

1876.

NEW ZEALAND.

MR. SMYTHIES' CASE: AFFIDAVITS OF MESSRS.
RUSSELL, HAGGITT, AND MACASSEY,

(USED IN THE COURT OF APPEAL IN 1872, IN CONNECTION WITH).

In the Supreme Court of New Zealand, Otago and Southland Districts. No. 2833.

Between JAMES URE RUSSELL, Plaintiff; and GEORGE ELLIOTT BARTON, Defendant.

I, JAMES URE RUSSELL, of Dunedin, in the Province of Otago, Settler, the abovenamed Plaintiff, make oath and say:—

1. The following is a correct statement of the circumstances attending the settlement of this action with Mr. Henry Howarth.

2. Previous to the commencement of the negotiation for settlement, one John Sibbald, a member of the Provincial Council, met me in the street, and asked me how I was getting on with Howarth, and why I did not come to some settlement with him, and get out of the law; to which I replied, that I did not wish to go on with the proceedings I had taken, and would be glad to settle; thereupon the said Sibbald proposed that he should undertake the part of mediator between me and the said Henry Howarth as he was a mutual friend, and I accepted his said proposal.

3. Afterwards the said Sibbald informed me that he had seen Mr. Howarth, and that he was willing to meet me and treat with me for a settlement, and the said Sibbald told me that he had made an appointment for me to see Mr. Howarth.

4. In consequence of this proposal, I afterwards on or about the twenty-seventh day of November, one thousand eight hundred and sixty-six, called upon the said Howarth, and had with him a long conversation respecting the settlement of this action, and of all claims by me upon the firm of Howarth, Barton, and Howarth, and of all my other claims against him, and of him and the said Howarth, Barton, and Howarth against me, and also for a settlement of my action against the Sheriff, Mr. Strode, for a false return to the writ of execution issued in this action against the share of the Defendant, George Elliott Barton, in the partnership property of the said firm of Howarth, Barton, and Howarth.

5. That thereupon, on the same day, being, as I believe, the twenty-seventh day of November, one thousand eight hundred and sixty-six, after receiving the said proposition for settlement, I wrote a letter to the said Henry Smythies, informing him of said proposition, and directing him not to proceed further in the said actions, or incur any further expenses, as it was probable that I would be able to settle with the said Howarth, and the said letter was written by me in the shop of Messieurs Ure and Co., grocers, in Princes Street, Dunedin, and was given by Mr. Ure, in my presence, to a porter in the employment of the said Ure and Co., for delivery at the office of the said Henry Smythies, in Rattray Street, and I saw said porter leave the shop with the letter to deliver it.

6. That two days afterwards, that is to say, on the twenty-ninth day of November, one thousand eight hundred and sixty-six, I called at the office of the said Henry Smythies, and seeing Henry Waddington Smythies, his son, engaged in writing out a brief in the said action against the Sheriff, I remonstrated with him for so doing after my letter of the twenty-seventh aforesaid; and I then complained to the said Henry Smythies, and told him personally of the proposed settlement, and of the said letter, and he then endeavoured to dissuade me from making a settlement; and either on the same day, or very shortly afterwards, he took me to the Judge's Chambers at the Supreme Court, and there showed me reports of cases which he said were entirely in my favour, and said that he was certain of success; but I told him that I feared an adverse verdict, and was quite tired of litigation, and very desirous of settling if possible.

7. That during the negotiations with the said Henry Howarth, I showed to him all the bills of costs up to that time received by me from the said Henry Smythies, and which included the costs of this action and of all the proceedings against the firm of Howarth, Barton, and Howarth, together with an account current purporting to be a debtor and creditor statement between me and the said Smythies; and said account current and bills of costs purported to show that I owed the said Smythies four hundred and ninety-four pounds five shillings, and that Smythies had received from me three hundred and ninety pounds eight shillings, leaving a balance in favour of said Smythies of one hundred and three pounds seventeen shillings; and I say that said costs and account current were furnished

to me by the said Henry Smythies early in October, one thousand eight hundred and sixty-six, and I was not furnished with any other costs or accounts current, nor did he make any other or further claim against me until long after the settlement of this action, as hereinafter more fully appears.

8. That during said negotiations for settlement, I explained to the said Henry Howarth, as the fact was, that a large proportion of the costs I showed to him were not fairly chargeable against me, and that all the criminal proceedings against the defendant, George Elliott Barton, were undertaken for costs out of pocket; he, the said Smythies, stating to me at the time he urged me to commence them, that he required them to clear his own character before the Judges, because as the matter then stood it did not appear whether he or the said George Elliott Barton had committed perjury; and I say that he repeated the same statement in a letter which he published in the *Daily Times* Newspaper of the twelfth day of May, one thousand eight hundred and sixty-six, in which he wrote as follows:—

“With the view of having the case heard before Mr. Rees left Dunedin, so that I might be cleared before the public of the charge of perjury made by Mr. Barton, I assisted Russell with the information, but immediately upon his (that is Rees’) admission, I handed over the papers to Mr. Rees, and acted no more in the matter except as a witness; although I believe Mr. Rees considered me as solicitor to the prosecution. Mr. Smith seems to think that because Mr. Barton is the leader of the bar and I only his clerk, it was my duty to the profession to submit to the charge of perjury, and not attempt to clear myself at the expense of Mr. Barton; I think otherwise, but I may be wrong. The public can now judge of my conduct.—I am, &c., HENRY SMYTHIES.”

9. That the said Henry Howarth looked through the said costs, and expressed his opinion that said costs would tax below the amounts of the payments, and afterwards the said costs were, upon taxation, in fact reduced by the taxing officer considerably below the said amount so paid and by the said Smythies appropriated in the said account current to the payment thereof.

10. That on the fourth day of December, one thousand eight hundred and sixty-six, the day previous to the final settlement with the said Howarth, I called upon Henry Smythies, and informed him that I had that day had an interview with Howarth, and I informed him of the terms Howarth had offered to me; and that I, on my part, had offered to take four hundred pounds in full of all demands; and I say that on that occasion the said Henry Smythies again endeavoured to dissuade me from settlement, and we together walked up High Street to the residence of a Mr. Fisher, quite at the top of the said street, and we were discussing the said settlement, and the said Smythies still endeavouring to dissuade me from it; but when he found that I was so determined upon settlement, he at last said, “Well, if you can get the four hundred pounds in cash, you had better take it;” and he then informed me that the costs of the action against the Sheriff would amount to about twenty-five pounds or thirty pounds, and that I ought to endeavour to get these costs added on and included in the settlement.

11. That on the following day, the fifth day of December, one thousand eight hundred and sixty-six, I settled all the said actions and proceedings with the said Howarth for the sum of four hundred and twenty pounds, the odd twenty pounds being for the costs of the said action against the Sheriff, which the said Smythies had on the previous day suggested to me to get added.

12. That on the afternoon of the same day, I wrote to the said Henry Smythies informing him that I had settled, and said letter was also written by me in the said shop of Ure and Company, and was by Mr. Ure, in my presence, handed to the said porter for delivery; and I saw him leave with it to deliver it at the office of the said Smythies, and I have no doubt that he did duly deliver it.

13. That on the seventh day of December, one thousand eight hundred and sixty-six, two days after the settlement, I called on Mr. Smythies, and then informed him, personally, of the said settlement; and I showed to him, and I believe left with him, my copy of the deed of settlement, of which the deed set forth in his affidavit of the fifth day of May, one thousand eight hundred and sixty-eight, is, I believe, a correct copy. And I say that during that interview, the said Smythies advised me not to enter up satisfaction on the judgment in this action until the bills of exchange given by the said Howarth to me, in part payment, were all paid.

14. That during all these several interviews the said Smythies never said or pretended that the settlement was made in fraud of his rights, and it was not until the seventeenth day of December, one thousand eight hundred and sixty-six, long after the said settlement, that the said Smythies furnished me with other and further costs, and with another account current, in which he claimed from me eight hundred and twenty-seven pounds fourteen shillings for costs, and showed the balance due from me as four hundred and thirty-four pounds sixteen shillings.

15. That so far from my being indebted to him in said sum of four hundred and thirty-four pounds sixteen shillings, I claim that rightfully he is indebted to me on foot of said accounts and costs.

16. I deny most positively that the settlement aforesaid was made without the knowledge of the said Smythies, and I say that during all the time of the negotiations I was in constant and almost daily communication with him, and for a considerable time after said settlement, continued to do business with him, and he had several cases of mine in his hands; and in corroboration of that fact I refer to a statement of the said Henry Smythies, in the seventeenth paragraph of an affidavit sworn by by him and the said Henry Waddington Smythies, on the twenty-first day of January, one thousand eight hundred and sixty-seven, and filed in this Court, wherein he says:—

“That he (Russell) was constantly in my office as is shown by the Call-book, in which his name appears upon eighty-six days upon which he saw me on business, between the sixteenth day of June last and the twenty-first day of December last; besides which, he was many times at my private residence, and many of such attendances extended over two hours.”

17. That on the twenty-fourth day of December, one thousand eight hundred and sixty-six, after the delivery to me of the said further costs and accounts current, I received from the said Henry Smythies the following letter:—

“DEAR SIR,—

“Rattray Street, 24th December, 1866.

“I hope you will help me through the Christmas by giving me some part of the spoil obtained from Mr. Howarth. You know we are told not to muzzle the ox that treadeth out the corn.

“I have no objection to wait for your award to settle up.

“Faithfully your’s,

“H. SMYTHIES.”

“J. U. Russell, Esq.”

18. That I replied to said letter on the twenty-seventh day of December, one thousand eight hundred and sixty six, and in my reply I wrote:—"I deny that I have received 'anything in the shape of spoil from Mr. Howarth' * * * When an ox requires all the corn to himself the sooner he is disposed of the better. I must decline giving you any more money."

19. That although I then believed and still believe that I am not indebted in any money whatever to the said Henry Smythies, I nevertheless for peace sake on the seventh day of February, one thousand eight hundred and sixty-seven, offered to pay him one hundred and fifty pounds in discharge of his claims upon me, but he then claimed two hundred and fifty pounds, and on that occasion made a proposal in writing to Mr. Ure, in a letter of which the following is a copy:—

"DEAR SIR,—

"Ratray Street, 7th February, 1867.

"You have asked me to propose terms upon which I am willing to settle with Captain Russell. They are these:—

"I withdraw the matter of Cameron and charge these against the estate.

"There is a small balance owing to Mr. Harvey in the action against Morison, Law, and Co. Captain Russell will settle that better than I can, and therefore I take that out of the settlement. Mr. Harvey has received eighteen pounds.

"For the remainder I will accept:

"Cash	...	...	...	...	...	£50	0	0
"Mr. Howarth's first bill	...	...	...	...	...	150	0	0
"Your bill	...	...	...	...	...	50	0	0

"Mr. Howarth's bill to be further secured by an authority to continue the action Russell v. Strode, if the bill be dishonoured.

"I am, dear Sir,

"A. R. Ure, Esq."

"HENRY SMYTHIES.

20. That the said demand of two hundred and fifty pounds was largely in excess of what the said Smythies afterwards was allowed on taxation of his costs; and I say that, on the taxation, the taxing officer refused to enter into any question of negligence or retainer, and that several items for work done contrary to my orders were allowed against me, although I protested against their allowance on that ground.

21. That a part of the said Henry Smythies claims against me are for work done in the case of Russell v. Strode after the said Smythies had notice of my intention to settle.

22. That a very considerable portion of the said costs was for work done on account of my claims against the trustees of the estate of Miller and Company, and others, to recover the Mavara Run, and which claims the said Smythies proposed to buy from me in a letter to me dated the seventeenth day of October, one thousand eight hundred and sixty-six, in which he writes to me as follows:—"If you have no confidence in me, you can, of course, engage some other solicitor; and if you have no confidence in your case, tell me what you will take for your interest in the station and sheep as it now stands. I think you had better do nothing to commit yourself at the meeting of creditors, which, I understand, will take place to-day.—I am, very faithfully yours, HENRY SMYTHIES."

23. That another very considerable portion of said costs are for an action brought against Howarth, Barton, and Howarth, and others, and seeking a discovery of the contents of two deeds alleged to be in their possession, and to recover damages against them—five thousand pounds.

24. That while the said Henry Smythies was still prosecuting the said action, he had in his actual possession full copies of the said two deeds, which I was informed by him and believe he had, on the twenty-third day of June, one thousand eight hundred and sixty-six, taken from the Supreme Court, where said copies had been left with the Deputy-Registrar as exhibits to an affidavit sworn, on the twenty-second day of June, one thousand eight hundred and sixty-six, by George Elliott Barton and John Honibourne Sanders.

25. That I advised him at once to return said deeds to the Court, as we had already seen the deeds, and had taken extracts from them, and they were of no use to us; but he said that he would keep them and make copies of them, and if traced to his possession he would say they had been by accident mixed up with his papers. And I say that the said Henry Waddington Smythies soon afterwards made a copy of one of the said deeds, which is in the handwriting of the said Henry Waddington Smythies, and is now in my possession and exhibited to me when swearing this affidavit, and is marked A.

26. That, after the said Smythies had obtained the said copy deeds as aforesaid, and when he was well aware of their contents, he falsely denied to Mr. Justice Chapman, on a motion in the said last-mentioned cause, that he had seen them; and the question of Mr. Justice Chapman, and the answer of the said Smythies, are both correctly reported in the *Daily Times* newspaper of the twenty-eighth day of September, one thousand eight hundred and sixty-six, as follows:—

"Mr. Justice Chapman: Has the money for the bills been paid?"

"Mr. Smythies: We cannot tell—we have no copy of the deed; this is a bill of discovery."

"Mr. Justice Richmond: It is not a bill of discovery—you could have inspected the deed. You are entitled to that, and it is your own fault if you have not inspected it before filing your declaration."

27. That a considerable portion of the costs in the said action for discovery of the contents of said deeds were incurred subsequently to the possession by the said Smythies of said copies, and I remonstrated with said Smythies against his carrying on the said action after he had full knowledge of said deeds, but he induced me to believe that said action involved other rights, and that I would recover heavy damages against the said Howarth, Barton, and Howarth; but I now believe the said Smythies carried it on solely to harass and oppress the defendants, and to make costs against me; and he, in fact, afterwards discontinued said action, which never came to a trial.

28. That, in the voluminous costs furnished to me by the said Henry Smythies, amounting to over eight hundred and twenty-seven pounds, he nowhere charges me for the making of the copy deed in the handwriting of his son, the exhibit above referred to, nor does he mention the fact that same was ever made; and the name of the said Smythies is omitted in the indorsement of the said exhibit

"A" from the place where a solicitor's name is usually put to documents prepared or copied by him, and where the said Henry Smythies is in the habit of indorsing his name.

29. That the costs of the said Henry Smythies furnished to me by him before taxation, are exhibited to me at the time of my swearing this affidavit, and are marked B.

30. That my letter of the twenty-second day of June, one thousand eight hundred and sixty-seven, to the Registrar of the Supreme Court, and his replies thereto, are exhibited to me when swearing this affidavit, and are marked respectively C and D.

JAMES U. RUSSELL.

Sworn at Dunedin aforesaid, this twelfth day of June, one thousand eight hundred and sixty-eight. Before me,

EDWARD FRAS. WARD,

A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand, Otago and Southland District. No. 2833.

In the matter of "The Law Practitioners Act Amendment Act, 1871;" and in the matter of HENRY SMYTHIES, at present of Naseby, in the Province of Otago, Gentleman; And in the matter of the Petition of the said Henry Smythies, under the said Law Practitioners Act Amendment Act.

I, BRYAN CECIL HAGGITT, of Dunedin, in the Province of Otago, New Zealand, Gentleman, a Barrister and Solicitor of the Supreme Court of New Zealand, practising in Dunedin aforesaid, make oath and say:—

1. That I am one of the members of the Council of the New Zealand Law Society.

2. That acting in conjunction with Mr. Howarth, the only other member of the Council of the said Society in Otago, I recently caused steps to be taken to ascertain whether the feeling of the profession in Otago was adverse or favourable to the re-admission of Mr. Henry Smythies to the practice of his calling in New Zealand.

3. That telegrams were forwarded by Mr. Howarth and myself to all the solicitors practising in the province, and who are now resident in Dunedin, inviting them to say whether they were in favour of or opposed to Mr. Smythies' admission. Of the solicitors so communicated with, twelve replied that they were opposed to Mr. Smythies' re-admission; two declined to express any opinion; two were indifferent; and two sent no reply.

4. That the members of the profession practising in Dunedin were expressly invited to attend a meeting at the Library of the Supreme Court House, to consider the case of Mr. Smythies, and a meeting of the members of the profession was held at the place aforesaid, on the twenty-fifth day of April, one thousand eight hundred and seventy-two, at which sixteen members were present.

5. That at such meeting it was unanimously resolved, "That the Attorney-General, as President of the Law Society, be requested to appear and oppose Mr. Smythies' petition."

6. That in accordance with such resolution, the necessary instructions have been given to the Attorney-General.

B. C. HAGGITT.

Sworn at Dunedin aforesaid, this eighth day of May, one thousand eight hundred and seventy-two. Before me

GEORGE COOK,

A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand, Otago and Southland District.

In the matter of "The Law Practitioners Act Amendment Act, 1871;" and in the matter of HENRY SMYTHIES, at present of Naseby, in the Province of Otago, Gentleman; and in the matter of the Petition of the said Henry Smythies, under the said Law Practitioners Act Amendment Act, 1871.

I, JAMES MACASSEY, of Princes Street, Dunedin, in the Province of Otago, New Zealand, Gentleman, make oath and say:—

1. I have read a copy of the affidavit sworn herein by the above named Henry Smythies.

2. In regard to the first paragraph of the said affidavit, I beg to refer to the twenty-second paragraph of an affidavit made in the cause of Russell v. Barton, and sworn on the twelfth day of June, one thousand eight hundred and sixty-eight, wherein is set forth an extract from a letter from the said Henry Smythies to the said James Ure Russell, in the following terms:—"If you have no confidence in me, you can of course engage some other solicitor; and if you have no confidence in your case, tell me what you will take for your interest in the station and sheep as it now stands."

3. In regard to the statements contained in the third paragraph of the said affidavit, I am informed that the deed therein mentioned was executed in confirmation of a previous deed containing a release and discharge, and that both deeds have been forwarded to the Registrar of the Court of Appeal by the Registrar of the Supreme Court.

4. The statements contained in the fourth paragraph are somewhat inaccurate, inasmuch as the said Alfred William Smith did appear, I acting as his solicitor and counsel, and also without the indemnity as alleged.

5. In reference to the allegations contained in the eleventh paragraph of my affidavit, sworn herein, on the eighth day of May last past, I say that the fact in the said paragraph mentioned can, I believe, be vouched by several witnesses, to wit, John Hyde Harris and Gibson Kirke Turton, of Dunedin aforesaid, Gentlemen, my former partners. I have been unable to find any papers tending to throw any light upon the transaction referred to in the said eleventh paragraph, for the reason that upon the dissolution of the late firm of "Harris, Macasey, and Turton" in March, one thousand eight hundred and sixty-eight, the papers connected with all settled actions were taken into the custody of the said Gibson Kirke Turton, and owing to his having changed his offices on two occasions since, some

of the papers have been lost. An additional reason why the papers should not throw any light upon the subject is, that no application was ever made to set aside the order (the complaint only affecting the validity of the copy and service), and when the matter was referred to in Chambers, the impropriety complained of was alluded to upon the hearing of a Chamber motion in the case, and not upon a summons specially directed to the irregularity.

6. The statements contained in the sixth paragraph of the said affidavit I believe to be wholly incorrect. For upon searching records and memoranda in my possession, I find that in all the under-mentioned cases in which the said Henry Smythies was employed as solicitor or counsel upon one side and I in the same capacity on the other side, the said Henry Smythies was unsuccessful:—Cohen *v.* Bank of New Zealand, McGarrigle *v.* Machin, Clements *v.* Edmondson, Same *v.* Dodson, Fox *v.* Campbell, Lynch *v.* Wood, McGregor *v.* Hunter, Kelly *v.* Reany, Crafts *v.* Chapman (appeal), Macandrew *v.* Latham (Court of Appeal), Logan *v.* Crawford, Russell *v.* Barton *re* Smith, Same *v.* Same *re* Howarth.

JAMES MACASSEY.

Sworn at Dunedin aforesaid, this eighth day of June,

A.D. 1872. Before me

GIBSON K. TURTON,

A Solicitor of the Supreme Court of New Zealand.

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