1933 *Present :* **Dalton A.C.J. and Drieberg J.**

ADAIKAPPA CHETTIAR *v.* THOS. COOK & SON.

64—D.C. Colombo, 27,296

Costs—Advocate's fees in appeal—Brief fee and consultation fee—Refresher for adjourned hearing—Provision for payment of two counsel—Amount limited by tariff—Expenses of taxation—Special provision for cases not provided for—Civil Procedure Code, schedule III.

In the scale of costs for advocate's fees in Appeal, a brief fee and a consultation fee may be allowed for more than one advocate but the amount shall not exceed the limit provided by schedule III. of the Civil Procedure Code.

There is no provision for the allowance of a further brief fee where the argument is continued over the day.

Allowance of a further consultation fee is in the discretion of the taxing officer.

The stamp duty payable on the bill of costs and on an affidavit filed in appeal is part of the expenses of taxation.

The proviso to the schedule gives a discretion to the Registrar to allow any charges or fees for which the tariff does not provide.

THIS was an application to revise the taxation of the defendant's bill of costs in appeal. The action involved a claim of the sum of Rs. 170,000 and the argument in appeal lasted eleven days. Defendant's bill of costs against the plaintiff in the Supreme Court amounted to Rs. 10,546.75, but was taxed at Rs. 2,317.75, the rest being disallowed by the taxing officer.

Gratiaen for plaintiff, petitioner.

Hayley, K.C. (with him *Ferdinands*), for respondent.

June 15, 1933. DALTON A.C.J.—

Two applications have been made to revise the taxation of the defendant-appellant's bill of costs in the appeal in the above case. The defendant bank applies to have various items that have been taxed off allowed; the plaintiff objects to several items that have been allowed.

More than one question is raised that is of considerable importance to a party that is successful in his suit, and also in a lesser degree to the legal profession.

The action was one that involved a claim for the sum of Rs. 170,000, and the hearing of argument on appeal in the Supreme Court is stated to have taken eleven days. The plaintiff thereafter appealed to the Privy Council, but his appeal was dismissed, with costs taxed at £828. 8*s*. 7*d*. Defendant's bill of costs again the plaintiff in the Supreme Court amounted to the sum of Rs. 10,546.75, but was taxed at Rs. 2,317.75, the amount of Rs. 8,229 being disallowed by the taxing officer.

The first question arising for decision is the number of counsel to be allowed. The first day of argument was November 25 for which Rs. 840 is charged as brief fee for senior counsel, and Rs. 420 for junior counsel. The taxing officer has allowed these items in the sum of Rs. 105 and Rs. 52.50 respectively. In his reasons for allowing only these sums he states that the highest charge allowed in the scale of fees by which he is governed is Rs. 105 and that a junior's brief fee as a rule is half the fee allowed to the senior.

With regard to this item, Mr. Hayley urges that the taxing officer is given a general discretion to allow even more than the maximum provided in the tariff in proper cases where the proceedings are very voluminous or unusually important or difficult. As against this, Mr. Gratiaen argues that, under the tariff, the taxing officer was correct in so far as he held he was bound by the amount in the tariff, but that he was wrong in allowing a brief fee for more than one advocate.

The tariff of advocates fees in appeal in the Supreme Court is set out in schedule III. to the Civil Procedure Code. With respect to the number of counsel allowed, I see in the tariff no such limitation as that suggested by Mr. Gratiaen. The inclusion in the tariff of a consultation fee necessarily implies the engagement of at least two counsel, otherwise there would be no need to provide for such a fee. The term "consultation" as used here, it has been held, is one to which the correct legal significance must be given, and signifies a meeting of two or more counsel with the proctor. (*Dawbaren v. Ryoll* [1].) The provision of an item for brief fee in the tariff, it is suggested in somewhat bald terms, implies only one brief and therefore only one counsel, or otherwise only one fee that can be taxed, but that is a suggestion which in my opinion has very little to support it. The limitation on the number of counsel allowed in the District Court has not been enacted in the Supreme Court tariff, and the latter tariff in my opinion provides for consultation fees and brief fees to be taxed for more than one counsel if necessary. The number of counsel for whom costs are to be allowed is a matter within the discretion of the taxing officer unless the Court has made any order governing the point in the case under consideration. It is to be observed that under the General Rules for the regulation of proctors' fees in the Supreme and District Courts of 1846, there is a note to the effect that, even at that date, fees for two advocates were allowed in certain cases in the Supreme Court which then, as now,

[1] *17 N. L. R. 216.*

was the Court of Appeal. There is no reason to think that the draftsman of the Code in 1889 sought to restrict the allowance of fees in the Appeal Court to one advocate.

With regard to the amount of the brief fee I think the taxing officer is bound by the limits imposed in the tariff. As against this view, it was strongly urged that in view of the terms of the last provision in the tariff he has a general discretion in proper cases, for example such as might be specially voluminous or difficult, to allow a brief fee exceeding the maximum laid down in the tariff. The proviso relied on is set out as follows:—

> The Registrar may allow any charges or fees not specially provided for, as he shall deem reasonable, on special application being made, subject to an appeal to the Court.

The argument advanced by Mr. Hayley on this point is that this provision is controlled by the general words used in section 208 of the Code, which sets out what expenses are included under the denomination of costs and does not bind down the taxing officer in any way to the fees mentioned in the tariff. In support of this he refers to the English practice. He points out that there the discretion of the taxing officer is not limited to the maximum fees prescribed by Appendix N. as provided by Order LXV., rule 8, in view of the fact that, apart from the provisions of that rule, a subsequent provision contained in rule 27, regulation 29, confers on him a general discretion in special cases to allow all such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party. It is pointed out in *In re Ermen; Tatham v. Ermen*[1] the taxing officer under these provisions has a twofold discretion—one, an ordinary discretion to be exercised within the limits of a maximum and minimum prescribed in Appendix N., and another, a general discretion under regulation 29 without such limits, to be exercised in exceptional cases.

Rule 27, regulation 29, has been further explained in *Société Anonyme Pecheries Ostendaises v. Merchants' Marine Insurance Company*[2]. Atkin L.J. there describes this rule, which seems to have been enacted in the present form for the first time in 1902, as the guiding rule in the taxation of costs, and as intended to sum up generally the principles upon which costs are awarded. He is clearly referring to regulation 29, from the words he uses, for they are not appropriate to rule 27 as a whole. He states it is intended to give to the successful litigant a full indemnity for all costs reasonably incurred in relation to the action. The whole principle that the taxing officer is to apply is to allow "all such costs, charges, and expenses as shall appear to him to have been necessary and proper for the attainment of justice".

I have specially referred to these two cases from those cited because I think they more clearly show the great contrast between the provisions of the English rules and what is provided in our section 208 and the proviso I have set out from the tariff. I regret I am quite unable to read into the proviso, when read either alone or in conjunction with section 208, any such extensive intention or principles as regulation 29 has been held to

[1] *(1903) 2 Ch. 162.* [2] *(1928) 1 K. B. 750.*

contain. The words we are asked to construe are brief and, so it seems to me, plain and explicit, and allow a discretion in the Registrar to allow any charges or fees for which the tariff does not provide, and no more. It might be pertinent to add here that under the English rules the taxing officer is as a rule nowhere limited to any maximum amount that may be allowed for the fee on brief.

The result then on this question relating to the brief fee is that two counsel will be allowed and the amount taxed by the Registrar for senior and junior counsel's fees will stand. As regards the quantum of the fees allowed to counsel it has been held that the Court will not generally interfere with the discretion of the taxing officer, and in my opinion no ground has been shown for interfering here.

The next question raised concerns the allowance of a brief fee where the argument was resumed after the first day. The taxing officer on the taxation of this bill pointed out when objection was taken to these items that there is no provision in the scale of charges in the Appeal Court for a brief fee for the second or any subsequent day of argument. He adds however that it has been the practice in the Registry to follow the scale of charges to be paid to advocates in the District Court and to allow for each such day half the fee allowed for the first day. In accordance with this practice he allowed Rs. 52.50 to senior counsel and half that amount to junior counsel. Mr. Hayley urged, in respect of these items also, the Registrar had a general discretion to tax at a higher figure than that set out in the scale followed by the taxing officer. Mr. Gratiaen for the plaintiff urged that these items should be disallowed *in toto*, as not being provided for or authorized. In my opinion his contention must be upheld.

As I have alrady stated, in my opinion, the taxing officer has in no case the general discretion for which Mr. Hayley contends. That sufficiently answers his argument raised on this question.

In support of his contention that these items must be wholly disallowed, Mr. Gratiaen first of all relies upon the absence of any provision in the Supreme Court tariff for any brief fee where the argument is resumed. He concedes that the proviso may contain authority for the taxing officer to allow a refresher fee properly so called in special cases, such for instance in the rare case of the Court of Appeal allowing further evidence to be taken, since it is a matter not specially provided for in the tariff. In this connection he has referred us to the English practice upon which he relies to support his argument, from which it would appear that the term "refresher", which as used in Ceylon may be said to be equivalent to the words "brief fee where trail or argument is resumed" used in the District Court tariff, has reference as a general rule only to an allowance or an addition day by day of a certain sum paid on trials where evidence is led, and has no application to hearings in the Court of Appeal where no oral evidence is taken. For this reason there is necessarily no provision, he argues, for "refreshers" in the Court of Appeal as there is in the District Court traiff. There is further no provision in the tariff for augmenting the brief fee such as exists under the English rules. So far as the Court of Appeal is concerned (the practice in the House of Lords and the Privy Council does not appear to be the same), when deciding the amount of the fee on the brief, the solicitor is generally in a position to know how long

the case is likely to last, and must calculate the fee accordingly. If in any difficult case, a longer time is taken in the argument than was expected application can be made to the master, not for a refresher, but for an enhancement of the brief fee, on the footing that there had been a miscalculation by the solicitor at the inception when the fee was marked. Such an application however, the taxing officer would be extremely unwilling to grant without very clear proof that any miscalculation had been made. (*Easton v. London Joint Stock Bank.*[1])

In seeking to make use of the English practice for the purpose of helping one to arrive at the powers of the taxing officer under our Code, one has to remember that as regards the brief fee the tariff fixes a maximum amount to which the taxing officer may go. He has, as I have pointed out, no general discretion to exceed that amount. Under the English rules, even where maximum fees are fixed in the case of refresher fees, under his general discretion the taxing master is not limited to the maximum. (*Cavendish v. Strutt*)[2]. Further, the English practice of allowing in an appropriate case an enhancement of the original fee on the footing of a miscalculation by the solicitor can have no place here since, whatever brief fee the proctor may pay, the taxing officer is bound here as he is not bound under the English Rules. However that may be, I can find no room under the tariff for advocates fees as framed for the Appeal Court here for the allowance of a brief fee where the argument continues over from the first day. The fee allowed is a brief only, and it seems to me that no further brief fee where the argument is resumed on a second or subsequent day is contemplated in the Supreme Court . It is specifically provided for in the District Court tariff and I think intentionally omitted from the Supreme Court tariff. It is to be noted that the proviso at the end of each tariff is practically in the same terms. Having regard to the limited powers of the proviso I think the taxing officer has no power to tax any further sum when the argument in the Supreme Court goes over a second or subsequent days. A refresher strictly so called where, for example, evidence is led in the Appeal Court is on a different footing. This is not such a case. The tariff of 1844 provided for a fee larger than the ordinary brief fee allowed if the proceedings were very voluminous or unsually important or difficult, but that provision was out of the tariff of 1889, possibly because the maximum of the ordinary brief fee was at that time enhanced and the maximum was then considered sufficient for all cases. Any suggestion that any larger fee could now be allowed in voluminous or important or difficult cases seems to me to be quite inconsistent with the deliberate deletion from the tariff of an earlier provision for such a larger fee. It is certainly a matter for consideration however whether the Registrar should not again be given power to tax a higher fee in very voluminous or important cases; otherwise, on occasion a sucessful party may well complain that he has not been indemnified for all costs reasonably incurred by him in respect of the action (*vide* Atkin L.J. in *Pêcheries Ostendaises v. Merchants' Marine Insurance Company*[3]).

I have come to the conclusion that these items to which Mr. Gratiaen has taken objection must be disallowed for the reason I have stated. I

[1] (1888) 38 *Ch. D. 25.* [2] (1904) *1 Ch. 524.*

[3] (1928) *1 K. B. at p. 762.*

have come to this conclusion with some little hesitation, as I would like to have heard something of the practice on this point in the House of Lords and the Privy Council which might possibly have been helpful. It may undoubtedly work a hardship in this instance, but the Registrar has I think no power to allow on an adjourned argument in the Court of Appeal a fee which he admits he has imported from the District Court tariff. Mr. Gratiaen's contention on this point, therefore, must be upheld.

The next items with which the appeals deal are the consultation fees allowed. I have already dealt with the number of counsel allowed, and as regards the first consultation and the fees taxed for both senior and junior counsel Mr. Gratiaen's objection must be overruled. His further contention also that the subsequent consultations that have been allowed should be taxed off on the ground that the taxing officer under the tariff could only allow one such fee must be over-ruled. I think under the proviso to the tariff the Registrar can allow for further consultations, on special application being made. They are clearly fees within the contemplation of the tariff, and the allowance of more than one consultation fee is, I think, a matter for the taxing officer's discretion, as is the amount of the fees to be allowed (*Re-Harrison* [1]), within the limits of the tariff.

The next item which is objected to by Mr. Gratiaen is a sum of Rs. 123, the amount of stamps on an affidavit which was allowed by the taxing officer. I think this sum was properly allowed. The defendant-appellant was wise I think in being ready with this evidence in view of the learned trial Judge's finding relating to the alleged or suggested omission of some important words from a power of attorney, and the evidence would quite possibly have been admitted but for counsel for respondent admitting that on this particular point the trial Judge was wrong. The objection must be overruled.

A similar amount, being the stamp duty payable on the bill of costs was objected to by Mr. Hayley as being no part of the costs of taxation. Section 216 of the Civil Procedure Code provides that if more than one-sixth of the amount of any bill of costs is disallowed by the taxing officer, the proctor shall bear the expense of taxation. What proctor is referred to, it is suggested, is not clear as the section now stands. Sections 215 and 216 have been taken from the General Rules of 1846 regulating proctors' fees and there they are clearly to be read together. The latter part has however now been incorporated separately as section 216 into the portion of the Code dealing with costs generally, and "any bill of costs" as therein now mentioned would seem to have been given a wider meaning than in the old rules. In any case, however, the substantial question on this point argued before us was whether or not the stamp on the bill came within the term "expense of taxation". It is a sum that has to be paid in order to have the bill taxed, and that being so it certainly seems to me to be part of the expense of taxation. Mr. Hayley's objection therefore to this sum being disallowed as part of the expenses of taxation must be overruled.

[1] *33 Ch. D. 52.*

With these conclusions on the matters raised on the review by either party, the bill will be referred back to the taxing officer to arrive at the amount to be now allowed.

Under all the circumstances, each side being in part successful on their appeals, I think they should each bear their own costs of the appeals.

DRIEBERG J.—

The defendants have brought up in review the taxation by the Registrar of their bill of costs of a successful appeal by them. The contest is mainly regarding counsel's fees. The bill amounted in the agregate to Rs. 10,546.75 and was taxed at Rs. 2,317.15; the disallowance was mainly in counsel's fees, those of senior counsel being reduced from Rs. 6,163.50 to Rs. 797.50, and in the case of junior counsel from Rs. 3,192.00 to Rs. 483. It is contended for the plaintiff that counsel's fees should be limited to one counsel only, and should be as follows:— Retainer, Rs. 10.50; Consultation fee, Rs. 31.50; Brief fee, Rs. 105, amounting in all to Rs. 147, and that all other items should be disallowed.

Dealing with fees for senior counsel, the following items have to be considered:—

Retainer: The defendants charged Rs. 21 but this was reduced to Rs. 10.50.

Consultation fees: The defendants claimed Rs. 315 paid for two consultations before the hearing, and another fee of Rs. 157.50 for a consultation after the hearing began. The appeal was listed to be mentioned on two occasions, August 19 and October 30, 1929, and Rs. 315 was entered in the bill as fees for counsel on each occasion. Apparently the case was listed on those days for the purpose of fixing a day for the hearing of the appeal which was begun on November 25, 1929. The Registrar allowed Rs. 31.50 for each attendance.

Brief fee and refreshers: Counsel was paid Rs. 840 as brief fee for the first day of argument and Rs. 420 for each further day. The Registrar allowed Rs. 105 as brief fee and Rs. 52.50 for each additional day.

Whether only the items and the amounts stated as contended on behalf of the plaintiff should be allowed depends on the interpretation of the provision in Schedule III., that the Registrar may allow any charges or fees not specially provided for, as he shall deem reasonable, on special application being made, subject to an appeal to the Court. Section 208 of the Civil Procedure Code states what comes under the denomination of costs, and among these there are fees of advocates and proctors. Schedule III. to the Civil Procedure Code, which deals with advocates' fees in appeal, provides for five items of this nature: Retainer; Consultation fees; Making or opposing any special motion; Brief fee; drawing, perusing, settling, and signing any application or petition. For each of these, except the retainer, it fixes a minimum and a maximum amount. These are the items specially provided for, and it is not possible to allow for them any amount in excess of that fixed by the schedule. We were referred to several English cases on the provisions regarding costs in the rules and Orders; the great discretion and latitude allowed by Order

LXV., rule 27, regulation 29, and the recognition of the previously existing practice in regulation 30 of the same rule and Order, make it difficult, if not impossible, to derive any help from these cases. But where a definite provision is made for any item of work and the charge fixed, as in Order LXV., rule 27, regulation 48, which provides for refreshers in matters to be tried upon *viva voce* evidence, questions regarding the matters which fall within that provision are decided according to the usual rules for the interpretation of statutory enactments. In *Walker v. The Crystal Palace District Gas Company*[1], which was a question arising under Order LXV., rule 27, regulation 48, regarding the computation of refreshers where the hearing occupied on the first and the second day a little over five hours, Denman J. said, "Costs are the creation of statute, and the Court or the master is bound by the Act or rules laying down the cases in which particular costs are to be allowed. Order LXV., rule 27 (48), is the rule which gives the master his authority; and, looking at that rule with these considerations, we must see that it is so construed as not to bind unsuccessful parties to the payment of larger costs than those sanctioned by legislative enactment or rule." Thus in the case of the retainer the fee is limited by the schedule to Rs. 10.50, and nothing more could be allowed.

Regarding the fees for three consultations—the provisions in the schedule is "Consultation fee, Rs. 10.50 to Rs. 31.50". Does this limit the fees on this account to one consultation only, or does it merely fix the charge for a consultation? It appears to me that there is no good reason for the former view. The number of consultations necessary would depend on the nature of the case, and a consultation may become necessary as the result of something which occurs during the hearing of the appeal. The right to charge for more than one consultation in a case before the Court of Appeal has been recognized (*Wegmann v. Corcoran, Witt and Company*[2]). I see no reason to question the discretion of the Registrar in allowing the fee for the second consultation.

The fee for two attendances of counsel, on August 19 and October 30, when the appeal was listed to be mentioned, is one which can be rightly brought within the further provision in the schedule. The attenance of counsel was necessary and it is a charge not specially provided for in the schedule.

I will deal with the question of the brief fee and the refreshers together. The Code does not use the word "refresher". In the schedule of advocates' fees in District Courts there is a provision for a fee ranging from Rs. 21 to Rs. 105, according to the class of the case, for "Brief fee on trial or argument"; and a fee of Rs. 10.50 to Rs. 31.50 for "Brief fee when trial or argument is resumed". In the Supreme Court there is only the provision "Brief fee, Rs. 21 to Rs. 105". Is this merely a provision for one brief fee, and is it possible to say that the brief fee for the adjourned argument is a matter not specially provided for and therefore one which the Registrar can allow on special application being made? It appears to me that the schedule intended to restrict the charge to one fee only. The schedule of fees in the District Court uses the words "brief fee" for the fee paid for the first day of argument as well as for the fee paid for the

[1] (1897) 2 Q. B. 500. [2] L. R. 13 Ch. Div. 65.

succeeding days. The allowance of one charge for brief fee, the same in amount as that allowed in the District Court for the first day, suggests that it was intended to make provision for one brief fee only and exclude brief fees for the adjourned hearing. The practice in England before the introduction of the rules and orders of the Supreme Court of 1883 affords some help on this point. In *Harrison v. Wearing*[1], Jessel M.R. explained the principle on which refreshers were allowed in some Courts and not in others. It depended on whether the evidence intended to be used was oral or written. Where the evidence was oral, the solicitor on one side could not know how many witnesses would be called on the other, and he could not mark one fee on the brief when he could not form an opinion of the duration of the case; it was otherwise when the evidence was written, for he could estimate how long the case would last and mark the brief accordingly. In fixing one brief fee only for the argument in appeal, but providing for refreshers in the District Courts the Code has apparently followed this practice. The fees for refreshers should therefore be disallowed and the brief fee limited to Rs. 105.

The plaintiff objects to the allowance of any fees for junior counsel on the ground that the schedule provides for fees for one counsel only. There is nothing in the schedule expressly limiting the fees to those of one counsel, while on the other hand the provision for a fee for consultation implies the engagement of two counsel. It has been held that the word "consultation", as distinguished from "conference", means a meeting of two or more counsel with a proctor (*Dawbaren v. Ryoll*[2]). The Registrar was right in allowing fees for junior counsel, but not of course for refreshers.

I agree with the Chief Justice that the item of Rs. 123, stamps on the affidavit the defendant sought to use, should be allowed, that the defendant's costs of taxation should be disallowed, and that among such costs should be included the charge for Rs. 123 for stamps on the bill of costs.

I agree with the order as to the costs of this appeal.

Varied.