1939 *Present :* **de Kretser J.**

HARAMANIS APPU *v.* WICKREMESINGHE *et al.*

125—C. R. Galle, 18,785.

Court of Requests—Taxation of costs—Powers of Commissioner—Witnesses charges—Party giving evidence not entitled to charge for expenses—Method of taxation—Civil Procedure Code, ss. 214, 338 (Cap. 86).

In the Court of Requests it is the duty of the Commissioner to determine the amount to be allowed to a successful party by way of costs on account of witnesses' expenses.

An appeal lies from the decision of the Commissioner.

A party who gives evidence in a case is not entitled to recover his expenses as costs.

Section 833 of the Civil Procedure Code taken with the Second Schedule Part III. makes provision for the taxation of costs in a Court of Requests and section 214 will have no application except in rare cases. Section 833 assumes an *ex parte* taxation of a bill of costs and expenses and as such expenses must be determined by the Commissioner, the most appropriate time for him to do so would be at the conclusion of the judgment.

If it is done thereafter, the party moving should do so with notice to the opposite party and only include the item in the bill after the decision of the Court.

APPEAL from an order of the Commissioner of Requests, Galle.

J. E. M. Obeyesekere, for plaintiff, appellant.

H. V. Perera, K.C. (with him *E. A. P. Wijeyratne* and *D. S. Senanayake*), for defendants, respondents.

Cur. adv. vult.

December 7, 1939. DE KRETSER J.—

This is an appeal from an order made by the learned Commissioner regarding charges in a bill of costs with respect to an expert witness, an Engineer in the Irrigation Department. Many points have been taken, all of them connected with the procedure to be adopted.

[1] *(1885) 29 Chan. Div. 448.*

Most of the reported cases deal with bills of costs in a District Court, and none of them has considered the effect of section 833 which deals specially with Courts of Requests.

I shall briefly review the legislation on this point. Courts of Requests were established by Ordinance No. 14 of 1843 which limited their jurisdiction to £5 and enacted that there were to be no written pleadings. The Supreme Court was empowered to make rules and did so in 1844. Most of the steps in a case were controlled by a "clerk of Court", and he was required by rule 23 to "tax the necessary costs and expenses of the suit against the party to be charged therewith". There was no schedule of costs.

Ordinance No. 9 of 1859 made further provision, and new rules came into force in 1860. Rule 35 with regard to costs is substantially the same as section 833 of the existing Code. We now get a schedule and definite amounts are fixed according to the value of the action. No additional costs were provided for advocates, and "batta of witnesses" was at the discretion of the Commissioner and according to the circumstances of each witness.

When the existing Code came into operation there existed a schedule of costs for Courts of Requests, and this schedule provided for review and appeal with regard to charges for surveys and plans and also gave the Commissioner power to allow a further sum of costs on special application, his order being subject to appeal. Then came the present schedule.

The above summary indicates that taxation of costs in Courts of Requests was in a class distinct and separate from taxation of costs in the District Courts; and while section 214 is of general application and specifically mentions Courts of Requests section 801 expressly enacts that "the following special rules of procedure shall be taken as limiting and controlling the general provisions". The general rules may apply when they are not inconsistent with the special rules. It seems to me that section 833 taken with the present schedule makes ample provision, and that section 214 will have no application to the taxation of costs in a Court of Requests except in very rare cases. Section 833 requires the chief clerk to tax costs according to the rates *specified* in the schedule. Those rates are specified with respect to the charges to be allowed for Proctors and Advocates. There is no multiplicity of items and no difficulty in applying the schedule, and really there is very little for the clerk to do. It should not be necessary to bring up such a bill in review before the Court unless the clerk were utterly incompetent or dishonest, and legislation cannot proceed upon such assumptions. There may, however, be such a case as was dealt with in *Samarasinghe v. Babunhamy*[1]. The schedule then proceeds to make provision for certain other items, and two of these, viz., the costs of surveys and plans and the costs of incidental proceedings, are placed solely within the discretion of the Commissioner and a right of appeal is given from his ruling. With regard to "witnesses' expenses", these were left to be determined by the Commissioner and no right of appeal is allowed. Obviously the Commissioner is not expected to review his own decision in these matters,

[1] *1 C. W. R. 131.*

and where a right of appeal is given it is to be inferred that he will have both parties before him so that the party dissatisfied may appeal from his order. Section 833 assumes an *ex parte* taxation of a bill of costs and expenses and, as such expenses must be determined by the Commissioner, the most appropriate time for him to do so would be at the conclusion of his judgment. If it is done thereafter, the party moving should move with notice to the opposite party, and only include the item in his bill after the decision of the Court has been given.

With regard to witnesses' expenses, there can be no objection to a scale being adopted for general use, and this is usually done. In such cases the items are predetermined by the Commissioner. But what of a special type of witness? Here again the Commissioner must decide, and he must use his discretion in a judicial manner. With regard to the items where an appeal is given, he is expressly required to allow only reasonable charges. Section 208 defines "costs", and the whole of the expense necessarily incurred are allowed. In illustrating what is meant certain items are specified, and the section originally had "charges of witnesses", but by section 2 of Ordinance No. 39 of 1921, these words made way for "such just and reasonable charges as appear to have been properly incurred in procuring evidence and the attendance of witnesses". The Commissioner therefore has guidance for the exercise of his discretion. No doubt he would ordinarily hear both parties on any special matter. He is required to determine the expenses, and that seems to imply hearing both parties first; but when he acts *ex parte* I can see no reason why any dissatisfied party should not apply to him to reconsider his decision. That procedure would be justified by the ordinary rule that when an order is made *ex parte* the party dissatisfied should in the first instance apply to the person who made the order. In the present case the Commissioner had nothing to do with fixing the amount of Mr. Webb's charges. These appear to have been fixed by Mr. Webb himself. But eventually the matter did come up before the Commissioner, and if I were satisfied that he did exercise his discretion properly I should not be inclined to interfere. I do not think, for the reasons I have already given, that the question had first to be raised before the Chief Clerk and to be referred by him to the Commissioner, and that this defect in procedure is fatal in view of the decision in *Mohamed v. Deen*[1]. I do not think the clerk's action was so irregular as to render all proceedings, and in fact the bill itself, a nullity, nor do I think the Commissioner's decision must necessarily be given at the time he gives judgment or at least before the bill is presented for taxation. I do think if the matter came up before him and he decided it there is no right of appeal, but there is always a right in this Court to revise proceedings when discretion has not been properly exercised.

In the present case the matter came before the Commissioner by way of review when conceivably his attitude towards the bill may have been different to what it would have been had the matter come before him originally. In the next place he says the item is excessive but seems to indicate that his hands were tied because Mr. Webb's evidence was very useful and therefore the expenditure was necessarily incurred. This is a

[1] *S. C. L. Rec. 174.*

nonsequitur. Behind this reasoning is the idea that Mr. Webb's bill has been prepared in accordance with regulations by which he is bound. The financial regulation quoted by the Commissioner does not imply that the officer is obliged to follow any scale of fees, nor does the circumstance that the bill was sent through the head of Mr. Webb's department indicate either approval of the bill or that it has been prepared in accordance with regulations. These are matters regarding which there ought to be evidence. There is no evidence of what the agreement between defendant and Mr. Webb was when he engaged his services. Mr. Webb's letter indicates that he sent in his bill on September 23, 1938, and that defendant accepted it by his letter dated September 30, 1938, *i.e.*, the date of the trial. Why everything was left to the last moment is not explained. Mr. Webb presumably had to get permission to do private work and would be approached much earlier ordinarily.

In view of the Financial Regulation quoted by the Commissioner the statement in the letter that the fees are due to Government requires to be read with some qualification. As I am sending the case back I shall not say anything about the items in the bill. It will be best perhaps if the matter is put before another Commissioner.

With regard to the order made regarding the batta bills presented by the first defendant in his capacity as a witness, I am unable to say the Commissioner's decision is wrong. There is every reason to believe that the first defendant attended Court and gave evidence in his own interests and that there was no obligation on his part to do so. It seems to me that our Code makes special provision on this point and throughout draws a distinction between a party and a witness. Section 141 deals with the position of a party who is required to give evidence. Sections 122 *et seq.* only provide for witnesses' costs being paid and deposited or secured in advance, and do not provide for their attending voluntarily and then charging.

The Commissioner says it has not been the practice for a party who gives evidence to charge for expenses, and my own experience corroborates him on this point. It would be unfortunate to depart from so inveterate a practice, especially in a Court of Requests where the policy has been to keep down costs.

The case of *Howes v. Barber*[1] quoted by Mr. Perera was decided in 1852 and dealt with the facts of that particular case. Lord Campbell C.J. said: "No doubt the practice of allowing costs to the successful party in respect of his having been a witness for himself may lead to inconvenient consequences; but we do not think we can lay down a rule that such costs can never be allowed . . . . We must trust to the intelligence and the vigilance of the taxing officers to defeat and to frustrate attempts that may be made to swell costs unnecessarily under the pretext that the parties were material and necessary witnesses. The simple fact of their being examined as witnesses must by no means be considered sufficient to establish a claim for their expenses as witnesses; and if it appears that their attendance was unnecessary, or that they attended to superintend the conduct of the cause, the claim ought to be rejected".

[1] *(1852) 18 Q. B. 588.*

It is to be noted that *15 & 16 Vict. c. 86* was not then in existence, and that in 1858 when the case of a party claiming expenses did arise it was decided on the provisions in the Act which provided that a party requiring to cross-examine a witness on his affidavit should pay the expenses. The case was *Davey v. Durrant.*[1] In that case the party refused to be sworn or cross-examined until his expenses were paid by the party who had required his attendance, and the Court held that he was in the same position as a witness and was covered by the Act.

But while the principles recognized in these cases might possibly be applied in appropriate cases, I think that our Code had made ample provision on the subject. In any case it is impossible to say that the Commissioner exercised his discretion wrongly.

The order with regard to Mr. Webb's charges is set aside and the case sent back for fresh consideration of this point.

There will be no costs of this appeal, and the costs of further proceedings will be in the discretion of the learned Commissioner.

Set aside.