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[FULL BENCH.]

Present: Lascelles C.J. and Middleton and Wood Renton JJ.

ATTORNEY-GENERAL *v.* SAIBO.

118—D. C. Kandy, 218.

Taxation of costs—Fees charged by Crown Counsel should be allowed though no fee was specially paid for the case—Civil Procedure Code, s. 208, applies to the Crown.

The fees of Crown Counsel should be allowed on taxation, in cases where costs are decreed to the Crown.

Even though the salary paid to Crown Counsel covers the performance of other duties than advocacy, a fair proportion of the salary paid may be regarded as an expense "necessarily incurred" on account of each litigation in which Crown Counsel receiving the salary appears.

The Crown is bound by section 268 of the Civil Procedure Code.

THE facts appear in the judgment.

Walter Pereira, K.C., S.-G. (with him *Akbar, C.C.*), for the Attorney-General.—The Crown has to pay salaries to the Crown Counsel and to the Law Officers for securing their services in Crown cases. The salaries paid stand in the place of fees. It has been held in England that a solicitor can be remunerated by salary for contentious as well as non-contentious business (see *Galloway v. Corporation of London*[1]), and that the client can recover usual cost from his opponent in litigation, unless the letter can show that such costs would exceed the amount of the salary. *Henderson v. Merthyr Tydvil Urban District Council,*[2] *Annual Practice* (1912) 539.

Le Mesurier v. The Attorney-General[3] is not applicable to the facts of this case. The fees recovered at the time of the decision of that case went to Crown Counsel, but now the Crown pays enhanced salaries to the Crown Counsel, and appropriates all the fees recovered from its opponents. Wendt J. in *Le Mesurier v. The Attorney-General*[3] did not see any objection to the fees of Crown Counsel being taxed if the fees went to the Crown, and not directly into the pocket of the counsel engaged in the case. The Supreme Court did not wish to encourage the system of " payment by results," but that objection cannot be raised now.

Section 208 of the Civil Procedure Code does not bind the Crown. A statute does not bind the Crown unless it is therein expressly so stated, or unless it appears to have that effect by necessary implication. See *Palaniappa Chetty v. Ismail Seidik,*[4] *The Attorney-General v. Constable et al.*[5] So that even if the expenses were not actually incurred by the Crown, the Crown is entitled to recover the costs. But in this case the Crown did, as a matter of fact, incur expenses, as the salary was paid to Crown Counsel for appearing in cases.

H. A. Jayewardene, for the respondent.—Section 208 of the Civil Procedure Code defines the term " costs "; no expense that is not necessarily incurred by a party can be said to be costs. Appearing in this case did not add to the expenses of the Crown. The Crown Counsel would get the same salary whether they appeared in this case or not. The Attorney-General is in the same position as an ordinary litigant under the Code. He can only recover moneys that he has actually expended for this case. See judgment of Middleton J. in *Le Mesurier v. The Attorney-General.*[3]

[Wood Renton J.—Is not the salary of Crown Counsel paid for the purpose of appearing in these cases? Is it not an expense " necessarily incurred " for this case?] The items in dispute cannot

[1] *L. R. 4 Eq. 90.*
[2] *(1900) 1 Q. B. 434.*
[3] *(1908) 10 N. L. R. 67.*
[4] *(1902) 5 N. L. R. 322.*
[5] *(1879) 4 Ex. Div. 172.*

be said to be necessarily incurred, as they were not spend by the Crown for this case. In *Henderson v. Merthyr Tydvil Urban District Council*[1] the Judges were not hampered by the definition of costs in section 208 of our Code.

[Lascelles C.J.—Is section 208 intended to be an exhaustive definition of "costs"? The word used is *include*.] The words of the section taken as a whole show that the definition is an exhaustive one. The rule of the Supreme Court as to taxation of costs requires a receipt of the advocate before his fees are taxed. No exception was made in favour of Crown Counsel.

Walter Pereira, K.C., S.-G., in reply.—The word "include" in section 208 shows that the definition is not exhaustive. See *Ludovici v. Nicholas Appu.*[2]

Cur. adv. vult.

March 13, 1912. Lascelles C.J.—

This appeal raises the question whether the fees of Crown Counsel should be allowed on taxation in cases where costs are decreed to the Crown. The Registrar in the present case disallowed the following items in the bill of costs submitted for taxation by the Crown Proctor, namely:—

				Rs.
Advising appeal	...	...	...	21
Retainer ...	...	...	...	21
Brief for Crown Counsel	...	...	...	21
Mr. Walter Pereira, K.C.	...	...	...	105

The Attorney-General being dissatisfied with the disallowance of these items, the matter is now referred to this Court for decision in review of the Registrar's taxation.

The position of Crown Counsel as regards fees in cases where costs are decreed in favour of the Crown appears to be as follows. Before the decision in *Le Mesurier v. The Attorney-General,*[3] it appears to have been the invariable practice to allow on taxation the fees of the Attorney-General. Solicitor-General, and Crown Counsel, but this practice never received judicial recognition. These officers up to the date when their salaries were adjusted on a sterling scale, were allowed to retain their fees when recovered. From that date the officers of the Attorney-General's Department who were in receipt of a sterling salary were prohibited by General Orders of Government from retaining any fees paid in respect of their services; and their fees, if allowed, are payable into the Public Treasury. In *Le Mesurier v. The Attorney-General*[3] the Crown Counsel, with respect to whose fees the dispute arose, was not paid in sterling, and so was entitled to retain any fees which might have been

[1] *(1900) 1 Q. B. 434.*

[2] *(1900) 4 N. L. R. 12.*

[3] *(1908) 10 N. L. R. 67.*

allowed him. The Court in that case disallowed the Crown Counsel's fees principally on the ground that the Attorney-General in that case had disbursed nothing, and had incurred no debt for fees to Crown Counsel, and that, therefore, the fees claimed by Crown Counsel were not " expenses necessarily incurred .... on account of the action " within the meaning of section 208 of the Civil Procedure Code. But it is clear from the judgment of Wendt J. that the Court was also influenced by considerations of public policy; that it had in view the mischief which might result from a system under which Crown Counsel received fees only if they were successful. The judgment of the learned Judge contained the following passage:—

> 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.

The question came up again in the District Court of Colombo (D. C. Colombo, 28,832) at a date when Crown Counsels had been placed on a sterling salary; and their fees, if recovered, would have been paid into the Treasury, as is the case now, and would not have been retained by the individual Crown Counsel. In that case the learned District Judge held that the Crown was entitled to recover the fees from the defendant, this decision being based partly on the passage which I have cited from the judgment of Wendt J. in *Le Mesurier v. The Attorney-General.*[1]

The present appeal is based upon two grounds. The first point for consideration is whether the Crown is bound by section 208 of the Civil Procedure Code. It is material to notice the nature of this section. It enumerates the different headings of expenditure which are included in the denomination " costs," so that whenever any question arises as to what expenses are included in the term " costs," the matter may be determined by reference to section 208.

" The Interpretation Ordinance, 1901," by section 14, provides that no enactment shall in any manner affect the right of the Crown unless it is therein expressly stated, or unless it appears by necessary implication, that the Crown is bound thereby; and there can be no doubt but that the Crown in Ceylon, as in England, may take advantage of statutes though not named. But do these principles of constitutional law really help the appellant? If it could be shown that prior to the enactment of the Civil Procedure Code the Crown was entitled as of right to have these costs allowed, it might well be argued that the pre-existing right of the Crown was

[1] *(1908) 10 N. L. R. 67.*

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not affected by the enactment of section 208 of the Code. In *Palaniappa Chetty v. Ismail Seidik,*[1] for example, it was held that before the enactment of the Civil Procedure Code creditors were allowed to intervene for concurrence or preference without being in possession of decrees, and that the enactment of section 352 of the Code, which required intervening creditors to be in possession of judgments, did not affect the pre-existing right of the Crown to intervene without a decree. But the present case is essentially different. There is no question of any prerogative or pre-existing right of the Crown being affected. The Attorney-General representing the Crown sets in motion the machinery provided by the Code for the taxation of costs, but he contends in effect that he is not bound by the section of the Code which enumerates and defines the different kinds of expendture which are included in the term " costs." In effect he contends that the term " costs " means one thing with reference to the Crown and another thing in reference to an ordinary suitor. I do not think that this proposition is tenable. When the Crown descends into the arena and applies to have its costs taxed, I think that the Crown must be taken to have submitted to the enactment by which the taxation of costs is regulated. I am therefore of opinion that the question under consideration must be determined on the footing that section 208 of the Civil Procedure Code is applicable. The other question is thus, whether the items which have been disallowed are expenses necessarily incurred by the Crown. If the matter had been *res integra*, I should have felt little difficulty in answering the question in the affirmative, in view of the decision in *Henderson v. Merthyr Tydvil Urban District Council,*[2] which does not appear to have been considered in *Le Mesurier v. The Attorney-General.*[3] In that case a district council engaged as their clerk a solicitor, who was to be paid an annual salary of £400 for his services both in litigation and in other respects. The question arose under section 5 of the Solicitors' Act, which provides that where there is an agreement between solicitor and client for payment of a lump sum for the whole of the solicitor's services, the client " shall not be entitled to recover from any other person, under any order, for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own solicitor." The Registrar in that case had disallowed an item of £11. 12*s*. 7*d*. in the solicitor's bill of costs, on the ground that the work had been already paid for by means of the solicitor's salary of £400. It was held that the Registrar was wrong; that a certain proportion of the £400 must be taken to have been paid in respect of the charge of £11. 12*s*. 7*d*.; and that it must be assumed, until the contrary was shown, that £400 was a proper sum to be paid to the solicitor for his whole

[1] *(1902) 5 N. L. R. 322.*
[2] *(1900) 1 Q. B. 434.*
[3] *(1908) 10 N. L. R. 67.*

services, and that the £11. 12*s*. 7*d*. was a proper sum to be paid him for this part of the work. " The District Council," said Channell J., " must therefore be presumed to be paying their solicitor £11. 12*s*. 7*d*. out of the 400 for the very work." The learned Judge also observed that cases " such as this frequently arise, and I believe that they are always dealt with in the High Court in the way I have mentioned." The principle on which this case was decided appears to me to solve the difficulties which prevented this Court in *Le Mesurier v. The Attorney-General*[1] from holding that a Crown Counsel's fees in a case where the Crown Counsel did not receive any particular fee for appearing in the action were " expenses necessarily incurred by either party on account of the action. " That such costs are " necessarily incurred " cannot be doubted, for the Crown must appear in such actions and the Crown must pay the counsel whom it employs. But were they incurred " on account of the action "? It is contended with some plausibility that they were not so incurred, because the salary of the Crown Counsel would have been the same if he had not appeared in this action. The decision in *Henderson v. Merthyr Tydvil Urban District Council*[2] seem to me to answer the question in the affirmative. A certain proportion of the Crown Counsel's salary must be taken, until the contrary is shown, to have been paid for his services in this action. It is true that the decision in *Henderson v. Merthyr Tydvil Urban District Council*[2] was a decision under sections 4 and 5 of the Solicitor's Act, 1870, but it is none the less in point in the present case. These sections empower solicitors to enter into agreements for the amount and manner of payment of the whole or any part of their services, and provide that the solicitor cannot recover as costs more than he gets under the agreement. With regard to the power to make such agreements there is no question. The right of the Crown to pay its lawyers by means of fixed salaries is indisputable. But the question whether a proportion of a solicitor's annual salary is attributable to the costs of any particular action, which was the main question in *Henderson v. Merthyr Tydvil Urban District Council*,[2] is in principle the same as that which arises in the present case. For the above reasons I am of opinion that the fees in the case are expenses necessarily incurred on account of the action within the meaning of section 208 of the Code.

There is one other point for consideration. On September 23, 1895, the Judges of this Court issued directions to the Registrar, said to be based on a Minute dated September 1, 1895, which has not been traced, that no advocate's fees be allowed on taxation unless a receipt signed by the advocate is produced by the taxing officer. If the view which I take is correct, namely, that Crown Counsels are paid by means of their salary for each case in which they appear for the Crown, there can be no objection to their giving

[1] (1908) *10 N. L. R. 67.* [2] (1900) *1 Q. B. 434.*

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the receipt required by these directions. For the above reasons I am of opinion that the appeal should be allowed with costs, and the disputed items remitted to the Registrar for allowance unless they are open to objection on other grounds.

MIDDLETON J.—

This was an application to review the taxation of a bill of costs by the Registrar of this Court. It appears that the Registrar has disallowed, amongst other items in the bill, the fees claimed for Crown Counsel, and it is the disallowance of these fees that has been brought up for review. At the present time Crown Counsel are paid salaries in sterling by the Government, and I understand that these salaries are intended to cover, not only the performance of all advisory duties, but also the performance of the duties of an advocate in the Courts upon any contentious business in which the Government may be engaged. It is contended for the Attorney-General, mainly on the authority of *Henderson v. Merthyr Tydvil Urban District Council,*[1] that he is entitled, on behalf of the Crown, on a successful trial, in which the Crown has been awarded costs against its opponent, to have allowed to him fair and reasonable sums to be paid to the Crown, as representing the fees which the Crown would have been compelled to pay to counsel if its contentious work were not done by salaried officials.

The real question to be decided here, in my opinion, is whether the sums claimed can be considered under section 208 of the Civil Procedure Code to be expenses necessarily incurred by the Crown on account of the action. If so, I think the Attorney-General should succeed in review. There is no question that some indefinite portion of Crown Counsel's salary must be considered as an expense necessarily incurred by the Crown with reference to that fraction of Crown Counsel's time which he devoted to this case. The Crown here has, therefore, necessarily incurred indefinite expenses in respect to this action. Do these fees claimed fairly represent those indefinite expenses so necessarily incurred? I think that it may fairly and reasonably be said that the fees ordinarily allowed under the rules as to costs do approximately represent such expenses, unless it can be shown that they will give the Crown more than the indemnity it is entitled to. If this be so, then I think they might reasonably come within the terms of section 208, and on the authority of the case relied on by the Attorney-General he is entitled to succeed. In the case of *Le Mesurier v. The Attorney-General*[2] I thought that the fees claimed for Crown Counsel, which had not been, and could not have been, paid to them by Government, unless recovered by the unsuccessful litigant, did not fall within the provision of section 208. It is observable that at the time of that case the Crown's custom was only to pay Crown Counsel in the

[1] *(1900) L. R. 1 Q. B. 434.*

[2] *(1908) 10 N. L. R. 67.*

event of the recovery of the fees they claimed from the unsuccessful adversary of the Crown, and it was fairly argued by me that the Crown really incurred no expenses on account of actions for counsels' fees in contentious business, as its agreement with its counsel was that they were only paid for such work when recovery was obtained from the other side.

The reasoning, however, of Channel J. in *Henderson v. Merthyr Tydvil Urban District Council* (*ubi supra*), which was not cited to us during the argument of *Le Mesurier v. The Attorney-General,*[1] leads me to think that the dictum of Mr. Justice Wendt at page 69 of the latter case was a proper modification of the view I expressed at page 72, which, however, did not affect that case on its facts.

On the question of the prerogative of the Crown, I am not aware, as I said at the argument, that the Crown has a peculiar privilege as regards costs which, it might claim, could not be restricted by section 208.

I would, therefore, allow the application in review with costs, if the fees claimed represent as approximately as possible the indefinite expenses incurred by the Crown in that behalf, and if there be no other good reasons for their disallowance.

Wood Renton J.—

I do not think that the point that we have to decide in the present case is covered by the authority of the decision of the Supreme Court in *Le Mesurier v. The Attorney-General.*[1] It was there held that 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. The fees claimed in *Le Mesurier v. The Attorney-General*[1] would, if recovered, have been paid to the Crown Counsel who had appeared on behalf of the Attorney-General, whereas here, if recoverable, they are payable to the Crown itself. Wendt J. dealt *obiter* with the very point now before us in the following language:—

> The 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 salaies 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.

My brother Middleton was not prepared to take this view, on the ground that, even under the circumstances which it contemplated, the salary of Crown Counsel would be paid in any event, and that as it covered the performance of a number of other duties, it could not be regarded, within the meaning of section 208 of the Civil

[1] (1908) 10 N. L. R. 67.

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Procedure Code, as an expense "necessarily incurred" on account of any particular litigation.

I refer to these *obiter dicta* merely for the purpose of showing that nothing was actually decided in *Le Mesurier v. The Attorney-General,*[1] adverse to the position assumed by the Crown here, and, indeed, that the present contention of the Crown had the support of one of the learned Judges by whom that case was decided. On the whole, I am of opinion that the view suggested by Wendt J. in *Le Mesurier v. The Attorney-General*[1] was right. It is necessary that the interests of the Crown should be represented in civil proceedings in which it is concerned. It is necessary also that the Crown should pay for the services of the advocates who represent it. Where such payment is made by an annual salary, even if that salary covers the performance of other duties than advocacy, a fair proportion of the salary paid may, I think, be regarded as an expense "necessarily incurred" on account of each litigation in which the Crown Counsel receiving the salary appears. That view was taken by Channel and Bucknill JJ. in *Henderson v. Merthyr Tydvil Urban District Council.*[2] It was there held that where a solicitor is employed at an annual salary, covering a considerable variety of duties besides appearance in Court, the unsuccessful party was liable to pay the solicitor's bill of costs, of which part was claimed in respect of his services as solicitor in the action. The decision in that case did not turn on any special English legislation. The rule laid down, which Channel J. describes as being in accordance with the well-settled practice of the taxing officers in the High Court, was one of principle. The *ratio decidendi* was that, under the circumstances of the case, a proportion of the salary paid to the solicitor should be attributed to the particular litigation in which the point arose, unless the respondent showed that the result would be to give the employer more than an idemnity for the loss of his services while employed in the suit.

"If the litigation," said Channel J., "had been of an expensive character, such as a suit in the House of Lords, and the profit-costs had exceeded the salary, it is apparent that the appellants could not have recovered all the costs without getting more than they paid the solicitor, and in that case no doubt the agreement might be urged in diminution of the costs."

Although it is unnecessary to decide the point, I desire to add that I do not agree with the learned Solicitor-General's alternative contention that section 208 of the Civil Procedure Code is not binding on the Crown. It seems to me that when the Crown comes into Court as a successful litigant and asks taxations of its bill of costs, it must be taken to have submitted to the rules of practice prescribed for the exercise of that branch of the jurisdiction of the Courts to which it appeals.

Appeal allowed.

[1] *(1908) 10 N. L. R. 67.*

[2] *(1900) 1 Q. B. 434.*