Present: Mr. Justice Wendt and Mr. Justice Middleton.

1906.
December 17.

LE MESURIER *v.* THE ATTORNEY-GENERAL.

D. C., Kandy, 12,998.

[THE DEHIGAMA CASE.]

Costs, taxation of—Crown Counsel appearing for the Crown—Fees not actually paid—Expenses of Crown Counsel—Proctor, recognition of appearance of—Objection to taxation of costs—Expenses of witnesses not called—Materiality—Taxing officer—Civil Procedure Code, ss. 27 and 208.

Where the Attorney-General employs Crown Counsel to appear on behalf of the Crown and disburses nothing, and incurs no debt by way of fees, he is not entitled to charge the opposite party such fees as he might reasonably have had to pay for the services of a private advocate had he chosen to engage one, but the Crown is entitled to recover travelling expenses and batta payable to such Crown Counsel.

A successful party is entitled to recover from the opposite party not only the expenses of witnesses who have been actually called at the hearing, but also the expenses of all material witnesses whom it was necessary to bring. Whether such witnesses were material or not must be decided by the taxing officer.

A party who has recognized the appearance of a proctor as representing another party to the suit cannot afterwards object to the taxation of costs due to such proctor on the ground that he had no authority to appear.

APPEAL from an order of the District Judge (J. H. de Saram, Esq.) overruling objections raised by the plaintiff to certain items in the defendant's bill of costs.

The material facts and arguments sufficiently appear in the judgments.

H. J. C. Pereira (with him *F. M. de Saram*), for the plaintiff, appellant.

Ferrando, C.C., for the defendant, respondent.

Cur. adv. vult.

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17th December, 1906. WENDT J.—

This is an appeal against the District Judge's ruling in review of his Secretary's taxation of costs. The plaintiff's action was dismissed, and he was condemned in the defendant's costs. The defendant (who is the Attorney-General sued on behalf of the Crown) brought in a bill made up of counsel's fees Rs. 892.50, proctor's fees and stamps Rs. 1,961.95, and batta to witnesses Rs. 2,392.81, total Rs. 5,247.26, which the Secretary on taxation cut down to Rs. 4,835.71. This taxation the learned District Judge affirmed. Certain of the objections taken in the Court below were not pressed before us.

I proceed to deal with the objections which appellant's counsel argued. The objection to the sum of Rs. 168 charged as Mr. Bawa's fees was not pressed, his receipt for Rs. 105 having been put in. For the same reason Rs. 52.50, being fee for Mr. Fernando at the first trial, was conceded. But exception was taken to the following charges for Mr. Fernando, viz., retainer Rs. 21, advising defence Rs. 21, and consultation Rs. 21, brief fee (second trial) Rs. 105, and refreshes for 16 days Rs. 504, on the ground that they had not been paid to Mr. Fernando, and were therefore not expenses necessarily incurred by defendant within the meaning of section 208 of the Civil Procedure Code.

The facts material to this objection, as agreed upon by counsel on both sides, were as follows: Mr. Fernando was one of the Crown Counsel, paid an annual salary by the Crown, and appeared in the case as part of his official duties. None of the fees in question were paid to him. When the Attorney-General succeeds in any action and obtains an order for costs against his opponent, those costs are taxed, including fees for the appearance of Crown Counsel, and if the taxed costs are recovered, they are paid to the particular Crown Counsel for whose services they were taxed. If those costs are not recovered, or if the Attorney-General is not awarded costs, the Crown Counsel gets nothing for his services beyond his regular official salary. The question then is, whether in a case in which he has disbursed nothing, and incurred no debt for fees to counsel, the Attorney-General is entitled to charge his adversary such fees as he might reasonably have had to pay for the services of a private advocate had he chosen to engage one. After much consideration I am unable to see how such fees could be brought within the category of "expenses necessarily incurred." Assuming that the liability of a litigant to pay his counsel (where such counsel has not insisted on payment in advance) is an "expense," the facts before us show that

there is no such liability on the part of the Attorney-General towards Crown Counsel. The risk of recovery from the opposite party, which ought to be and generally is the risk of the client, becomes the risk of the advocate when his client is the Attorney-General. It is unnecessary to enlarge upon the unwholesome effect which such a form of " payment by results " must have on the practitioner—the inducement which it offers the advocate of the Crown for striving unduly to secure an order for costs. Still, if the practice to allow the taxation of such costs had received judicial recognition for many years, I should have hesitated to say that nothing short of a legislative enactment could have imposed a liability on the unsuccessful litigant to pay such fees. The defendant has, however, not been able to show that this Court has ever recognized the practice relied on. To my own knowledge that practice has existed for at least twenty-five years, but its legality has never, so far as I am aware, been brought to the test of a legal decision. In 1890, when the Civil Procedure Code defined what could be recovered by way of " costs, " no exception was made in favour of the Attorney-General or the Crown. The order of the Supreme Court, dated 1st September, 1895, directed the Registrar, in taxing advocates' fees, to require the production of a receipt from the advocate engaged. Here, again, no exception was made. Our Registrar informed the District Judge that he was accustomed to dispense with such receipt in the case of Crown Counsel, " because he knew it was not in their power to furnish it at that stage." It is not suggested that the Court was ever apprized of this variation, and I do not think that, now we are asked to pronounce as to its validity, we can support it. An alteration in the destination of these fees, when recovered, might perhaps have obviated the objection to their allowance. I do not see that any exception could be taken to the practice of the Crown paying yearly salaries to counsel for doing its work in Court; and it would be reasonable enough that the Crown, when successful should recoup itself by recovering from its opponent a fair fee for the work done. But in such a case the fee must go to the Crown, and not directly into the pocket of the advocate engaged in the case.

For these reasons the charge of Rs. 672 as Mr. Fernando's fees must be struck out of the bill. But I agree with my brother Middleton in thinking that the Crown is entitled to recover the travelling expenses and batta, which (as I understand) it would in any case have to pay Crown Counsel. These were omitted from the bill, but I think it only reasonable to allow the defendant an opportunity of bringing them in if he so desires.

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As to the objection that Mr. Borrett, the Crown Proctor, could tax no costs, because Mr. Siebel had originally been the proctor on the record and had been irregularly changed, all that need be said is that the plaintiff condoned the irregularity, and has all along recognized Mr. Borrett as representing the Crown. The objection was therefore properly overruled by the District Judge.

As regards batta for witnesses, appellant's counsel, in the course of his argument, took exception to the number of days for which the allowance had been made, but upon our expressing the view that the allowance did not seem excessive, in view of the distance to be travelled to and from the Court, he very fairly withdrew that objection. The objection that remained, and which appellants pressed, was to the taxation of batta for six witnesses, who, though in attendance, had not been examined. Plaintiff had called twenty-eight witnesses, and defendant twenty-one. For nineteen of them, as well as for the six not examined, batta was allowed. It is not denied that this is a charge for an out-of-pocket expense, which the defendant has in fact disbursed. The objection then comes to this: that, whereas defendant ultimately examined only twenty-one witnesses, his having six others in attendance was unreasonable. According to the old Rules of Court (Rules of 1833, section 1, rules 23, 40) the charge for witnesses was only disallowed if the witnesses had, in the opinion of the Court, been summoned " unnecessarily. " Section 208 of the Code amounts to the same thing. The District Judge did not think the six witnesses in question were unnecessary; on the contrary, he states that " it was not suggested by plaintiff that defendant summoned more witnesses than were necessary, merely for the purpose of swelling costs. The nature of the case was such that it was necessary for the defendant to summon a large number of witnesses, though in the end he found it unnecessary to produce all of them. I think, therefore, that the objection fails. The appellant then succeeds only as to the Rs. 672, counsel's fees. This charge was made in accordance with the existing practice, and although we have now pronounced it untenable, I do not think we ought to cast the defendant in costs. The order in appeal will be varied by reducing defendant's bill by Rs. 672. The record will be sent back for defendant to supplement his bill by adding charges for the batta and travelling expenses of Crown Counsel, which will be taxed by the Secretary after notice to plaintiff. No costs of the appeal.

MIDDLETON J.—

This was an appeal from an order of the District Judge acting in review of the taxation of the costs by the Secretary of the District

Court. Some six objections were raised in the District Court, but before us the first and fourth and part of the third were abandoned, and it was ultimately stated by counsel for the appellant that he only desired to contend for the general principles of taxation which he had supported, and which had been in discussion before the District Judge.

The first objection urged was that Proctor Borrett was not the proctor on the record, but Proctor Siebel, and that two proctors cannot appear in one case. Assuming for the sake of argument that Mr. Siebel had not been removed under section 27 of the Civil Procedure Code, the plaintiff has acted ever since Mr. Borrett came into the case as if he recognized him as the proctor in the case, and it was only on taxation of costs that the point was raised. The plaintiff has throughout the case led the defendant to believe that he acknowledged Mr. Borrett as the proctor on the record and to act on that belief, and I think that he cannot now be heard to say that he is not. On this point I think, therefore, that the District Judge was right in holding that the plaintiff was estopped from raising the question of the proctor's status. It is not therefore necessary to deal with the Attorney-General's alleged privileges as to the appointment and removal of proctors under section 27 raised by counsel for the respondent. As regards the third objection, that the Attorney-General is not entitled to tax the costs of advocates' fees not paid by him to the Crown Counsel appearing for him against an unsuccessful opponent, I find myself unable to accede to the affirmative of this proposition, supported on the ground of immemorial custom, by the learned counsel for the respondent. So far as I can gather, the Attorney-General, in respect to the taxation of costs, is put in no better position that an ordinary litigant under the Civil Procedure Code. By section 208 are included under the denomination of costs the whole of the expenses necessarily incurred by either party on account of the action and in enforcing the decree. I therefore hesitate to say that a fee which the party has not paid to an advocate is an expense necessarily incurred. It is neither an expense nor is it incurred in the sense that the Attorney-General is bound to pay it. As a matter of fact no fees are paid to Crown Counsel, as a general rule, by the Attorney-General, the Crown Counsel having to wait till they have been recovered under the system of custom which has prevailed. I am not prepared to hold that the so-called immemorial custom can impose a legal obligation to pay money. In my view without legislative sanction this custom cannot be supported, and the Attorney-General would only be entitled to recover such costs as he necessarily incurred, which would, in my opinion, include the batta and travelling expenses of Crown Counsel.

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I was inclined during the hearing to think that the Attorney-General might fairly charge the Crown Counsel's salary as part of his necessary expenses, but I think that the argument of counsel for the appellant that such salary would be paid in any event, and that it covers the performance of a number of other duties, negatives the theory of its being an expense necessarily incurred for any particular litigation. The Minute of the Supreme Court is a most reasonable one for the guidance of its Registrar; but I fail to see how any exception in favour of the Attorney-General can be extracted from it. The taxing officer would therefore, in my opinion, be wrong in including the items objected to by the appellant, unless it was established to his satisfaction that they had actually been paid to the advocates and were necessary. As regards the objection taken to the payment of witnesses under their specified classes, the counsel for the appellant reduced his objection to a request for our decision of the question whether the plaintiff was bound to pay for witnesses who had not given evidence and whose materiality is not shown. My view is that if a claim is made for the expenses of a witness not called, the objection should be made to the taxing officer, who should thereupon inquire whether he was a material witness whom it was necessary to bring, but whom it became unnecessary to call. The taxing officer can be satisfied on this point generally by a statement of the proctor appearing on the other side. If the witness's materiality is not established to the satisfaction of the taxing officer, he will not allow his costs; if it is established, then his costs should be taxed, the test being the materiality of the witness's evidence to the case to be established by the party bringing him. If this was done by the Secretary of the District Court—and it is not suggested that it was not—it is not necessary to send the case back for re-taxation. I agree to the order proposed by my brother Wendt.

Order varied.