

1951  
 BETWEEN:

June 12 & 13  
 Sept. 12

FREDERICK ALLAN HAMILTON . . . . . SUPPLIANT;

AND

HIS MAJESTY THE KING . . . . . RESPONDENT.

*Crown—Petition of right—Solicitor employed as an agent of the Minister of Justice—“Instructions to Agents” issued by the Department of Justice—Accounts for professional services rendered by an agent subject to taxation by Deputy Minister of Justice—The Consolidated Revenue and Audit Act, S. of C. 1930-1931, c. 27, s. 29(1)—Liability of a solicitor for his wrongful acts—Action dismissed—Counter-claim allowed.*

Suppliant, a lawyer, was employed as an agent of the Minister of Justice in connection with various claims and proceedings. His accounts were sent to the Department of Justice but remained unpaid. Suppliant now claims \$273.48 for his services. Alleging negligence on suppliant's part in searching the title to a certain farm property—search that he was instructed to make—and the delivery of a faulty certificate of title, the respondent by way of a counter-claim seeks to recover the loss or damage suffered by him as a consequence of suppliant's negligence.

*Held:* That the action must fail since suppliant's accounts were not taxed by the Deputy Minister of Justice as required by clauses 13, 14 and 15 in the “Instructions to agents” issued by the Department of Justice.

2. That the action must also fail because there was not an unencumbered balance available out of the amount authorized by Parliament for the particular service to pay the commitments under the alleged contracts or agreements within the meaning of s. 29 of the Consolidated Revenue and Audit Act, 21-22 Geo. V, c. 27.
3. That the suppliant was negligent in giving a certificate of title without having searched the title personally, but relied on the report of the registrar of deeds which report was not accurate.

PETITION OF RIGHT by suppliant to recover from the Crown the amount of his fees for services rendered.

The action was tried before the Honourable Mr. Justice Angers at Sydney.

The suppliant appeared in person.

*E. F. Cragg* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J. now (September 12, 1951) delivered the following judgment:

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This is a petition of right whereby the suppliant claims from His Majesty the King the sum of \$273.48 for services rendered, with interest and costs.

In his petition the suppliant alleges in substance:

he was employed to take proceedings on behalf of respondent against W. N. MacDonald and the Margaree Steamships Company Limited for \$252, being charges for mooring of the barge *Norman Mac* to the government wharf at Leitches Creek, Nova Scotia, from August 1, 1946, to December 31, 1947, and for electrical energy supplied to the *S.S. Beaver* and for summer and winter berths for the seasons 1946 and 1947, in the sum of \$167.

on or about July 14, 1948, he issued a writ in the county court of District No. 7 at Sydney, Nova Scotia, for \$167, being the amount of the claim as subsequently reduced by the department, and he recovered a judgment on August 13, 1948, against said W. N. MacDonald and the Margaree Steamships Company Limited for \$167 and \$25.15 for costs;

on or about September 29, 1948, he issued an execution and delivered it to the sheriff for seizure of the defendant's goods and chattels;

the sheriff returned to him the sum of \$198.39, being the amount recovered under judgment and he (the suppliant) remitted the said amount to the Department of National Revenue;

on or about January 15, 1949, he rendered an account for his services to the Department of National Revenue for \$81 fees and \$12.60 disbursements, making a total of \$93.60; this account has not been paid;

on or about February 7, 1949, he was retained by the Enforcement Counsel of the Wartime Prices and Trade Board to take proceedings against one Celia Brooks (Brooks Store) for violations of the Wartime Prices and Trade Board regulations; on February 14, 1949, he laid an information against the said Celia Brooks and on the 25th of the same month the accused pleaded guilty;

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on or about February 25, 1949, he rendered an account for services in the said case to the Regional Director, War-time Prices and Trade Board, at Halifax, for \$39 fees and 88 cents disbursements, making a total of \$39.88; the said bill has not been paid;

on or about April 27, 1949, he was instructed to lay an information against Rose Gallen for failure to file income tax returns for 1946 and 1947 and on May 3, 1949, he laid the said information; on May 12, 1949, the accused pleaded guilty before the magistrate and was fined \$25 and costs; he remitted the fine and costs to the department;

on or about May 12, 1949, he rendered a bill to the Department of National Revenue for services rendered in the said case for \$20; the said account has not been paid;

on or about April 27, 1949, he was instructed by the Department of National Revenue to lay an information against Louis Gallen for failure to file his income tax returns for 1946 and 1947; he laid the said information; on May 12, 1949, Louis Gallen appeared and pleaded guilty to the offence charged and was fined \$25 and costs; he remitted the fine to the department;

on or about May 12, 1949, he rendered his bill to the Department of National Revenue for \$20 for services rendered in the said case; this bill has not been paid;

on or about March 24, 1949, he was instructed by the Department of National Revenue to lay an information against Clarence P. Thompson for failure to file his income tax return for the years 1940 to 1946, inclusive; he laid the said information; on April 14, 1949, the accused appeared before the Magistrate and pleaded guilty to the offence and was fined \$25 and costs; he remitted the fine to the Department of National Revenue.

on April 18, 1949, he rendered an account to the Department of National Revenue for \$20 for services rendered in this matter; the said account has not been paid;

on or about March 29, 1949, he was instructed by the Department of National Revenue to lay an information against Daniel MacKenzie for failure to file his income tax returns for the years 1944 to 1946; he duly laid the said information; on April 19, 1949, the accused appeared before

the magistrate and entered a plea of guilty to the offence and was ordered to pay a fine of \$25 and costs; he remitted the fine to the Department of National Revenue;

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on April 20, 1949, he rendered his bill for services in the above matter for the sum of \$20; the said bill has not been paid;

on or about March 24, 1949, he was instructed by the Department of National Revenue to lay an information against Charles E. Murphy for failure to file his income tax returns for the years 1941, 1944 and 1945; he duly laid the said information; on April 14, 1949, the accused appeared before the magistrate and pleaded guilty to the offence and was fined \$20 and costs; he remitted the said fine to the Department of National Revenue;

on or about April 18, 1949, he rendered his account, amounting to \$20, for services rendered in the above matter;

on or about March 24, 1949, he was instructed by the Department of National Revenue to lay an information against John F. MacNeil for failure to file his income tax returns for the years 1945 and 1946; he duly laid the said information; on April 14, 1949, the accused appeared before the magistrate and pleaded guilty; the magistrate imposed a fine of \$25 and costs; the said fine was remitted to the Department of National Revenue;

on April 18, 1949, he rendered his account, amounting to \$20, for services rendered in the above matter; the said account has not been paid;

on or about March 29, 1949, he was instructed by the Department of National Revenue to lay an information against James Vasilakis for failure to file his income tax returns for the year 1941; he duly laid the said information; on April 14, 1949, the accused appeared and pleaded guilty; the magistrate imposed a fine of \$20 and costs; on April 18, 1949, he remitted the fine and costs to the Department of National Revenue;

on April 18, 1949, he remitted his bill, amounting to \$20, for services rendered to the Department of National Revenue in the above matter; this account has not been paid;

1951		the following amounts remain unpaid:				
HAMILTON	amount due under paragraph 5 herein					\$ 93.60
U.	" " " "	8	"			39.88
THE KING	" " " "	11	"			20.00
Angers J.	" " " "	14	"			20.00
	" " " "	17	"			20.00
	" " " "	20	"			20.00
	" " " "	23	"			20.00
	" " " "	25	"			20.00
	" " " "	28	"			20.00
Total .....						\$273.48

the Department of National Revenue above referred to is a department of the Government of Canada, established under the Department of National Revenue Act, R.S.C. 1927, chapter 34;

the Wartime Prices and Trade Board is a department of the Government of Canada established by Order in Council P.C. 2516.

In his statement of defence His Majesty the King pleads as follows:

he does not admit any of the allegations of the petition of right;

if said allegations are true he says that a term of the suppliant's employment as an agent of the Minister of Justice was that he was to be paid for professional services such amounts as the Deputy Minister of Justice might determine on taxation and that none of the accounts above referred to have been taxed;

if one or more contracts, agreements or undertakings were entered into as alleged in the petition of right, which is denied, they involved a charge on the Consolidated Revenue Fund and neither the Comptroller of the Treasury nor an officer of the Department of Finance designated by him and approved by the Treasury Board had, in any case, certified that there was a sufficient unencumbered balance available out of the amount authorized by Parliament for the particular service to pay the commitments under the alleged contracts, agreements or undertakings within the meaning of section 29 of the Consolidated Revenue and Audit Act, chapter 27 of the Statutes of Canada, 1931;

for these reasons the Deputy Attorney General of Canada, on behalf of His Majesty the King, prays that the petition of right be dismissed with costs.

In addition to his statement of defence the respondent filed a counterclaim in which he says substantially as follows:

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by letter dated July 14, 1947, from H. S. Prince, the District Solicitor at Saint John, N.B., of the Department of Veterans' Affairs, to the suppliant, the latter was instructed, as agent of the Minister of Justice, to search the title to a certain farm property at Howie Centre, Nova Scotia, which one Stanley B. Steele, of Sydney, had agreed to sell to the Director of Veterans' Land Act; by this letter the suppliant was instructed to "proceed to search this title immediately" and forward his certificate in duplicate as soon as possible, so that the purchase might be completed without delay;

by a letter dated July 16, 1947, to the said Prince the suppliant acknowledged receipt of the letter previously referred to and advised that he would proceed with the search and advise him in due course;

by letter dated July 25 to the said Prince the suppliant advised that the title in the property was in order, subject to the description being submitted, and that, as soon as he received the description, he would forward a formal certificate;

by letter dated August 14 the suppliant forwarded to the said Prince duplicate copies of the deeds, affidavit of the vendor and certificate of title;

the certificate of title reads in part as follows:

All that certain lot, piece or parcel of land situate, lying and being at Howie Centre, in the County of Cape Breton, and more particularly bounded and described as follows:

(I do not deem it necessary to reproduce the description).

I hereby certify that the title to the above described property is free from encumbrances, except as set out below.

Dated at Sydney, in the County of Cape Breton, this 4th day of August, A.D. 1947.

F. ALLAN HAMILTON,  
 Agent for the Minister of Justice.

Encumbrances:

1. Municipal taxes to date.

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the said Prince also received from suppliant the following documents:

Re: Deed Stanley B. Steel to the Director, the Veterans' Land Act, dated the 2nd day of August, A.D. 1947.

I hereby certify that the Director, The Veterans' Land Act, now has good title in fee simple to the property mentioned in the above deed, free from all encumbrances and/or easements whatsoever, including taxes to June 30, 1947.

Dated at Sydney, in the County of Cape Breton, this 26th day of August, A.D. 1947.

F. ALLAN HAMILTON,  
 Agent for the Minister of Justice.

on August 1, 1947, the said Steele gave to the Director of Veterans' Land Act a warranty deed to the said property and the purchase price of \$300 was paid to the said Steele;

on August 25, 1947, the Director entered into a contract with Charles W. Steele, of Sydney, for the erection by Steele of a dwelling house on the said property for \$5,850, the said house to be built for a veteran, Roy Sinclair Anthony, pursuant to an agreement between the veteran and the Director under the Veterans' Land Act, chapter 33 of the Statutes of Canada, 1942-43;

by letter dated October 8, 1947, the said Prince, on behalf of His Majesty, forwarded to the suppliant a cheque for \$77.54, of which \$38.61 was in payment for the services rendered by the suppliant in acquiring the land in question;

the Director subsequently learned, after construction of the said house had been commenced, that his title to the land was defective and that he had not received from Stanley B. Steele good title to the property, free from all encumbrances;

the land which was included in the conveyance to the Director from Stanley B. Steele, but to which the Director did not thereby secure good title, was expropriated on July 16, 1949, by depositing in the Registry Office at Sydney a plan and description of the land in accordance with The Expropriation Act R.S.C. 1927, chapter 64;

the suppliant, in breach of his duty:

- (a) failed to search the title to the property at all;
- (b) if he searched the title, he did not search it in the manner in which it should have been searched by a reasonable and competent solicitor;

(c) if he searched the title in the manner in which it should have been searched by a reasonable and competent solicitor, the report that he made to the Director was not a report that a reasonable and competent solicitor would have made;

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by way of counter claim the Deputy Attorney General claims on behalf of His Majesty:

- (a) an amount equal to the amount of compensation that is agreed upon or that is adjudged as compensation for the expropriated land;
- (b) an amount equal to the amounts paid or payable by His Majesty by way of legal costs and expenses to secure good title to the land in question;
- (c) such other relief as this Court may seem meet; and
- (d) the costs of this counterclaim.

I deem it apposite to recapitulate the evidence briefly. [Here the learned judge reviews the evidence and proceeds]:

It was submitted by suppliant that the petition of right was the proper procedure to adopt in the present case. This seems to me obvious; there was no other recourse at his disposal. The law in this connection is clear: Exchequer Court Act, section 37, the first paragraph whereof reads as follows:

Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.

See also the Petition of Right Act, R.S.C. 1927, chapter 158.

Counsel for respondent drew the attention of the Court to the fact that the Court has jurisdiction in matters of contract in virtue of section 18 of the Exchequer Court Act. This question was not challenged by suppliant. The decision of the Judicial Committee of the Privy Council in re *The Queen v. Doutre* (1), although referred to by counsel in relation to another aspect of the case, seems to me to dispose of the point.

The defence on the merits is twofold: 1° accounts of agents, before being paid, must be taxed by the Deputy

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Minister of Justice; 2<sup>o</sup> there was not an unencumbered balance available out of the amount authorized by parliament for the particular service to pay the commitments under the alleged contracts or agreements within the meaning of section 29 of the Consolidated Revenue and Audit Act, 21-22 Geo. V, chapter 27. The first paragraph of section 29, which is the only one having some relevancy, is thus worded:

29. (1) No contract, agreement, or undertaking of any nature, involving a charge on the Consolidated Revenue Fund, shall be entered into, or have any force or effect, unless the Comptroller, or an officer of the Department of Finance designated by him and approved by the Treasury Board, shall have certified that there is a sufficient unencumbered balance available, out of the amount authorized by Parliament for the particular service, to pay any commitments under such contract, agreement or undertaking which would, under the provisions thereof, come in course of payment during the fiscal year in which such contract, agreement or undertaking is made or entered into.

With regard to the first ground of defence, reference may be had to the Instructions to agents, exhibits A and B. Clause 15 in exhibit A stipulates:

15. Accounts rendered for professional services will be examined by the Deputy Minister of Justice and will be subject to taxation and reduction at his discretion. His decision will be final and conclusive and not subject to appeal. This method of determining and fixing the amount of an agent's remuneration is the basis on which any business has been or may be entrusted to any agent.

No account which does not bear the following certificate will be considered,

I hereby certify that I rendered the services indicated above and that this account truly shows the fees claimed, moneys disbursed and all moneys received from any source whatever by me in connection with the subject matter of the account.

Agent of the Minister of Justice

Clauses 13 and 14 in exhibit B, although differently worded, are to the same effect:

13. Accounts of agents for professional services are taxed by the Deputy Minister of Justice whose taxation is not appealable. This is the basis on which all work is entrusted to an agent.

14. All copies of an agent's account must bear the following certificate signed by the agent:

I hereby certify that I rendered the services indicated above and that this account truly shows the nature of the services, the time occupied, the fees claimed, disbursements made and all moneys received by me in the matter.

Agent of the Minister of Justice

Clauses 13, 14 and 15 are clear and categorical and, although liable to give rise to arbitrary decisions, they must be followed.

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On this ground alone I believe that the action must fail.

The second reason set forth in the statement of defence is that there was not, out of the amount authorized by parliament for the particular service involved, a sufficient unencumbered balance available to pay any commitments under the said contract or agreement which would, under its provisions, come in course of payment during the fiscal year in which the contract or agreement is made. This reason is based on section 29 of the Consolidated Revenue and Audit Act, 21-22 Geo. V, chap. 27, hereinabove reproduced. For this additional reason I am of opinion that the suppliant is not entitled to the relief sought.

The suppliant was negligent in giving a certificate of title to the Director concerning the Stanley B. Steele property without having searched the title personally, but relied on the report of the registrar of deeds for the County of Cape Breton, John Roderick Gillies. Unfortunately, this report was not accurate.

The liability of a solicitor for his wrongful act or neglect of his duty to his client has been the subject of numerous decisions and various commentaries by authors. The doctrine that a solicitor, as any other person, is liable for his wrongful acts is generally recognized: *Mayne on damages*, 11th edition, 497; *Bullen and Leakes Precedents of pleadings*, 54; *Howell v. Young* (1); *Godefroy v. Jay* (2); *Hadley et al. v. Baxendale et al.* (3); *in re Dangar's Trusts* (4); *Hett v. Pun Pong* (5); *Blyth v. Fladgate* (6); *Gould v. Blanchard* (7); *Finkbeiner v. Yeo* (8); *Marriott v. Martin* (9); *Johnson v. Solicitor* (10). Mayne relates the doctrine clearly and I deem it apposite to quote a passage from his treatise (p. 497):

Damages in actions against solicitors for neglect of their duty are governed by the same principles as those laid down in the case of sheriffs. The plaintiff is entitled to be placed in the same position as if the solicitor had done his duty. But he is entitled to no more. Therefore, where no diligence could have been effectual, as where the client had

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| (1) (1826) 108 Eng. Rep., 97.  | (6) (1891) 1 Ch. D., 337.   |
| (2) (1831) 131 Eng. Rep., 159. | (7) (1897) 29 N.S.R. 361.   |
| (3) (1854) 156 Eng. Rep., 145. | (8) (1915) 9 W.W.R. 891.    |
| (4) (1889) 41 Ch. D., 178.     | (9) (1915) 21 D.L.R. 463.   |
| (5) (1890) 18 S.C.R. 290.      | (10) (1917) 36 D.L.R., 239. |

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no ground of action or defence, the solicitor cannot be liable for negligence in some step in the proceedings, unless it has caused loss independent of the necessary result of the suit, or other proceeding. It lies upon the defendant, however, to establish this defence affirmatively, and the fact that the plaintiff has suffered no actual injury is no bar to the action, if otherwise maintainable. He is still entitled to nominal damages for the breach of implied contract committed by him.

The authors and the jurisprudence distinguish the damages which may reasonably be considered as arising from a breach of contract and those which would not arise in the ordinary course of things but which may arise due to circumstances peculiar to the case. I do not think necessary to deal with this distinction, since the liability of the suppliant evidently arises from his failure to search the title.

I may say that the suppliant appeared to me to be honest, reliable and trustworthy; his demeanour in Court impressed me favourably. Notwithstanding this, I have no other alternative but to declare that the suppliant is not entitled to the relief sought by his petition.

The respondent will be entitled to his costs against the suppliant, if he deems fit to claim them.

There remains the counterclaim. Having reached the conclusion that the suppliant was guilty of negligence in the exercise of his duties, I must condemn him to pay to His Majesty the loss or damage suffered by him as a consequence of suppliant's negligence. Said loss or damage amounts to \$1,276 as follows: \$926 for the delay and the increased cost of construction of the Anthony house and \$350, costs of the expropriation of the Coonan property, rendered inevitable by the faulty certificate of title delivered by suppliant.

As intimated by the suppliant, the respondent was incomprehensibly negligent in taking eighteen months to decide whether he would pay \$350 for a small parcel of land or take a chance in a lawsuit. Undoubtedly His Majesty did not display much haste in the matter. I may note incidentally that this way of acting is rather customary on the part of the Crown. Be that as it may, I do not believe that the dilatoriness of His Majesty can relieve the suppliant of his responsibility.

There will be judgment against the suppliant maintaining the counterclaim for \$1,276.

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As in the main action, His Majesty the King will be entitled to his costs, if he sees fit to claim them.

*Judgment accordingly.*