JAMES A. HOWLEY .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1927

*May 7.
*May 14.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Appeal—Leave to appeal—Evidence—Admissibility—Privileged communication as between solicitor and client—Conflict with a judgment of another court of appeal.—Article 1024a Cr. C.

The appellant was convicted on an indictment charging him with having, with intent to defraud and by false pretences, obtained from one Mrs. Falardeau and one Mrs. Cirkel valuable securities of about $404,000, by inducing them to transfer property to appellant's wife in consideration of an annuity of $400 monthly during their lives. At the trial, the appellant sought to prove certain conversations between Mrs. Cirkel and Mr. R. G. de Lorimier K.C., his intention being to

*PRESENT:—Mr. Justice Mignault in Chambers.

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show that the deeds of transfer were passed at the request and in compliance with the importunities of Mrs. Cirkel with whom the suggestion of an annuity, he claimed, had originated. The trial judge, having convinced himself by questions put by him to Mr. de Lorimier that the latter had acted as legal adviser of these ladies, refused to allow the evidence on the ground that these communications between client and solicitor were privileged and could not be disclosed without the consent of Mrs. Cirkel, which consent she refused to give. The appellant's conviction was affirmed by the appellate court; and the appellant now moves for leave of appeal to this court under article 1024a of the Criminal Code, on the ground that the judgment to be appealed from conflicts with the judgment of the Alberta appellate court in *Rex* v. *Prentice and Wright.* ((1914) 7 Alta. L.R. 479.)

Held that there is no possible conflict between this decision and the one from which the appellant seeks leave to appeal to this court. The Alberta court fully recognized the rule that relevant communications between solicitor and client are privileged unless the client consents to their disclosure; all that was decided in that case was that the client had agreed to this disclosure when he instructed his solicitor to communicate to the opposite party or his solicitor something *prima facie* privileged and that, under these circumstances, the communication which the solicitor was instructed to make to the solicitor of the adverse party was not privileged.

MOTION for leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the conviction of the appellant on an indictment charging him with having obtained certain property by false pretences.

The material facts of the case are stated in the above head-note and in the judgment now reported.

N. K. Laflamme K.C. and *Lucien Gendron* for the appellant.

A. R. Macmaster K.C. for the respondent.

MIGNAULT J.—The appellant, on September 15th, 1926, was convicted before Victor Cusson, a magistrate sitting as a judge of the Court of Special Sessions at Montreal, on an indictment charging him with having, with intent to defraud and by false pretences, obtained from Dame Angélique Leduc, widow of C. B. Falardeau, and Dame M. L. Falardeau, widow of Fritz Cirkel, various stocks and bonds and titles to immovable properties, shares, hypothecs, moneys, and other valuable securities, the whole of a total value of about $404,000.

The complaint against the appellant in short was that by making false representations to these ladies he had induced them to transfer property to his wife in consideration of an annuity of $400 monthly during their lives. These representations were that the deceased, C. B. Falardeau (who had appointed his wife his universal legatee, the latter being also owner of one-half of the estate as having been in community of property with her husband) had neglected to make proper returns of income under the War Income Tax Act, especially in connection with a company known as the Canada Industrial Company of which he had virtually the ownership and control; that the deceased and his estate had thereby incurred large penalties; and that the appellant was in position to settle this liability. The transfers were made by four deeds passed before Mr. Lavimodière, notary, on December 24th, 1924.

At the trial, the appellant sought to prove certain conversations between Mrs. Cirkel, a daughter of the deceased, and Mr. R. G. deLorimier K.C., his intention being to show that these deeds were passed at the request and in compliance with the importunities of Mrs. Cirkel with whom the suggestion of an annuity, he claimed, had originated. The learned trial judge having convinced himself by questions put by him to Mr. deLorimier that the latter had acted as legal adviser of these two ladies, refused to allow the evidence on the ground that these communications between client and solicitor were privileged and could not be disclosed without the consent of Mrs. Cirkel, which consent she refused to give. The appellant was convicted and sentenced to three years' imprisonment in the penitentiary.

The appellant appealed from the conviction to the Court of King's Bench on several questions of law, the only one with which I am concerned being the exclusion of the evidence to which I have referred. The Court of King's Bench (Guerin, Bernier and Hall, JJ.), on April 25th, 1927, unanimously dismissed his appeal. The judgment of the court was delivered by Mr. Justice Hall. On the question of the legality of the evidence sought to be obtained from Mr. deLorimier, the judgment is as follows:

The last ground of the appeal is that based on the objection to the evidence of Mr. deLorimier. If he were not the solicitor of the Falardeaus, it can hardly be doubted that the accused was entitled to offer

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evidence of the conversations he had with Mrs. Cirkel. But it is impossible for me to interpret his relations with Mrs. Cirkel in any other light than that of solicitor and client. He himself says, that he was not consulted "*en ma qualité d'avocat,*" but he admits that he made entries in his books against the estate.

Mr. deLorimier, like Howley, was an old friend of the family, and had been solicitor for the Canada Industrial Company for some years. When Falardeau died, he attended on Mrs. Falardeau and, at Mrs. Cirkel's request, consented to look after her interests.

Howley himself reports that Mrs. Cirkel had seen deLorimier and arranged for him to look after her affairs, and again, "deLorimier was representing the Falardeau interests."

Then Ouimet, the man Howley appointed secretary of the company, says that Mrs. Cirkel declared: "*deLorimier est notre aviseur légal.*" Janssen reports that, on Mrs. Cirkel's representation, he went to deLorimier to get advice.

I conclude, therefore, that Mr. deLorimier was acting for Mrs. Cirkel in his quality of advocate, and that his evidence was properly excluded.

The appellant now comes before me asking for leave to appeal from the unanimous judgment of the Court of King's Bench. His petition is founded on article 1024A of the Criminal Code and can only be granted if the judgment appealed from conflicts with the judgment of some other court of appeal in a like case. Subject to a judicial exercise of any discretion conferred by that article, I am in no way concerned with the merits of the appeal, or with the legality or illegality of the evidence tendered, but only with the question whether such conflict exists.

The decision on which the appellant relies as being in conflict with the judgment of the Court of King's Bench is a decision of the appellate division of the Supreme Court of Alberta in *Rex* v. *Prentice and Wright* (1), decided on October 23rd, 1914.

The judgment of the Alberta court was rendered on a case stated by the trial judge, referring to three points, the only one which need be considered here being the following:

1. In the course of the cross-examination of George Brown (the complainant), counsel for Prentice directed certain questions to him on the subject of when he first considered commencing criminal proceedings, and inquired whether it was not at about the time certain civil proceedings were commenced by Prentice against Brown, in which Prentice made large claims in respect of certain building contracts. Counsel for Prentice then asked the witness: "You remember instructing your solici-

(1) (1914) 7 Alta. L.R. 479; 23 Can. Cr. Cas. 436.

tors to communicate with Prentice's solicitors at that time?" I instructed the witness not to answer, and the following discussion then took place:—

"Mr. Biggar: If the solicitor can communicate to other people and the person who moves him cannot be asked if it was on his authority, it puts the solicitor in a very happy position. I am asking if he authorized his solicitor to do something, some particular thing.

"The Court: If you show first that he later did a certain thing.

"Mr. Biggar: I cannot interpose a witness.

"The Court: All right, you cannot ask the question.

"Mr. Biggar: Does your Lordship think I am at liberty to interpose a witness?

"The Court: No, I do not think so.

"Mr. Biggar: Your Lordship suggested that if I prove if the solicitor had done something, I can ask the witness if he authorized it. Now, I am simply suggesting, even if there is a way to interpose, that your Lordship's suggestion should be given effect to in anticipation of the question.

"The Court: No, I am merely holding that you cannot ask the question that you are now putting.

"Mr. Biggar: Well, perhaps I am putting it in that form. What I want to inquire is whether he authorized his solicitor to take certain steps with regard to the institution of inquiries for the purpose of instituting criminal proceedings against the present defendant. Your Lordship rules against me. Very good. My friend, Mr. Ford, asks that your Lordship would at this stage rule against him on exactly the same point.

"The Court: Yes.

"Was I right in excluding the evidence?

The Alberta court decided that the trial judge should have allowed the question to be put to Brown. Mr. Justice Beck, with whom Mr. Justice Stuart concurred on this point, said:

The first question raises this point: Can a witness, on the ground of privilege, be allowed to refuse to answer the question whether he authorized or directed his solicitor to make a certain communication to the solicitor for the opposite party in anticipated or pending litigation? The learned judge's ruling is distinctly placed on the ground of privilege in the witness, not on the ground that the question was irrelevant or vexatious (Rule 199). The whole question of privileged communications between client and solicitor is discussed at great length in Wigmore on Evidence, ch. LXXX. The rule is there formulated, par. 2292, with, I think, sufficient accuracy:—

"Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the client waives protection."

It surely is beyond question that the contents of the communication itself from the witness's solicitor to the solicitor for the oposite party which, in order to avoid confusion I shall call the letter, do not come under the privilege, for the contents of the letter were *ex hypothesi*

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intended to be made known to a third party in adverse interest, and therefore neither the contents nor the actual letter itself can possibly be said to have been communicated by the client to the solicitor in confidence. It seems almost, if not equally, plain that the authorization or direction to send the letter does not come under the privilege, for the mere authorization or direction is not a statement made for the purpose of obtaining advice. The question of fact whether or not the authorization or direction was given "is not within the mischief which that rule is intended to guard against; and, therefore, is not within the rule": *Desborough* v. *Rawlins* (1). I, therefore, think the ruling of the learned trial judge in respect of the first question reserved was wrong.

The third judge, Mr. Justice Simmons, concurred. He quoted the following statement of the law by Jessel, M.R., in *Anderson* v. *Bank of British Columbia* (2):

> That, as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights, or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and, it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret unless with his consent (for it is his privilege and not the privilege of his confidential agent), that he should be enabled properly to conduct his litigation.

And Mr. Justice Simmons added:

> The client can remove the privilege by consent, and in the case under consideration the question is based upon the assumption that the witness did consent to removal of the privilege by instructing his solicitor to communicate something *primâ facie* privileged.
>
> I conclude, therefore, that the ruling of the learned trial judge was incorrect.

I take it therefore that the Alberta court fully recognized the rule as stated by Wigmore and Sir George Jessel that relevant communications between solicitor and client are privileged unless the client consents to their disclosure. All that was decided in that case was that the client had agreed to this disclosure when he instructed his solicitor to communicate to the opposite party or his solicitor "something *primâ facie* privileged," and that under these circumstances the communication which the solicitor was instructed to make to the solicitor of the adverse party was not privileged.

(1) 3 Myl. & Cr. 515; 40 E.R. 1025.

(2) L.R. 2 Ch. 644.

There is therefore no possible conflict between this decision and the one from which the appellant seeks leave to appeal.

The application is dismissed.

Motion dismissed.