ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1916.

January 20.

P. NUSSERWANJI & Co., PLAINTIFF *v.* S. S. WARTENFELS, DEFENDANT.*

Costs—Taxation of Costs—Costs are awarded as an indemnity, and not as a penalty—Costs of the Secretary of State for India, to be taxed in the ordinary way—Profit costs of the Government Solicitor and brief fees to the Advocate-General, to be allowed on taxation—Application to review the certificate of the Taxing Master.

Where the Secretary of State for India is a party to a suit filed in the High Court in its Ordinary Original Civil Jurisdiction and costs are awarded to him, he is entitled to have his bill of costs taxed in the ordinary way, although the Government Solicitor and the Advocate-General employed on his behalf are paid fixed salaries for the conduct of all Crown cases.

Hence, all profit costs of the Government Solicitor and brief fees to the Advocate-General should be allowed on taxation.

TAXATION of costs:

On the 18th September 1914, the plaintiffs filed this suit against the S. S. Wartenfels (a German ship) then lying in the Bombay harbour to recover the price of coal and other necessaries supplied and for arrest and sale of the ship. The vessel was the subject-matter of certain proceedings in Prize in the Court of the Resident at Aden and was handed over to the Bombay Government by an order of that Court dated the 4th September.

The Secretary of State for India therefore became the defendant on intervention.

The suit was tried by his lordship Macleod J. and dismissed on the 18th December 1914 with costs. The decree ordered *inter alia* "that the plaintiffs do pay to the said defendant on intervention, the Secretary of State for India in Council, his costs of the suit when taxed and noted in the margin thereof." The Solicitor to Government lodged his bill of costs of the suit on

* O. C. J. Suit No. 1 of 1914.

behalf of the defendant for taxation in the ordinary way. The plaintiffs objected on principle to all the items charged in the bill, save and except the items of actual disbursements made by the Solicitor to Government on behalf of the said defendant on the ground that the Solicitor to Government and the Advocate-General as salaried officers of the Crown were not entitled to charge the Government and the Government were not liable to them for the costs covered by the items objected to. The plaintiffs relied on the general principle that party and party costs are awarded as an indemnity to the successful party in respect of the expense to which he has been put by the unsuccessful party and not by way of penalty.

The bill was taxed on the 22nd December 1915 and a warrant to review was heard on 6th January 1916. On both these occasions the plaintiffs' objections were disallowed by the Assistant Taxing Master who recorded his grounds as under:—

It follows from the decisions in the *Attorney-General* v. *Shillibeer* (1849, 19 L. J. Ex. 115), *Galloway* v. *Corporation of London* (1867, L. R. 4 Eq. 90, 97) and *Henderson v. Merthyr Tydfil Urban District Council* (1900, 1 Q. B. 434) that if the defendants' costs were going to be paid into the Government Treasury, the defendant would be entitled to have his bill of costs taxed in the same way as any other litigant. And, I think, it makes no difference to the plaintiffs that under an arrangement with the defendant the Government Solicitor will retain costs awarded to his client. Such an arrangement has been held not to be opposed to public policy in *Azimulla's case* (1892, I. L. R. 15 Mad. 405). In *Galloway* v. *Corporation of London*, Vice Chancellor Wood ridiculed the argument that a party like the Corporation of London would use the agreement with their Solicitor as a means of making profit out of litigation. His remarks apply equally well to the arrangement between Government and their Solicitor, although in the English case costs exceeding the guaranteed salary went into the client's pocket, whereas in this case the whole amount of taxed costs will be retained by the Government Solicitor. Under this arrangement the Government Solicitor gets costs only when Government is in the right, and then only such charges as are proper are allowed on taxation. Further, were it not for such an arrangement, Government would probably have to pay their Solicitor a much higher salary. Lastly, the allowance of

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such costs "if recovered" has been recognised by the practice of both English and Indian Courts. It appears from the judgments of the Master of the Rolls and Lord Justice Bowen in *Carson* v. *Pickersgill & Sons* (1885, 14 Q. B. D. 859), that in cases of pauper litigants both the Common Law Courts and the Chancery Courts formerly allowed full costs on the ordinary scale to such litigants when successful, although they were under no liability to pay them. In Bombay the proviso to Rule 203 of the High Court Rules empowers the Court to award costs against the adverse party or out of the property recovered in a suit and to direct the payment thereof to the attorney representing the pauper. A similar provision for costs of pauper litigants has been made by the Calcutta High Court by Rules 791 and 792 of its Original Side Rules. And in Madras the Government Solicitor has been allowed costs "if recovered" as appears from *Azimulla's* case, cited above. With regard to the fees of the Advocate-General I may refer to the case of *Lord Advocate* v. *Stewart, No. 2*, 63 J. P. 473...wherein it was held that Crown Counsel's fees may be allowed against an unsuccessful party although such Counsel may be paid by salary. The plaintiffs' Solicitor has not been able to cite a single Indian case where, when costs have been awarded to Government, the profit costs of the Solicitor to Government and the fees of the Advocate-General have been wholly disallowed on taxation.

On the 10th of January 1916, the Assistant Taxing Master duly issued at the instance of parties a certificate to the effect that he had disallowed plaintiffs' objections to the allowance of profit costs of the Solicitor to Government and the fees of the Advocate-General.

The plaintiff applied to the trial Judge to review the certificate of the Taxing Master.

Kanga, for the plaintiffs:—Costs as between party and party are given by way of indemnity to the successful party and not as a penalty imposed on the party ordered to pay: see *Clarke* v. *Hart*,[1] *Gundry* v. *Sainsbury*[2] and *Harold* v. *Smith*.[3] See also Seton on Decrees, 7th Edition, Vol. I, p. 243 and Halsbury's Laws of England, Vol. XXVI, p. 804. The main test would be, if Government were unsuccessful could the Government Solicitor have proceeded against the Government

[1] (1858) 6 H. L. C. 633 at p. 667.
[2] [1910] 1 K. B. 645.
[3] (1860) 5 H. & N. 381.

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for his taxed costs? No doubt the Government incur expenses in actions brought by or against them. But they have a standing solicitor and counsel who receive fixed fees from public revenues for their remuneration. If no portion of the salary of these officers could be allocated to the work done in a particular suit, the Government must fail, if the principle of indemnity recognised by the Common Law of England is to be followed. Government are only entitled to actual disbursements and not to profit costs. As to the remarks of the Taxing Master about pauper's costs and the references made to English cases on the point, it should be noted that in Bombay before the amendment of Rule 203, a pauper was not allowed costs, even if successful and that was also the case in England.

Jardine (Advocate-General), for the defendant:—All taxed costs awarded to the Secretary of State in suits to which he is a party are in the nature of indemnity against the *general* expenses incurred by the Secretary of State in engaging the services of legal advisers. A party ordered to pay costs is not entitled to the benefit of a private arrangement between his opponent and his solicitor. It is conceded that the Government have incurred expenses in this case as any private party would have done. If no particular portion of the salary of their solicitor could be allocated to the work done in this suit, the Government are on general principles entitled to be compensated by receiving costs from the losing party: see the dictum of Channell J. in *Henderson* v. *Merthyr Tydfil Urban District Council*:[1] "It is for the party objecting to the allowance of the usual costs under such circumstances to show that the allowance will give more than an indemnity, and in all ordinary cases...it is impossible for him to shew it." The onus is cast upon the unsuccessful party.

[1] [1900] 1 Q. B. 434.

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Further, there is an implied arrangement with Government to retain costs awarded to them against an adverse party, and the practice has been uniform. Both the Indian and the English decisions are in favour of the allowance of profit costs of the Government Solicitor. In *Azimulla Saheb* v. *Secretary of State for India*,[1] it was held that an arrangement between Government and their Solicitor whereby the latter received a salary and in addition the costs awarded to Government in any litigation cannot affect a third party condemned in costs: see *The Attorney-General* v. *Shillibeer*,[2] *Raymond* v. *Lakeman*,[3] *Henderson* v. *Merthyr Tydfil District Council*,[4] *Galloway* v. *Corporation of London*[5] and *The Lord Advocate* v. *Stewart, No. 2.*[6] The last mentioned case is conclusive on the allowance of brief fees of the Advocate-General: see also Halsbury's Law of England, Vol. XXVI, p. 804.

If the Solicitor to Government had not the chance of receiving profit costs under an implied arrangement with Government, he would have to be paid a higher salary. Profit costs should be looked upon as compensation for such excess salary as Government would otherwise have to pay.

MACLEOD, J.:—This is an application to review the certificate of the Taxing Master. On the 18th September 1914, the plaintiff filed this suit against the S. S. Wartenfels then lying in Bombay harbour to recover the price of coal, supplied to her before she left Bombay in July 1914. The vessel was the subject-matter of certain proceedings in Prize in the Court of the Resident at Aden and had been handed over to the Bombay Government by an order of that Court, dated the 4th September. The Secretary of State, therefore, became

(1) (1892) 15 Mad. 405.
(2) (1849) 19 L. J. Ex. 115.
(3) (1865) 34 Beav. 584.
(4) [1900] 1 Q. B. 434.
(5) (1867) L. R. 4 Eq. 90.
(6) (1899) 63 J. P. 473.

defendant on intervention in the suit which was eventually dismissed as against him and the plaintiffs were ordered by the decree to pay his costs of the suit when taxed. The defendant, accordingly, brought in his bill of costs for taxation. On such taxation the plaintiff contended that only such sums as had been disbursed by the defendant's solicitor on his behalf should be allowed and that as the defendant employed a solicitor on a fixed salary and also paid a fixed monthly sum to the Advocate-General who was expected to conduct all Crown cases on the Original Side of the High Court, all profit costs and brief fees to the Advocate-General should be disallowed.

It is unfortunate that no evidence was placed on the record to show the exact terms of the arrangement which existed between the defendant and his legal advisers with regard to their remuneration, but it was admitted during the argument before me that the question for decision was whether the defendant was entitled to have his bill of costs taxed without reference to any such arrangement or whether only actual disbursements should be considered on taxation and the remaining charges disallowed altogether. The law to be applied is the Common Law of England.

The identical question arose in *Azimulla Saheb* v. *Secretary of State for India*,[1] confirmed on appeal in the case of *Muhammed Alim Oollah Sahib* v. *The Secretary of State for India*;[2] and it was decided that an arrangement between Government and their Solicitor whereby the latter receives a fixed salary and in addition the costs awarded to Government in any litigation would not affect a party condemned to pay costs to Government. It cannot be disputed that at Common Law costs are awarded to a successful party as an indemnity for the expenses legitimately and

(1) (1892) 15 Mad. 405. (2) (1893) 17 Mad. 162

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reasonably incurred in fighting the action. As stated by Bramwell B. in *Harold* v. *Smith*,(1) costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out the extent to which costs ought to be allowed is also ascertained.

It would, therefore, follow that a successful party cannot recover anything beyond expenses actually incurred or for which he is liable.

No doubt in *Raymond* v. *Lakeman*,(2) where the purchaser's solicitor received a fixed salary, there is a dictum of the Master of the Rolls to the effect that a party who has to pay costs is not entitled to the benefit of a private arrangement between his opponent and his solicitor as to costs but it does not appear that the solicitor was to get the costs recovered in addition to his salary. In *Gundry* v. *Sainsbury*(3) that dictum was not even referred to. The plaintiff's solicitor agreed with his client to conduct his case in the County Court without charging him anything. The plaintiff was awarded £15 damages, but in the course of his evidence he admitted that he had arranged with his solicitor not to pay the costs of the action, consequently counsel for the defendant asked the County Court Judge to enter judgment for the plaintiff for £15 but without costs, on the ground that under the proviso to section 5 of the Attorneys and Solicitors' Act, 1870, the plaintiff was not entitled to recover from the defendant more costs than were payable by the plaintiff to his solicitor under his agreement. It was contended

(1) (1860) 5 H. & N. 381. (2) (1865) 34 Beav. 584.

(3) [1910] 1 K. B. 645.

by the plaintiff that as the agreement was verbal the proviso to section 5 had no application. The learned County Court Judge held that the agreement need not be in writing and gave judgment for £15 without costs. The Divisional Court upheld this decision. Before the Appeal Court it was contended for the respondent that the proviso to section 5 of the Act of 1870 simply re-affirmed the Common Law doctrine. It was held that it was only when the agreement was set up by the solicitor that the statute required it to be in writing, and that the case would be decided under the Common Law. Buckley L. J. remarked:

"Suppose the Act of 1870 does not apply. Then the client comes to the Court and says: 'This is a matter in respect of which I am entitled to get costs because I have been put to expense, and the law as administered in this Court allows me in that state of things to be indemnified by the defendant to the extent of party and party costs.' But he having come to assert that right, the Court says 'True, you are entitled to such indemnity, but inasmuch as you have nothing to pay by reason of your agreement with your solicitor there is nothing for which to indemnify you.'"

The Assistant Taxing Master has distinguished that case on the ground that the plaintiffs' solicitor was only employed for that particular case. The Taxing Master has referred to the cases of *The Attorney-General* v. *Shillibeer*,[1] *Galloway* v. *Corporation of London*[2] and *Henderson* v. *Merthyr Tydfil Urban District Council*,[3] but in all those cases the arrangement with the salaried solicitor was that he should get a fixed salary and nothing more so that the costs awarded to the party employing a salaried solicitor went into the pockets of that party in reduction of the salary paid to the solicitor. By 18 and 19, Vic., cl. 90 it is expressly provided that costs awarded to the Crown are to be paid into the consolidated fund, and it is possible, though extremely improbable, that in any one year the Crown or any

[1] (1849) 19 L. J. Ex. 115. [2] (1867) L. R. 4 Eq. 90 at p. 97.
[3] [1900] 1 Q. B. 434.

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Corporation or individual employing a salaried solicitor might receive as the result of successful litigation, profit costs exceeding that salary. But as remarked by Channell, J. in *Henderson* v. *Merthyr Tydfil Urban District Council*[1], it would be impossible in ordinary cases for a losing party to show that an actual profit was being made.

In *The Attorney-General* v. *Shillibeer*[2], Baron Parke remarked:

"It is perfectly clear that the Crown incurred expenses about this suit; and unless the Crown is to be compensated by the payment of the ordinary fees, there would be no mode of compensating it at all, because it is impossible for the Crown to say what proportion the expense of conducting this particular suit must bear to the entire salary for the year until the end of the year, when all the suits are known, and when the expense of each would be calculated, which at the time the costs are taxed it is impossible to know; and therefore it is impossible, if the Crown is to be compensated at all, that it should be compensated except in the way of payment of the ordinary fees."

The decision in *Gundry* v. *Sainsbury*[3] was foreshadowed by Page Wood V. C. in *Galloway* v. *Corporation of London*,[4] where he says:

"The argument which struck me most was that with regard to the indemnity; but I cannot apprehend that the Court can investigate agreements of this nature with respect to such a question. Mr. Bagshawe cited a case (*Hockley* v. *Bantock*)[5] which tended to support his view, with reference to the principle of indemnity, where a person is ordered to pay costs; and, for aught I know, if an agreement has been entered into by a client with a solicitor that he shall pay no costs, it may be a question whether or not the opposite party can avail himself of that agreement, and say to the client, you do not require indemnity."

This case differs from all the English cases cited in that it is admitted that the costs, if allowed, will not go to Government to compensate them in part for the expenses they incur annually in employing a salaried solicitor but will go to the solicitor himself in excess of his salary.

(1) [1900] 1 Q. B. 434.
(2) (1849) 19 L. J. Ex. 115.
(3) [1910] 1 K. B. 645.
(4) (1867) L. R. 4 Eq. 90 at p. 97.
(5) (1833) 2 My. & K. 437.

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It is suggested that if this arrangement did not exist and the solicitor had not the chance of recovering profit costs in suits by or against Government in which costs might be awarded to Government, he would have to be paid a higher salary and that, therefore, as such costs are allowed by Government to be paid to their solicitor, they are really compensation for such excess salary as they otherwise would have to pay.

I doubt whether this is a satisfactory argument apart from the fact that there is no evidence to show that if the abovementioned arrangement did not exist Government would pay their solicitor a higher salary.

But as stated by Baron Parke in *The Attorney-General* v. *Shillibeer*[1], the Government have incurred expenses, although no particular portion of the salary of their solicitor can be allocated to the work done in this suit, and therefore, they are entitled to be compensated by receiving costs from the losing party. If they choose, instead of setting off their costs against the salary they have to pay, to hand them over to their solicitor as a bonus, can the plaintiffs object? I think they could only object if the solicitor depended entirely on his remuneration for costs recovered from opposite parties. If, for instance, a party agrees with his solicitor to pay him a fixed sum, say, £100 for the costs of a suit and pays him that amount, then, if he wins, whatever his costs, when taxed, may amount to, he is not entitled to recover more than £100 from the losing party. But the latter can have no voice in the spending of that money by his opponent, even although there may be an agreement to pay the solicitor the balance of his taxed costs.

The question of the fees of the Advocate-General stands on the same footing, but there is further a

[1] (1849) 19 L. J. Ex. 115.

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decision in *The Lord Advocate* v. *Stewart, No. 2*,(1) cited with approval by Lord Halsbury, Vol. XXVI, p. 804, that a losing party must pay the fees of counsel for the Crown even though he be paid a fixed salary

In my opinion, therefore, the decision of the Taxing Master was right and the application for a review must be dismissed.

Attorneys for the plaintiffs: Messrs. *Ardeshir, Hormusji & Co.*

Attorney for the defendant: Mr. *E. F. Nicholson.*

Application dismissed.

G. G. N.

(1) (1899) 63 J P. 473.

CRIMINAL REFERENCE.

1916.

March 31.

Before Mr Justice Batchelor and Mr. Justice Shah.

EMPEROR *v.* A DEAF AND DUMB ACCUSED.*

Criminal Procedure Code (Act V of 1898), section 341—Deaf and dumb accused—Procedure and Practice.

Though great caution and diligence are necessary in the trial of a deaf and dumb person, yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act, he is liable to punishment.

THIS was a reference made by A. K. Kulkarni, First Class Magistrate at Bhusawal. It was in the following terms:

"I beg to submit herewith the proceedings in case No. 1 of 1916 in which the Police Sub-Inspector of Bhusawal charged a deaf and dumb man for having stolen two sadis worth Rs. 6 belonging to the complainant Halimabi mard Sultanalli from her dwelling house at Bhusaval. The prosecution witnesses were examined and their depositions recorded. The accused, however, could not be made to understand the proceedings though every

*Criminal Reference No. 5 of 1916.