

ROCKWOOD v. COS MAHOMADU.

*D. C., Colombo, 13,955.*

1903  
October 7.

*Assessors in civil and criminal cases—Right to demand remuneration—Jurisdiction of Court to decree fees of assessors.*

There is no provision in the common or statute law of this Colony entitling assessors in civil or criminal cases to demand remuneration for their services, which enables a Court to order payment of any fee to any person summoned as an assessor, except in cases under the Land Acquisition Ordinance; nor has there been a continuous custom or practice whereby District Courts have acquired jurisdiction (if such jurisdiction can be so acquired) to decree fees to assessors.

**T**HIS was an action by the plaintiff, a doctor of medicine, against the defendant, his patient, to recover fees for professional services rendered. The plaintiff's claim amounted in the aggregate to Rs. 6,027. The defendant took exception to the reasonableness of many of the items of the plaintiff's bill and tendered Rs. 2,324.75. On the motion of the defendant, the Court, with the consent of the plaintiff, appointed three assessors to be associated with the Judge in the trial of this case.

After a careful analysis of the different items of the bill, judgment was entered for the plaintiff for Rs. 3,338.46, with costs in that scale, and a further order was made that "each of the assessors be paid a fee of Rs. 31.50 for each day on which they sat, and these will be taxed against the defendant."

The defendant appealed.

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 October 7. Wendt, J., on 3rd August, 1903.

*Dornhorst, K.C.*, for appellant.—The costs should be divided, as the amount claimed was Rs. 6,027, the amount tendered Rs. 2,324.75 and the amount for which judgment was entered, viz., Rs. 3,338.46, was nearer the defendant's figure than the plaintiff's. Further, there is no provision in law for the payment of assessors. They are like jurymen. Unless there is an agreement between the parties, no one can be charged with either the whole or the half fees as costs. Charter of 1833, § 20; No. 19 of 1844, § 1; Ordinances No. 21 of 1852; No. 2 of 1854; No. 11 of 1868, §§ 120, 138; No. 1 of 1889, § 53; No. 15 of 1898, § 277. [Objection was also taken by the learned counsel to plaintiff's right to sue, according to either the English or Ceylon Common Law, but it was not pressed.]

*Van Langenberg*, for respondent.—As regards assessors' fees, they are costs. The plaintiff only gets judgment in the class in which he succeeded. Undoubtedly, he ought to pay any extra cost the defendant may have incurred by having to answer in a higher class.

*Dornhorst*.—Assessors' fees are not taxed as costs.

*Layard, C.J.*—We will inquire what the practice is in the District Courts of Colombo and Kandy.

*Cur. adv. vult.*

7th October, 1903. LAYARD, C.J.—

There appears to me to be no reason to interfere with the judgment in favour of the plaintiff for the sum of Rs. 3,338.46. There is one other point which was argued before us by appellant's counsel which requires consideration.

The appellant's counsel argues that the District Court has no power to order that the assessors be paid a fee of Rs. 31.50 for each day on which they sat, and to direct that such fee be taxed against the defendant. The provision with regard to assessors appears to have been as follows. By section 20 of the Charter of 1833 every District Court was to be held before one Judge and three assessors. By Ordinance No. 21 of 1852 it was provided that the District Court might be held before a Judge without any assessors, and subsequent to that date it was left to the discretion of a District Judge whether he should sit with assessors or not. Under the Charter rules and orders were made by the Judges for summoning and empanelling assessors, and they were subject to the same penalty for non-attendance as jurors; no provision was made for payment of any fee to them. Under the Ordinances

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Nos. 19 of 1844 and 2 of 1854 assessors were chosen in the same manner as jurors, but beyond that the Ordinance of 1844, which contained no repealing clause, did not interfere with the rules and orders then in existence respecting assessors, the first rule (which enacted who were eligible to be assessors) only excepted, which was superseded by section 1 of the Ordinance No. 19 of 1844. In 1868 the Legislature passed the Administration of Justice Ordinance, No. 11 of 1868, and by part VI. of that Ordinance dealt with the qualification, summoning, and empanelling of assessors as well as jurors; and provided for a penalty not exceeding Rs. 50 for neglect on the part of a juror or assessor to attend Court after being duly summoned. Such was the Statute Law until the Criminal Procedure Code of 1883. This Ordinance repealed the whole of chapter VI. of No. 11 of 1868 (sections 120 to 138, both inclusive) and the whole of chapter VII. (Rules for summoning and empanelling Assessors) so far as such rules concern Criminal Procedure. Chapter XXIII. of that Ordinance dealt with the liability to serve as jurors or assessors in criminal trials. Again, no provision was made for the payment of fees to assessors or jurors. Then followed the Ordinance No. 1 of 1889, which repealed so much of Ordinance No. 11 of 1868 as had not already been repealed, and provided that the District Judge may, at his own instance or upon the application of any party, have three assessors associated with him at the hearing and decision of a cause or other proceedings, such assessors to be selected and summoned in terms of rules to be made by the Judges of the Supreme Court under the provisions of section 53 of that Ordinance. That section provides for the Supreme Court making rules, amongst other things, for the summoning, empanelling, and challenging of assessors; but the Legislature has nowhere provided for the payment of fees to assessors, or has enabled this Court to lay down rules providing for the payment of fees to such assessors. I cannot find any provision in our Statute Law for the payment of a fee to either a juror or assessor in a criminal prosecution or civil case. The only general provision that has ever been made by the Legislature for any payment to a juror and assessor is limited to those summoned for a criminal trial, who by the provisions of section 277 of the Ordinance No. 15 of 1898 (which Ordinance repealed the Criminal Procedure Code above mentioned) are entitled when serving as a juror or assessor at any Court-house more than five miles from his residence to an allowance for his travelling expenses, and, if he is obliged to sleep from home, for his board and lodging, such allowance to be computed at such rates as the Governor, with the

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advice of the Executive Council, may from time to time determine. This provision appears to emphasize the fact that at any rate no juror or assessor is entitled to a fee for attending as such at a criminal trial, and I can find no provision which makes any difference between an assessor attending as such at a civil trial and one summoned to attend a District Court criminal trial. There is therefore no provision of the law which entitles assessors under any circumstance to demand a fee, and I can find no provision in any Ordinance which enables a Court to order a payment of any fee to any person summoned as an assessor except in land acquisition cases. The question still remains whether there has been a continuous custom or practice having the force of law by which the District Courts have obtained jurisdiction to decree a fee to an assessor (if jurisdiction can be obtained by such practice or custom, which I doubt). Certainly in criminal cases fees are never awarded to assessors, and the District Judges of Kandy and Colombo, who have been consulted by us, have replied that a very limited number of cases have been tried by them in which assessors have been employed in civil cases. Each of them can only refer to two cases tried by them. The Kandy Judge never appears to have exercised such a jurisdiction during the ten years he has presided in that Court. In one case he says the assessors were paid no fees; in the other judgment went against the party at whose instance fees were fixed, and he was condemned to pay such fees. The District Judge of Colombo has twice directed the losing party to pay the assessors' fees. I cannot find therefore that there has been a uniform practice with regard to the payment of assessors' fees in our Courts. I think, therefore, the order of the District Judge directing the defendant to pay the assessors' fees in this case cannot stand, and must be set aside.

The appellant further complains that the District Judge has allowed the plaintiff his costs in class V. Plaintiff's counsel admitted it would be just that plaintiff should pay to defendant any extra costs incurred by defendant by reason of the action having been brought in a higher class than it need have been. The amount recovered by plaintiff falls within class IV. The plaintiff is entitled to costs in class IV. only, and must pay the defendant any extra costs defendant may have incurred by reason of this action having been brought in class v.

Subject to the above modifications, I would affirm the judgment of the District Judge and dismiss the defendant's appeal with costs.

This judgment does not affect the money which was deposited in Court by the plaintiff and defendant and has since been paid out

WENDT, J.—

I concur. The Chief Justice's review of the legislation upon the subject shows that a Court has no jurisdiction to order a party to an action to pay fees to the assessors summoned and empanelled to assist the Judge. I do not, however, anticipate that this ruling will cause any practical inconvenience, as in most cases the parties will be ready to agree at the inception of the trial to some arrangement for remunerating the assessors for their services.

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