I am wrong in that conclusion, I think that at the very latest the bill of costs fell to be taxed in accordance with the tariff in existence at the time the taxing officer commenced the taxation on September 16, 1949. The bill as rendered and submitted for taxation was prepared under the then tariff and while the taxing officer reserved his findings, his consideration of the bill as a whole could not take into consideration any changes in the tariff made after he reserved his finding. The delay in finally determining the matter ought not, in my view, to affect the conclusions to be reached.

In Maxwell, 9th ed., pp. 234-5, it is stated:

But a new procedure would be presumably inapplicable, where its application would prejudice rights established under the old, or would involve a breach of faith between the parties. For this reason, those provisions of the repealed s. 32, Common Law Procedure Act, 1854, which permitted error to be brought on a judgment upon a special case and gave an appeal *upon a point reserved at the trial,* were held not to apply where the special case was agreed to, *and the point was reserved,* before the Act came into operation.

Where a special demurrer stood for argument before the passing of the Common Law Procedure Act, 1852 (c. 76), it was held that the judgment was not to be affected by that Act, which abolished special

demurrers, but must be governed by the earlier law. *The judgment was, in strictness, due before the Act, and the delay of the Court ought not to affect it.*

In my view, therefore, it was not open to the taxing officer to take into consideration the amendment to Rule 107 made on October 31, 1949.

I think, however, that the tariff in effect prior to amendment permitted the taxing officer to include Item 21 as a proper disbursement to be allowed the defendant. It is admitted that the services rendered by Marion & Marion —a firm of Patent Attorneys—were necessarily incurred by the defendant and its solicitors in preparing its defence and in preparation for trial, that it was not done prematurely or from an excess of caution, and that the amount of the item is reasonable considering the nature of the case and the services rendered.

The proper principle upon which party and party costs should be taxed is that the successful party should have an indemnity against costs reasonably incurred in prosecuting or defending the action (Halsbury 2nd ed., vol. 31, p. 214). That principle, however, is subject to the provisions of the applicable tariff. In this Court party and party costs are taxed pursuant to Tariff A, contained in the appendix to the Rules (Rule 263).

In Tariff A, under the heading "To Solicitors," it is provided:

> Except where expressly provided for, disbursements are not included herein, but are left to be allowed by the taxing officer.

Disbursements which are not specifically mentioned are therefore left to the consideration and discretion of the taxing officer and are to be allowed or disallowed on the basis of the principles which I have mentioned. While the amount of Item 21 is substantial and forms about two-thirds of the total bill as taxed, it was a disbursement necessarily and properly incurred by the defendant and I am unable to find that in allowing it to the defendant the taxing officer proceeded upon any wrong principle. That being so, his discretion should not be interfered with on appeal (Halsbury, 2nd ed., vol. 31, p. 215).

I am advised by the taxing officer that it has long been the practice in this Court in taxing bills of costs in patent

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matters, and following a trial, to allow disbursements of the same kind as Item 21—expenses necessarily incurred in investigating relevant patents in Canada and elsewhere. I see no reason why upon a discontinuance the practice should be otherwise.

The appeal will therefore be dismissed with costs to be taxed.

Appeal dismissed.