1936 *Present :* **Abrahams C.J., Maartensz and Moseley JJ.**

WICKREMESINGHE *v.* SENEVIRATNE.

1045—D. C. Galle, 31,449.

Costs—Proctor's bill of costs—Charge for making copies of plaint—Copies made by mechanical process—Reasonable charge—Civil Procedure Code, Schedule III.

The item "making a copy of the plaint" occurring in schedule III. of the Civil Procedure Code should be construed as making a copy by other than mechanical means.

Where, owing to the number of defendants in a case, copies of the plaint were printed, the taxing officer has power to allow a reasonable fee for making the copies.

APPEAL from an order of the District Judge of Galle.

This was a partition action in which the respondent, who was the proctor of the plaintiffs in the action, included in his bill of costs the following item: "Making copies of plaints (110 folios in each) 50 cents per folio Rs. 14,355. Owing to the large number of defendants in the action it was found convenient to have the copies printed and the actual cost of printing was Rs. 35. The taxing officer reduced the item to Rs. 5,205.50. On a reference to the District Judge he held that the item should be 5,220. Against this order both parties appealed.

H. V. Perera (with him *L. A. Rajapakse*), for appellant in appeal No. 104, and respondent in appeal No. 105.

The taxing officer has a discretion to allow a sum within the specified limits as is fair and reasonable. In this instance he has followed an imaginary scale which he could not reproduce before the District Judge. Therefore we do not know what scale was followed by him.

The scale in schedule III. refers to work done, and can only mean professional services rendered. The amount charged by the proctor and the amount allowed by the Judge bear no relation to the value of the work done.

Alles v. Buultjens[1] was wrongly decided. It may be admitted that if the proctor's clerk has made these copies, then it would come within the meaning of a professional service; but here the work was done by an independent contractor. Professional services rendered must be distinguished from actual disbursements. It is a fundamental principle of all contracts of agency that the agent must be remunerated for reasonable expenses; he must of course be indemnified for actual disbursements made by him on the principal's behalf.

"Making" a copy, in schedule III., must be taken to mean making a copy by other than mechanical process. When the Civil Procedure Code was enacted, handwritten copies were the rule, and the Legislature did not contemplate the printing of copies.

It cannot reasonably be contended by the proctor that he even compared each one of the printed copies with the manuscript. He would normally have corrected only the proof copy.

[1] *6 C. W. R. 197.*

It cannot be that the Legislature contemplated allowing an exorbitant charge like the present one. The decision in *Alles v. Buultjens* (*supra*) works great hardship and injustice; and in the present case the initial step of making the plaint and copies for service would cost more than the value of the land which is only Rs. 11,000.

N. E. Weerasooria (with him *T. S. Fernando*), for respondent in appeal No. 104, and appellant in appeal No. 105.

It is not denied that 261 copies were necessary. The charge made by the proctor is in accordance with the scale in schedule III., and there should be no departure from that scale. The language of the schedule is clear, and if there is hardship caused, it is a matter for the legislature to amend the law accordingly.

Even though the process employed in making the copies is a mechanical one, each copy has been certified by the proctor. He would therefore be personally responsible for any errors in the printed copies. Under sections 49 and 55 of the Code, it is the duty of plaintiff to serve a copy of the plaint with the summons on each defendant.

"Making" should not be limited to mean acts of the proctor himself so long as the proctor is responsible for the made copies, however they may be made. The word "making" is a general one, and is wide enough to include making by a mechanical process. *Alles v. Buultjens* (*supra*) holds that the process employed in making the copies makes no difference to the rate allowed by the schedule.

In *Anohamy v. Nonabada*[1], the Court approved a modified rate of charges for printed copies of the plaint in a partition case.

Bills of costs may be unreasonable; but it has been pointed out from time to time, and certainly so long ago as 1916 (in *Juan Appu v. Pelo Appu*[2]) that the remedy lay with the Legislature.

This Court will not lightly interfere with the interpretation of an enactment concerning procedure or practice which has been recognized for a long time; see *Boyagoda v. Mendis*[3].

Plaintiff has got his own bill of costs in the case taxed on the footing that he has had to pay his proctor according to the rate allowed by the taxing-master; be cannot now be heard to say that the proctor cannot charge on the basis upon which he has himself acted.

Cur. adv. vult.

November 12, 1936. MOSELEY J.—

The appellant in case No. 104 was one of the plaintiffs in a partition action and the respondent was his proctor. In case No. 105 the positions are reversed, but, as the two cases are being considered together, I shall for the sake of convenience, refer throughout to the client as the appellant and to the proctor as the respondent.

The latter included in his bill of costs the following item:—"Making 261 copies of plaints (110 folios in each) at 50 cents per folio Rs. 14,355."

It is conceded that this number of copies was necessary and it is contended on behalf of the respondent that the charge is according to the scale in the third schedule to the Civil Procedure Code. According to the scale a charge of 50 cents per folio is allowed for making and serving a copy of the plaint, or translation thereof, for service.

[1] *8 C. W. R. 40.* [2] *19 N. L. R. 272.* [3] *30 N. L. R. 321*

It is not disputed that, normally, such a charge represents a fair remuneration for the work performed.

In this case, however, owing to the large number required, it was considered convenient to have the copies printed, in respect of which the actual cost was Rs. 35. The taxing officer reduced the item of Rs. 14,355 to Rs. 5,208.50 following a scale which differs from that laid down by the Civil Procedure Code.

Both the appellant and the respondent raised objections to the revised figure, and the bill of costs was referred to the District Judge. The appellant contended that the charge was excessive; the respondent that the taxing officer had no discretion to allow anything less than the amount fixed by the Code. The acting additional District Judge thought that the taxing officer was entitled to allow any sum up to what he referred to as "*the maxima,*" and further thought that Rs. 20 for each copy of the plaint was a fair and reasonable charge, and found that the item should be Rs. 5,220.

Against this finding both parties have appealed on the grounds indicated above.

Counsel for the appellant has urged that the amount charged in the bill of costs, and indeed the reduced amount fixed by the District Judge, bears no relation to the value of the work done. He further contended that the charges fixed by the schedule are "*maxima*", and that in a case of this nature the taxing officer has a discretion to allow such sum within the specified limit as he considers a fair and proper remuneration for the work done.

In the case of *Alles v. Buultjens*[1], in which the facts closely resemble those in the case before us, the Court, while allowing in full an item for printing copies of a plaint which was charged according to scale, was of the opinion that "the object of the schedule is to fix a maximum up to which "the taxing officer is entitled to tax when he is satisfied that some item of work in the case has been done".

No reasons were advanced by the learned Judges in support of this view with which I regret that I am unable to agree.

A taxing officer has a discretion to allow charges or fees not specially provided for in the schedule, but where a definite fee is fixed in respect of an item, it appears clear that a taxing officer has not, not is it desirable that he should have, a discretion to depart therefrom.

In my view, therefore, the charge for printing copies of a plaint, assuming that such printing can be said to come within the meaning of the words "making a copy", would be 50 cents a folio, that is to say, the proctor's charge in this case would be a proper one.

In the case of *Alles v. Buultjens* (*supra*), the view was taken that "as the schedule now stands no distinction is made as to the process by which copies are made".

It was admitted there, as I think it must be in this case that, if the copies had been made by the proctor's clerk in his own handwriting, the charge would be in order. The amount involved in that case was small, viz.:—Rs. 588, and the extravagance of such a charge was not so apparent as in the present case.

[1] *6 C. W. R. 197.*

That a proctor should be able, by the mere act of handing certain script to a printer and paying the latter Rs. 35 for work done, to recover on that account from his client a sum of Rs. 14,355 can only be described as fantastic.

There can be no doubt that such a circumstance could not have been envisaged when the Civil Procedure Code became law, and handwriting was the universal means of making a copy.

Counsel for the respondent has contended that the language used in this particular item of the schedule is clear, and it is not for the Court to attempt to give effect to the intention of the Legislature, and that it is for the Legislature to remedy the evil, if such it be.

It is a fundamental principle of interpretation that in order to avoid a hardship or an injustice the ordinary meaning of a word may so far be modified. There are numerous authorities for the proposition. It will suffice to quote one. The County Courts Act (*13 & 14 Vict. c. 61*) by section 12 provided that a plaintiff in trespass who recovered a sum not exceeding £5 should not get costs, but that, if he recovered less than £5 and the Judge certifies, the plaintiff should recover his costs. In *Garby v. Harris*[1], the plaintiff recovered £5 exactly. He was not *ipso facto* entitled to costs; and as the amount recovered was not less than £5, it was contended that the certificate given by the Judge was improperly given and should be rescinded. It was held that as there was no doubt about the intention of the Legislature, the words "less than £5" should be read as "not exceeding £5".

It seems to me that in the present case we are faced with no less an injustice.

There is, I take it, no limit to the number of persons whom it may be necessary to cite in a partition action, so it may be that with the present case the limit of injustice has not been reached. In order to avoid such an injustice, I feel that there is ample justification for construing the words "making a copy" as I think the Legislature intended them to be understood, that is to say, as making a copy by other than mechanical means.

That being so, it follows that the item as charged in the bill does not, in my opinion, fall within the meaning of item in the schedule.

The appeal in case No. 104 is therefore allowed with costs. The item is one in respect of which the taxing officer had power to allow a reasonable fee. In all the circumstances, I think a charge of Rs. 200 including Rs. 35 actually paid to the printer, would be reasonable and should be allowed.

The appeal in case No. 105 is dismissed with costs.

ABRAHAMS C.J.—I agree.

MAARTENSZ J.—I agree.

Appeal No. 104 allowed.

Appeal No. 105 dismissed.

[1] *(1852) 21 Law Jour. Ex. p. 160.*