not, as alleged by Mr. Crichton, grey in colour. Mr. Crichton said that the jute was deficient in strength and colour, that it was grey and heavy rooted. Mr. Wallace struck me as being a person who had experience in, and sound knowledge of, jute. I was favourably impressed by his evidence and the manner in which he gave it. In a matter of this kind there is room for exaggeration, and I cannot but think that, if there were defects in the jute in question, these defects have been exaggerated by the witnesses for the plaintiff. I do not say wilfully exaggerated, but there exists in the case of expert witnesses a tendency to support the view which is favourable to the party who employs them, so that it is difficult to get from them an independent opinion. A high authority once said: "Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence." I do not say that in the present case I have acted on the principle so stated. I may observe also that I do not attach any importance to the suggestions made by the defendant's Counsel that Mr. Crichton's firm would be willing and are desirous to take over the plaintiff's agency, and therefore that Mr. Crichton is not an important witness.

I decide this case solely upon the evidence which has been laid before me as to the quality of the jute. The plaintiff has failed to satisfy me that the jute was inferior to the standard quality of the mark, the burden of proving which lay upon him.

Judgment therefore must be given against the plaintiff, and the action be dismissed with costs.

S. C. B.

Attorneys for the plaintiff: *Leslie and Hinds.*

Attorneys for the defendant company: *Morgan & Co.*

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April 2, 7, 15.

Before Mr. Justice Ameer Ali.

BROJENDRA NATH MULLICK.

v.

LUCKHIMONI DASSEE.*

Attorney and client—Remuneration—Suit—Promissory Note—Agreement by Attorney to take a gross sum in lieu of costs—Client—in Attorney's day book.

* Original suit No. 881 of 1900.

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An attorney is not entitled to any reward for services rendered to his client beyond his just and fair professional remuneration during the subsistence of the relationship of attorney and client, unless the client had competent and independent advice to measure the amount of service rendered by the attorney.

Tyrrell v. *Bank of London* (1), *O'Brien* v. *Lewis* (2), *Holman* v. *Loynes* (3), *Rhodes* v. *Bate* (4), *Morgan* v. *Minett* (5), *Liles* v. *Terry* (6), followed in principle.

In re Whitcombe (7), *Lawless* v. *Mansfield* (8), referred to. And *Holditch* v. *Carter* (9) distinguished.

An attorney cannot split up his functions by acting partly as attorney and partly as agent of the same client.

THE plaintiff Brojendra Nath Mullick, an attorney of this Court, brought this action against the heirs and representatives of his client Mutty Lall Paul, deceased, for the recovery of the sum of Rs. 5,000 on a promissory note, dated December 15, 1897, and executed by the said Mutty Lall Paul, in the following terms :—

"I, Mutty Lall Paul, son of Rye Charan Paul, deceased, of No. 6-1, Newgi Pooker East Lane, Calcutta, do hereby agree and promise to pay Babu Brojendra Nath Mullick of 25, Sobharam Bysack's Lane, Calcutta, Attorney-at-Law, or order, the sum of Rs. 5,000, on demand, in consideration of his detecting the forged deed of gift alleged to have been executed by me in favour of my three sons by my first wife, in respect of Mowhli Bazar on the Lower Circular Road, and also for advising and procuring proofs to obtain decree in the Subordinate Judge's Court at Alipore, for the cancellation of the said forged document, and for all works done by you in connection therewith.

Dated the 15th day of December 1897. MUTTY LALL PAUL."

Mutty Lall Paul died on January 2, 1898, leaving him surviving his sole widow Luckhimoni Dassee, the defendant, her two sons Sarat Chunder and Boidya Nath (the latter being an infant), and three other sons by his first wife, namely, Poorna Chunder, Charoo Chunder and Chundy Charan. The widow and all the sons were made defendants in this suit.

Mutty Lall Paul left a Will, dated December 16, 1897, by which he appointed the defendants Luckhimoni and Sarat Chunder as Executrix and Executor thereof, but Probate of which

(1) (1862) 10 H. L. C. 26, 44.
(2) (1862) 32 L. J. Ch. 569.
(3) (1854) 4 De G. M. & G. 270.
(4) (1865) L. R. 1 Ch. A. C. 252, 257.
(5) (1877) L. R. 6 Ch. D. 638.
(6) (1895) 2 Q. B. 679.
(7) (1844) 8 Beav. 140.
(8) (1841) 1 Dru. & War. 557, 605.
(9) (1873) L. R. 3 P. & D. 115.

had not yet been granted, the defendant Charoo Chunder having entered a Caveat against the grant thereof.

The plaintiff prayed that the sum of Rs. 5,000 secured by the promissory note, with interest at 6 per cent. per annum, be decreed in his favour, and the same be directed to be paid out of the estate of Mutty Lall Paul; and there was the usual prayer of a general character for such further relief as the nature and circumstances of the case might require.

The defendants Poorna Chunder, Charoo Chunder and Chundy Charan in their written statement alleged that their step-mother Luckhimoni and their half-brother Sarat Chunder had always entertained feelings of animosity towards them, and that the plaintiff was still acting as attorney for their step-mother and step-brothers in the testamentary matter aforesaid. That on May 18, 1895, these defendants were informed by Jadub Chunder Dutt, an attorney of this Court, since deceased, that their father had executed a deed purporting to be a release from him (the father) in favour of these defendants, of his half share in the property known as Mowlali Bazar. That these defendants were very much surprised at this information, and caused on May 18, 1895, a letter to be written to Mutty Lall Paul through their attorney Mr. Swinhoe, since deceased, to the effect that they themselves not being aware of any such deed they suspected it to be a forgery; to which the present plaintiff, as attorney for Mutty Lall Paul, replied that his client Mutty Lall Paul had never executed any such document, and requested Mr. Swinhoe to deliver up the alleged deed of gift within 24 hours. Mr. Swinhoe wrote back to say that neither he nor these defendants had any knowledge whatever of the existence of the document in question, and consequently he could not comply with the request.

That in August 1895 Mutty Lall Paul instituted a suit against these defendants in the Court of the Subordinate Judge of Alipore, praying that the alleged deed of gift be declared to be forged, and be set aside, and that the defendants be ordered to deliver up the same. These defendants having pleaded in that suit that they had no knowledge whatsoever of the alleged

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document, and its original not having been produced or discovered at any time, the Subordinate Judge, on May 7, 1896, declared the alleged deed as null and void.

That on December 14, 1900, these defendants heard for the first time, from the attorney for the plaintiff, of the existence of the promissory note on which the present action has been brought. They disputed the validity of the same and contended, *inter alia*, that there was no consideration for the same; and that they having first given the information to Mutty Lall Paul about the deed of gift alleged to have been executed by him, it could not be said that it was the plaintiff who detected or traced the makers of the fraudulent deed; and that Rs. 5,000 claimed by the plaintiff was too exorbitant for what he had done in connection with the Alipore case; and that the plaintiff was not entitled to recover any sum beyond his legitimate fees for work done by him as attorney for Mutty Lall Paul, and that the suit on the promissory note should therefore be dismissed with costs.

The plaintiff deposed that on various occasions he held consultations with Mutty Lall Paul and his pleaders engaged on his behalf in the Alipore case, and that he helped them with his suggestions and advice from time to time, but he omitted to enter in his day-book all the items of work done by him for Mutty Lall Paul, as he was promised a lump sum as a reward for his labours, *i.e.*, Rs. 5,000, for which Mutty Lall Paul executed the promissory note in his favour. The plaintiff further deposed that part of the work was done by him as Mutty Lall Paul's attorney and part as his agent.

The promissory note in question was prepared in the office of the plaintiff, and was written by one of his clerks, and was taken by him to Mutty Lall Paul, who executed it; but no evidence was adduced by the plaintiff to shew that Mutty Lall Paul had any competent and independent advice to estimate the value of the services rendered to him by the plaintiff before executing the promissory note.

Mr. A. Chaudhuri (with him *Mr. Mehta*) for the plaintiff. This promissory note was not really a reward, but was given

to the plaintiff in accordance with an agreement that he should get a lump sum for his services; and such an agreement is not void: see *In re Whitcombe* (1), *Lawless* v. *Mansfield* (2). *In re Heritage* (3), *In re Taylor and others* (4), *Holditch* v. *Carter* (5). If this promissory note be taken to be a reward, then the plaintiff ought to get a reference to the Taxing Officer for his just and fair remuneration for the services rendered: Belchambers' Practice, pp. 20, 21; *Shamsoonessa Begum* v. *Carrapiet* (6).

Mr. Robinson (with him *Mr. Sinha*) for the defendants Poorno Chunder, Chundy Charan and Charoo Chunder Pal. The mere promissory note is no proof of debt due from the defendants; the plaintiff must prove consideration before he is entitled to a decree. The transaction being as between attorney and client, the plaintiff can only recover his proper professional remuneration, and cannot be allowed to make a gain to himself at the expense of his client: *Lawless* v. *Mansfield* (2), *Tyrrell* v. *Bank of London* (7), *O'Brien* v. *Lewis* (8). The plaintiff's own evidence is that this was a reward for the services rendered by him to Mutty Lall Paul, and it being in the nature of a gift from client to solicitor, cannot stand: *Holman* v. *Loynes* (9), *Rhodes* v. *Bate* (10), *Liles* v. *Terry* (11), *Morgan* v. *Minett* (12), *Wright* v. *Carter* (13).

Mr. Chaudhuri, in reply. I refer to Cordery on Solicitors (3rd Edition), pp. 319, 320, 348, 372 and 379; and *In re Frape* (14).

Mr. N. Chatterjee for the infant defendant Boidya Nath Paul. I leave the matter to the discretion of the Court, and only ask for my costs of appearing.

AMEER ALI J. This is an action by an attorney of this Court upon a promissory note dated the 15th of December 1897 executed by one Mutty Lall Paul, since deceased.

(1) (1844) 8 Beav. 140.
(2) (1841) 1 Dru. & War. 557.
(3) (1878) L. R. 3 Q. B. D. 726.
(4) (1891) 1 Ch. 590.
(5) (1873) L. R. 3 P. & D. 115, 117.
(6) (1857) Boulu. 316.
(7) (1862) 10 H. L. C. 26, 44.
(8) (1863) 32 L. J. Ch. 569.
(9) (1854) 4 De G. M. & G. 270, 283.
(10) (1865) L. R. 1 Ch. A. C. 252.
(11) (1895) 2 Q. B. 679.
(12) (1877) L. R. 6 Ch. D. 638.
(13) (1902) 18 T.L. R. 256.
(14) (1893) 2 Ch. 284, 295.

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Mutty Lall Paul died on the 2nd of January 1898, and the suit is brought against his heirs and representatives for the amount of the promissory note, viz. Rs. 5,000. The plaintiff's case is that he acted as Mutty Lall Paul's attorney from February 1893 until his death, that he helped him in discovering a forged release and in other ways assisted him in obtaining a decree in the Court of the Subordinate Judge of Alipore declaring the said release to be a forgery, and that in recognition of his work in connection with these matters Mutty Lall Paul executed the promissory note.

In his evidence-in-chief he said in distinct terms that the amount of Rs. 5,000 was a reward to him, that he had demanded Rs. 10,000, but the deceased fixed it at Rs. 5,000.

The promissory note was prepared in his office and written by one of his clerks, taken by him to Mutty Lall Paul on the 15th of December, and was executed by the deceased on that date in the presence of his son Sarat, and one Satish Chunder Soor. The defendants to this action are the widow of Mutty Lall Paul, named Luckhimoni Dassee, and his sons by her. Mutty Lall Paul also left three sons by a predeceased wife, who are also parties to the suit. These latter contend that the promissory note is void for the following reasons :—

(i) because it was obtained under circumstances which showed undue influence ;

(ii) that Mutty Lall Paul was at the time not in a fit condition to understand the nature of his act ; and

(iii) on the ground that there was no consideration for the note.

This in substance represents their contentions. The minor defendants through their Counsel left the matter to the Court. The other defendants have not raised any serious objection. Their attitude, however, is explained by the fact that the plaintiff is acting as their attorney in certain testamentary proceedings which are pending in this Court in consequence of a will propounded on behalf of Sreemutty Luckhimoni Dassee, which the sons of Mutty Lall Paul by the predeceased wife contend is a fictitious document.

The question therefore involved in this case turns upon the well-recognized rule of law that an attorney is not entitled to any donation irrespective of his just and legitimate costs during the subsistence of the relationship.

The plaintiff's case is that some time in 1895 he was instructed by Mutty Lall Paul to obtain for him a loan on the mortgage of his property. He went to another attorney of this Court, since deceased, named Jadub Chunder Dutt, to help him to raise the loan sought for by Mutty Lall Paul. Jadub Chunder Dutt expressed his willingness to assist the plaintiff, who accordingly took the papers to him for the purpose of showing Mutty Lall Paul's title to the properties proposed to be mortgaged. Jadub Chunder Dutt upon looking into the papers discovered that Charoo Chunder Paul, one of the defendants in the present case, and one of the sons of Mutty Lall Paul, had already tried to raise money on the same properties upon the basis of a release, a copy of which was given to the plaintiff. This information was brought to Mutty Lall Paul, who thereupon asked the plaintiff to enquire and find out the author of the fabricated document, but the plaintiff admits he was unsuccessful in his efforts to discover the genesis of the forgery. I am giving merely the substance of his evidence.

A suit was subsequently brought by Mutty Lall Paul in the Subordinate Judge's Court at Alipore which was practically undefended and a decree was made setting aside the document.

In the course of this suit, the plaintiff says, he on various occasions saw the pleaders of Mutty Lall Paul engaged in the Alipore case and helped them with suggestions and advice. He was asked, if he had entered in his day-book or day-books the various works which he had done for Mutty Lall Paul in connection with the discovery of the forgery or the prosecution of the suit in the Alipore Court. He stated that he entered some of the items, but omitted others. He admitted that as an attorney it was most irregular on his part not to enter in his day-book all the work he did for his client.

In explanation of his laches or omission, whatever it may amount to, he said that, as he was promised by Mutty Lall Paul

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a lump sum for his labours, he did not think it necessary to enter the items of work from time to time as they were done. Towards the end of his evidence, when pressed with the difficulty which he had created for himself by the omission to which I have referred, he was obliged to state that part of the work was done by him as attorney and part as an agent.

This position I cannot accept. An attorney cannot split up his functions in the way suggested. I have no doubt upon the evidence that what the plaintiff stated in chief represents the correct view of the matter, viz., that Rs. 5,000 was fixed, by whomsoever it be, as his reward in recognition of his services to Mutty Lall Paul.

The plaintiff's demand cannot be regarded as moderate. He asked for Rs. 10,000. Naturally he overestimated his services, but the plaintiff suggests that the deceased in the exuberance of his gratitude fixed it at Rs. 5,000. The question then is, the facts being as stated above, whether I ought to allow his claim.

The principle which regulates contracts of this nature between solicitors and their clients during the subsistence of the relationship has been enunciated over and over again in the English Courts.

In the case of *Tyrrel* v. *Bank of London* (1) Lord Westbury distinctly laid down that "There is no relation known to society of the sduties of which it is more incumbent upon a Court of Justice trictly to require a faithful and honourable observance than the relation between solicitor and client;" and he added: "I earnestly hope that this case will be one of the many which vindicate that rule of duty which has always been laid down, namely, that a solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration, to which he is entitled."

In *O'Brien* v. *Lewis* (2), a gift by a client to his solicitor during the subsistence of the relationship was set aside. The same rule was applied in *Holman* v. *Loynes* (3) to a sale.

(1) (1862) 10 H. L. C. 26, 44. (2) (1863) 32 L. J. Ch. 569.
(3) (1854) 4 De G. M. & G. 270.

The general principle relating to matters of this nature is enunciated in *Rhodes* v. *Bate* (1). At p. 257, Turner L. J. says as follows: "I have thought it right to enter thus minutely into the facts of the case for three reasons,—first, because the case in my view of it is of no little importance in its bearing upon the principles of the Court with reference to cases of persons standing in confidential relations." And he goes on to say: "With respect to the first of these reasons I take it to be a well-established principle of this Court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits, which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."

In this connection it may be observed that in the case before me the plaintiff does not allege that Mutty Lall Paul had any competent or independent advice to measure the amount of service rendered to him by the plaintiff as against the reward he was proposing to give.

In *Morgan* v. *Minett* (2) Vice-Chancellor Bacon held "That the relation of solicitor and client existed between Mr. Minett and the testator is not called in question in the slightest degree. It is not said that the relation prevents a client bestowing his bounty upon his solicitor, but what the law requires is that considering the enormous influence which a solicitor in many cases must have over his client, in order to give validity and effect to a donation from a client to his solicitor, that relation must be severed." In *Liles* v. *Terry* (3) a donation to the wife of a solicitor was set aside on the same ground.

On behalf of the plaintiff, however, it was urged that an agreement to take a gross sum in lieu of costs was not void, and that, properly viewed, this promissory note should be regarded in that light, and in support of that proposition learned Counsel for the plaintiff referred to *In re Whitcombe* (4). The remarks of the Master of the Rolls at p. 144 are, however, very pertinent to the

(1) (1865) L. R. 1 Ch. A. C. 252, 257.
(2) (1877) L. R. 6 Ch. D. 638.
(3) (1895) 2 Q. B. 679.
(4) (1844) 8 Beav. 140.

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present enquiry. Whilst upholding on the special facts of that case, the agreement by which the solicitor was allowed to accept £4,000 in gross in lieu of all the costs he had incurred at the time of the settlement of the case, the learned Judge said as follows:—"I must remark on the great danger which solicitors incur when they enter into such arrangements with their clients. An agreement like this between a solicitor and client for taking a fixed sum in satisfaction of all demands for costs is an agreement which may be perfectly good; but this Court, for the protection of parties, looks at every transaction of this kind with great suspicion. The matter may turn out to be perfectly fair and right, still it exposes the conduct of the solicitor to suspicion, and naturally awakens the vigilance and jealousy of this Court, seeing that one party has all the knowledge and the other is in ignorance."

To my mind those remarks are extremely apposite to the present case.

It is impossible to suppose that the reward the plaintiff asked for, or which according to him was fixed by Mutty Lall Paul, was not more than commensurable with the work which he seems to have done: but, even if he thought the reward was not excessive, it was still the bounden duty of the solicitor to keep entries of his work, to enable the Court to ascertain whether the reward or remuneration was in proportion to the service rendered.

I would desire to impress on all legal practitioners the necessity of strictly complying with the requirements of the law and of keeping in view the policy which regulates the relationship between a client and his legal adviser.

The view which I have tried to formulate is enforced in the case of *Lawless* v. *Mansfield* (1), which was cited by the plaintiff's Counsel. That case to my mind instead of supporting the plaintiff shows the general rules observed by the Court. At p. 605 the learned Chancellor said as follows: "Now, I take it, that these two propositions are perfectly clear in law: first, that where the relation of attorney and client subsists, in questions of accounts between the parties, the common rule does not prevail; though the party only alleges generally that the

(1) (1841) 1 Dru. & War. 557, 605.

accounts are erroneous, the Court will make a decree opening the accounts, if sufficient cause is shown; and, secondly, that a solicitor, to whom his client has given bonds or bills, cannot produce those securities, and say, as a third person might, they prove the existence of his debt; but from the relationship in which the parties stood, and the alarm of this Court, lest by means of such relationship any undue influence should have been exerted, the solicitor is bound, irrespective of his securities, to prove the debt, for which those securities were given."

The case of *Holditch* v. *Carter* (1) is totally different. That was a testamentary suit and a compromise was effected. By the agreement arrived at between the defendant and her opponents she agreed to stop the litigation on their paying amongst other things £700 for the agreed costs of the solicitor. The learned Judge stated that it was the same as if she had received £700 with one hand and paid it over to the attorney with the other, and so came under the rule that bills once paid cannot be taxed except under special circumstances. As I said already, that case is wholly different from the present.

In re Taylor (2) has no bearing on the question for determination before me.

It is absurd to say that the plaintiff detected the forgery. He got some information from Jadub Chunder Dutt which he conveyed to Mutty Lall Paul. He seems to have also gone to the police on behalf of the deceased and had various conferences with him and his mofussil advisers in connection with the suit in the Alipore Court. This is all the work he appears to have done.

On the facts therefore I have no hesitation in coming to the conclusion that this sum which is purported to be secured by the promissory note is a reward for whatever work or services he had rendered to the deceased at that period, and having regard to the policy of the law and the rule to which I have referred, a rule the value of which cannot be under-estimated, and which, so far as I am concerned, will be invariably enforced in this Court, I must hold that the plaintiff is not entitled to recover on the promissory note.

(1) (1873) L. R. 3 P. & D. 115. (2) (1891) 1 Ch. 590.

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Then arises the question whether the plaintiff is or is not entitled to any relief in the present action with regard to the work actually done by him, and to his just and proper professional remuneration. *Mr. Robinson* for the defendants contended that to give him relief on that basis would be altering the nature of the action.

There is a prayer for general relief in the plaint; and although the action is brought on the promissory note, the circumstances show that the plaintiff undoubtedly did some work for Mutty Lall Paul, and I am inclined to hold that, instead of referring the plaintiff to another action, I ought to give him relief on that basis in the present suit.

I would therefore refer it to the Registrar, who is also the Taxing Officer, to enquire what was the work done by the plaintiff and what is the just and fair professional remuneration to which he is entitled for his services to Mutty Lall Paul in connection with the matters referred to in this suit.

The Registrar will then call on the plaintiff to submit his bill of costs and will thus be able to dispose of the matter in accordance with the practice.

A final decree will be made when the report is submitted.

The question of costs is reserved.

Case referred to the Registrar.

Attorney for the plaintiff: *B. C. Dutt.*

Attorneys for the defendants: *Swinhoe & Co.; R. C. Mitter.*

B. D. B.

FULL BENCH

Before Sir Francis William Maclean H.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Henderson.

1902
April 30.

IN THE MATTER OF KALU MAL KHETRI.*

Excise—Commission by servant of licensed manufacturer or vendor of act in breach of conditions of license—Liability of servant—Bengal Excise Act (Bengal Act VII of 1878) s. 59.

Held, that the servant of a manufacturer or vendor under Bengal Act VII of 1878 is not liable under s. 59 of the Act to the penalty provided by that section for

*Reference to Full Bench in Criminal Revision No. 1067 of 1901.