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BRAJANATH BAISAKH v. MATILAL BAISAKH.

the trust estate, which is the subject of the deed of 1844. The plaintiff will also get a moiety of his costs so far as they can be apportioned out of the same property.

Attorneys for the plaintiffs: Messrs. *Hatch & Hoyle.*

Attorney for the defendant: Baboo *D. C. Dutt.*

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June 18.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Macpherson.

C. J. WILKINSON *v.* ABBAS SIRKAR AND ANOTHER.*

Delivery of Bill of Costs—Right to Maintain Suit—Executor.

There is no law in force in India to prevent an executor of an attorney from maintaining a suit for business done by the attorney, without having previously delivered a bill of costs to the defendant, and left it with him for a reasonable time before bringing the action; and the fact that the defendant had notice that the bill was to be referred to taxation is immaterial.

Statute 3 James I, c. 7, has not been extended to this country.

THIS was a case submitted for the opinion of the High Court by the first Judge (Mr. Fagan) of the Calcutta Court of Small Causes, on the following point:

"Whether on the bill forwarded herewith, a suit can be maintained by the plaintiff in the presence of an admission that the bill was not either delivered to or left with the defendant for a reasonable time prior to action brought, and in the absence of evidence that he had notice of the taxation which was going to be made between himself and his attorney."

The following were the facts as stated by the Judge in referring the case:

The plaintiff in this case sued as Officiating Administrator General of Bengal, and executor to the will of Samuel Fenn, late a solicitor of the High Court. As such he claimed the sum of Rs. 368-5, on a bill of costs taxed as between party and party for Rs. 345-5, to which was appended the taxing officer's certificate to the effect that he allowed of that bill Rs. 23 as between attorney and client. It was proved that this bill was not delivered to and left with the defendant a month prior to

* Reference from the Small Cause Court of Calcutta.

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the action brought, and on that ground I non-suited the plaintiff. The plaintiff subsequently obtained a *rule nisi*, calling on the defendant to shew cause why the non-suit should not be set aside on the ground that the English Statute, which requires the delivery of a bill to the client a month prior to the attorney's suing on it, never was in force in India. On behalf of defendant, it was contended that if the Statute 2 Geo. II. having been passed two years after the introduction of English Law into this Presidency never was in force here on account of its not having been expressly extended to this country, then that section of it which repeals the Statute 3 James I, c. 7, s. 1, was in operation in this country, and the Statute of James remains in force here though repealed in England; and that this Statute would answer his purpose equally well.

Mr. *Graham* for the plaintiff.—The Statutes relating to the delivery of a signed bill do not apply in India, and therefore there is no law making it necessary to deliver a signed bill before an action could be maintained. If there be such a law it rests with the defendants to show that such a law exists in India. It was not necessary to prove that notice of taxation had been given.

Mr. *Jackson* for the defendant cited *Barett* v. *Moss* (1) and *Blackelor* v. *Crofts* (2). After an attorney's death his bill could be taxed: *Penson* v. *Johnson* (3). The late Supreme Court held that a bill of costs should be delivered, and non-suited an attorney who had not done so before bringing his action: *Comberbatch* v. *Kistopreah Dossee* (4). A client's right to have a signed bill will pass to his assignees in case of bankruptcy, and the Court has power independently of the Statute of George II. to order an attorney to deliver a signed bill of costs: *Clarkson* v. *Parker* (5). A bill cannot be referred to taxation if delivered by the executor before action is brought: *Doe* d *Sabin* v. *Sabin* (6).

(1) 1 C. & P., 3.
(2) Comb., 348.
(3) 4 Taunt., 724.
(4) 2 Mor. Dig., 85.
(5) 7 Dowl., 87.
(6) 8 Dowl., 468.

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PEACOCK, C. J.—It appears to me that there is no doubt in this case. Mr. Wilkinson, as the Officiating Administrator General, and executor of the will of the late Mr. Samuel Fenn, sued the defendants in the Small Cause Court, for a bill of the testator against the defendants, for business done as an attorney. The question submitted by the Judge of the Small Cause Court for the opinion of this Court is, "whether the suit can be maintained by the plaintiff in the presence of an admission that the "bill was not either delivered to and left with the defendant "for a reasonable time prior to action brought, and in the absence "of evidence that he had notice of a taxation which was going to "be made between himself and his attorney."

The first question is whether a suit can be maintained by the executor of an attorney for business done as an attorney, without having previously delivered the bill to the defendant and left it with him for a reasonable time before bringing the action. It appears to me that there is nothing which requires him to do so, or prevents him from maintaining an action until a bill has been delivered. Statute 3 James I., c. 7, has been referred to. That Statute, in the first portion of it, refers to attorneys of the Courts of Westminster, and although the general words "no attorney" are used in the subsequent portion of it, yet it has been held that the Statute does not extend to other attorneys in England than those at Westminster. In *Brickwood* v. *Fanshaw* (1), it was held that the Statute did not extend to fees for prosecuting in inferior Courts in England, but only to suits in the Courts of Westminster Hall. I am of opinion that a Statute which applied only to the Attorneys of the Courts of Westminster in England, and to business done in those Courts, did not become part of the law of this country when either the Mayor's Court or the Supreme Court was established. Although the English law generally was extended, it was not every law which was extended; and certainly it appears to me that no law was extended, which was enacted simply with reference to a particular class of persons in England. If a law for example had enacted that no person should sell tea or

(1) Car., 147.

tobacco or rice in England without a license, it is clear that such a law would not have been extended to India by virtue of the Charter establishing the Mayor's Court. But even if the Statute of James I. did extend to attorneys of the Supreme Court, or to attorneys of the High Court, there is nothing in that Act which requires an executor of an attorney to deliver a signed bill. That Act requires the bill to be signed *with the proper hand of the attorney.* That is the thing to be delivered. It has been held, that an executor of an attorney is not bound to deliver that thing before he can sue, and unless he is obliged to deliver that thing, I know no law which requires him to deliver any thing else. Therefore, if he is not obliged to deliver a bill signed by the proper hand of the attorney (which would preclude him in most cases from suing at all), it appears to me that there is no law which requires him to deliver a bill at all. It has been held that the Statute 2 Geo. II., c. 23, section 23, which requires a bill subscribed by the proper hand of the attorney to be delivered, did not extend to the executor of an attorney; and it was also held, as I understand the case in *Blackelor* v. *Crofts* (1), that it is not necessary for an executor to deliver a signed bill under the Statute of James.

The Statute of Victoria which requires a signed bill to be delivered by an executor, has not been extended to this country, and therefore does not apply to it. It has been said in argument that unless the executor be bound to deliver a bill, clients may be seriously injured by having unconscionable bills made out by attorneys, enforced against them after the attorneys' death by their executors; but that by no means follows. An executor could not recover the amount of his testator's bill merely by saying "here is such a bill entered in his books." If a bill has not been delivered and taken, it would be necessary to prove the items of the bill and the reasonableness of those items before the executor could recover and if the defendant pleaded when such an action was commenced against him, he might apply to the Court to order the bill to be taxed, and to stay the proceedings in the meantime, so really there is

(1) Comb., 348.

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no injury likely to be sustained by a defendant, even though the Statutes of James and of Geo. II. do not extend to this country. The Judge does not ask us whether the bill taxed between attorney and client, in the absence of evidence that notice of taxation was given to the client, would justify the Court in awarding to the plaintiff without further evidence the full amount allowed upon taxation. The only question which is asked is the one which I have read. It appears to me that with reference to the question whether a suit can be maintained or not without delivery of the bill, the question whether the client had notice of the taxation is wholly immaterial.

Our opinion to the effect which I have stated will be reported to the Judge of the Small Cause Court, and the defendant will pay all the costs of this reference.

MACPHERSON, J.—I concur.

Attorneys for the plaintiff: Messrs. *Berners & Co.*

Attorneys for the defendants: Messrs. *Gray & Co.*

Before Mr. Justice Phear.

GORDON *v* GORDON.

Suit for Divorce—Inspection of Letters.

1869
Aug. 23.

The respondent is entitled to have brought into Court letters written by her to the petitioner, while the facts to which they speak were fresh in her memory.

If the petitioner has none he should make an affidavit to that effect.

This was an application by respnodent on a summons for a list of letters written by respondent to petitioner, verified by affidavits, and now in the power, possession, or control of the petitioner, to be furnished for the inspection of respondent.

Mr. *Hyde* for the respondent referred to the 7th section of the Divorce Act, and cited the following cases: *Winscom v. Winscom and Plowden* (1), *Pollard* v. *Pollard & Hemming* (2), *Stone* v. *Strange* (3). By section 31, Act II. of 1855, any letters written by the respondent at the time when the facts to which they spoke

(1) 3 Sw. & Tr., 383. (2) Sw. & Tr., 613. (3) 34 L.J. Ex., 72