1925.

Present : Jayewardene A.J.

MOONESINGHE *v.* PEREIRA *et al.*

66—C. R. Colombo, 19,715.

Advocate—Action for refund of fees not maintainable—English law.

An advocate cannot sue or be sued by a client in respect of fees due to him or paid to him.

An advocate in Ceylon stands towards his clients in the same legal position as a barrister-at-law in England.

The principle laid down in *Kennedy v. Broun* [1] applied.

The rules of the Roman-Dutch law on the subject have no application to local advocates.

THE plaintiff through his proctor retained the defendants' testator, who was a barrister-at-law, an advocate of the Supreme Court, and a King's Counsel, to appear for him in a case in appeal. Before the appeal could be heard, the advocate died, and it is admitted that no work was done for the fee paid to him. After the death of the advocate, the plaintiff requested the defendants, the advocate's executors, to return the fee which the defendants refused. The plaintiff instituted the present action for the recovery of the fee, and the learned Commissioner of Requests gave judgment for the plaintiff.

E. J. Samarawickreme, K.C. (with him *R. L. Bartholomeusz*), for defendants appellants.

L. H. de Alwis, for plaintiff, respondent.

June 17, 1925. JAYEWARDENE A.J.—

This action raises an interesting question affecting the legal profession, namely, whether an advocate in Ceylon can sue or be sued in respect of fees due or paid to him. The plaintiff in the present action retained the defendants' testator who was a barrister-at-law, an advocate of this Court, and a King's Counsel, to appear for him in appeal in case No. 101 (S.C.), D.C. Colombo, No. 8,211. Before the appeal could be heard, the advocate died, and it is conceded that no work was done for the fee paid to him. The advocate was retained by the plaintiff's proctor who sent a letter to the advocate. The fee was handed to the advocate by the

[1] *(1863) 7 L. T. 626 (630).*

client (plaintiff) personally. After the death of his advocate, the plaintiff requested the defendants, the advocate's executors, to return the fee to enable him to retain other counsel. The executors had arranged with another advocate to argue this and some other cases in which their testator had been retained, but this arrangement was not approved by the plaintiff who desired to retain and did retain an advocate of his own choice. The defendants refused to return the fee. The plaintiff instituted the present action for the recovery of the fee paid. The defendants in their answer raised various pleas. They denied that the fee was paid by the plaintiff, and said it was paid by his proctor, and that they had made satisfactory arrangements for the argument of the plaintiff's case in appeal. They also denied that any cause of action had accrued to the plaintiff to recover the money as it was a fee paid to an advocate. The facts not being in dispute, the main issue raised for decision was whether an action can be maintained for the refund of fees paid to an advocate ?

The learned Commissioner of Requests, after hearing some evidence and argument, decided in favour of the maintainability of such an action. He held that as under the Roman-Dutch law, which he thought applied to a case of this kind, an advocate can sue for his fees, an advocate in Ceylon can do so, and can also be sued for its return, if there has been—as in this case—a total failure of consideration. He also held that although the defendants' testator was a barrister-at-law and a King's Counsel, he had to take his oath as an advocate of the Supreme Court of this Colony, and that it was in the latter capacity that he practised his profession. In his opinion the legal relations between an advocate and his client in Ceylon were not the same as those between a barrister-at-law and his client in England, where the barrister-at-law has no dealings with his client, but is retained by his solicitor. The learned Commissioner rightly observed that under the English law there is no contractual relationship between counsel and client, and that counsel cannot sue the client for his fees, nor has the client any right of action against counsel in respect of his professional engagements. But, in his opinion, this principle was inapplicable to advocates in Ceylon.

The decision of the question, it seems to me, must depend upon the view we take of the legal position of an advocate towards his client under the law of Ceylon. Advocates and proctors are admitted and enrolled in Ceylon not under the Common law—the Roman-Dutch law—but by virtue of the powers conferred on the Supreme Court by the Charter of 1833 (section 17) and affirmed by the Courts Ordinance, 1889 (section 18). It seems, therefore, to be doubtful whether the principles which regulated the rights and obligations of advocates under the Roman-Dutch law would be applicable to advocates enrolled under our law.

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Under the Roman-Dutch law a party to an action can be represented by a proctor, or an advocate, or by both. (*Voet 3, 3, 1.*) This is not possible under our law, for under section 24 of the Civil Procedure Code "an advocate instructed by a proctor for this purpose (that is, of any appearance, application, or act in any Court) represents the proctor in Court." As regards fees the Civil Procedure Code makes express provision for their taxation and recovery. Under section 208, the term costs includes "fees and charges of advocates and proctors." Under sections 72 and 212, the right of a proctor to a lien is recognized, but no such right is granted to an advocate, although according to *Voet 6, 1, 3,* an advocate under the Roman-Dutch law did have such a right, for "expenses made." Section 215 of the Civil Procedure Code recognizes the right of a proctor to bring an action for costs against his client. Its material words are as follows :—

> "No proctor shall commence or maintain any action for the recovery of any fees, charges, or disbursements at law until the expiration of one month or more after he shall have delivered unto the party charged therewith, or left with him at his dwelling house or last known place of abode, a bill of such fees, charges, and disbursements subscribed by such proctor."

The proctor includes in his bill the fees, if any, paid by him out of his own money to the advocate. What is due to a proctor is called in schedule III. to the Civil Procedure Code "costs and charges," and what is paid to an advocate is called "fees."

The right of an advocate to bring an action for his fees is not recognized by the Code, and no procedure is indicated for their taxation at the instance of an advocate. No such provision has been made in the Code, because our law does not recognize the right of an advocate to sue for his fees. Our law does not allow the appearance of an advocate in Court, unless he is instructed by a proctor. There are, no doubt, certain sections (806, 809 (*b*), 820), in part X. of the Code which provides a "special procedure for Courts of Requests" which appear to recognize the right of an advocate to act without a proctor in cases instituted in Courts of Requests, but I believe the Supreme Court firmly put down the attempt of an advocate at Kegalla to act without a proctor under one of these sections. Under the Criminal Procedure Code a "pleader" means (1) an advocate ; (2) any person authorized under any law for the time being to practise in such Court, and under section 287 "every person accused before any criminal Court may of right be defended by a pleader." It may be contended that in view of the definition of the term "pleader" an advocate can defend an accused without being instructed by a proctor. I do not think this would necessarily follow, if the rule of the

profession as recognized by this Court is otherwise. Further, the General Council of Advocates has laid down a rule that no advocate should accept a fee in any case, civil or criminal, otherwise than on the instructions of a proctor. See "*The Ceylon Law Review*," *vol. VII., p. 106.*

These rules have no statutory authority, but the Supreme Court recognizes the right of the General Council of Advocates to make rules on questions of professional etiquette. In one instance the Supreme Court invited the General Council of Advocates to decide whether certain practices were consistent with the traditions and etiquette of the profession, and acted on the opinion expressed by the Council. See "*The Ceylon Law Review*," *vol. VII., p. 11.*

The General Council of Advocates insists on the observance of the rule above referred to. The learned Commissioner seems to think that the English rule has no application here as advocates have direct relations with clients. The learned Commissioner, I do not think, has practised at the local bar, and his opinion is evidently based on what he has observed in his Court and on the statement in the evidence that the fee sought to be recovered in this case was paid direct by the client to his advecate. In Ceylon clients generally insist on taking the fee to their advocates with a letter from the proctor. Clients are not satisfied unless they meet their counsel and have a few words with them. This practice seems difficult to stop. I suppose it will disappear gradually. It appears to prevail even in England where the Bar Council has condemned it as "undesirable." But I do not think it affects the rule which, I trust, is universally observed that counsel must be retained by the proctor and not by the client. Although the client may hand the fee personally to the advocate and speak to him about his case, the advocate accepts the fee on the strength of the proctor's letter retaining him.

In the present case I find that the advocate was retained by the proctor, although the fee was handed to him by the client personally. The client acted as the proctor's messenger or as the post office.

In my opinion an advocate is always retained and must be retained by a proctor as counsel are retained by solicitors in England. If an advocate accepts a fee without being retained by a proctor, he would be guilty of professional misconduct of a serious nature. If such is the position of an advocate, can he be sued for the recovery of fees paid to him and for which he had done no work ? In my opinion, an advocate in Ceylon stands in the same legal position as a barrister-at-law in England towards his clients.

Under the English law a barrister-at-law cannot sue or be sued by a client in respect of fees due to him or paid to him. The

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law on the subject was laid down in *Kennedy v. Broun* (*supra*) by Erle C.J. who said—

> " We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect ; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation. For authority in support of these propositions we place reliance on the fact that in all the records of our law, from the earliest time till now, there is no trace whatever either that an advocate has ever maintained a suit against his client for his fees in litigation, or the client against an advocate for breach of a contract to advocate ; and as the number of precedents has been immense, the force of this negative fact is proportionally great. To this we add the tradition and understanding of the profession, both as known to living memory and as expressed in former times."

Pollock on " *Contract*," *p. 648* (*5th ed.*) states the law thus—

> " The decision of the Court of Common Pleas in *Kennedy v. Broun* (*supra*) has established the unqualified doctrine that " the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation." The request and promises of the client, even if there be express promises, and the services of the counsel, " create neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise."

The same question came up for decision before the Privy Council in a case from Quebec : *The Queen v. Doutre.*[1] There an advocate who was entitled to practise in his country—not only as "an advocate and barrister," but also as " an attorney, solicitor, and proctor at law "—sued the Crown for the recovery of fees due to him in respect of professional services. The Crown raised the objection that the advocate, who also held the rank of Queen's Counsel, was incapable of maintaining an action for fees, and relied on the case of *Kennedy v. Broun* (*supra*). In the course of his judgment Lord Watson dealing with this question of law said (p. 751)—

> " 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 Bar of England to sue or make agreements for payment of their fees, was rightly applied in the case of *Kennedy v. Broun* (*supra*), but they are not prepared

[1] *(1884) 9 App. Cases 745.*

> to accept all the reasons which were assigned for that decision in the judgment of Erle C.J. It seems 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 excepted, can recover their fees by an action at law."

Advocates in Quebec appear to be in the same position as proctors of the Supreme Court in Ceylon who were entitled to do the work of an advocate in addition to that of a proctor until the Civil Procedure Code (section 769) took away their right to appear before the Supreme Court in appeal, and restricted that right " to a party in person or his counsel."

It will be noted that the Privy Council refused to apply the rule of English law as laid down in *Kennedy v. Broun* (*supra*), where the members of the legal profession are not merely advocates or pleaders, but are entitled to exercise the functions of solicitors or proctors. An advocate in Ceylon is not in the same position as an advocate in Quebec, for his functions are limited to advocacy and pleading. In my opinion, therefore, an advocate in Ceylon is in exactly the same position as a barrister-at-law in England, as the separation of the two branches of the profession are as strictly maintained here as in England. It is, I believe, owing to this distinction between the two branches that Ceylon advocates have been granted the concession of being enrolled as barristers-at-law in England without keeping all the terms and passing any of the law examinations.

Even in South Africa according to Nathan (*Common Law of South Africa, vol. IV., p. 2015, section 2006*) the practice by which an advocate can sue for his fees has become obsolete. Locally, no case can be found in which an advocate has sued or has been sued in respect of fees due to him or paid to him, and it is generally believed that no such action can be maintained.

In *Perera v. White* [1] in which the defendant, alleging that all the leading counsel had been retained by the plaintiff, applied to this Court to apportion counsel to advise him in his defence, basing his motion on the Roman-Dutch law (*Voet 3, 1, 11*). Bonser C.J. thought that the English practice should be followed in retaining

[1] *(1900) 4 N. L. R. 209.*

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counsel, and he based his view that the Supreme Court would have the right to apportion counsel if a party to a litigation should retain the whole roll of advocates, not on the Roman-Dutch law, but on the general ground that it would amount to a grave scandal and might occasion injustice.

Whatever the strict Roman-Dutch law on the subject may be, that law has no application to advocates in Ceylon who are not admitted and enrolled under the Common law, but under the powers conferred on this Court by the Charter of 1833 and the Courts Ordinance, 1889. Even if the Roman-Dutch law had been applicable, the position of an advocate in Ceylon is so materially different from that of an advocate under the Roman-Dutch law that the application of the Roman-Dutch law rules would be impossible.

The written law is based on the principle that an advocate is incapable of suing for fees, and fees due and paid to an advocate can be recovered by the proctor who is entitled to include such fees in his bill of costs.

The principle laid down in *Kennedy v. Broun* (*supra*) is, in my opinion, applicable, and the present action cannot be maintained.

For these reasons I hold that the conclusion arrived at by the learned Commissioner is wrong, and that the judgment appealed from must be set aside. The appeal is allowed. I do not think it necessary to make any order as regards costs.

Appeal allowed.