

THE HAMBURG-AMERICAN } APPELLANTS; 1907  
 PACKET COMPANY (SUPPLIANTS) } \*June 12.  
 \*Dec.-28.

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE REGISTRAR IN CHAMBERS.

*Taxing costs to the Crown—Fees to counsel and solicitor—Salaried officer representing the Crown.*

As the statutes of Canada defining the duties and salaries of the Attorney-General and his deputy deny additional compensation for services rendered by them in connection with litigation affecting the Crown, it is improper to allow counsel fees or solicitor's fees in respect of services rendered in such capacities by either of these officers on the taxation of costs awarded in favour of the Crown. *Jarvis v. The Great Western Railway Co.* (8 U.C.C.P. 280), and *The Charlevoix Election Case* (Cout. Dig. 388) followed.

**A**PPEAL from an order of the Registrar in Chambers, on taxation of the costs awarded to the respondent on an appeal to the Supreme Court of Canada(1).

The judgment in question was taken on appeal to the Judicial Committee of the Privy Council, pursuant to leave granted on 22nd July, 1903(2), and subsequently(3) the order granting leave to appeal was rescinded and the appeal dismissed by the Board.

On the taxation of the costs awarded to the Crown, the Registrar, in Chambers, allowed counsel fees to the Attorney-General of Canada and the deputy Minis-

\*PRESENT:—His Lordship Mr. Justice MacLennan, in Chambers.

(1) 33 Can. S.C.R. 252.

(3) 28th July, 1906; see p.

(2) 41 Can. Gaz. 415.

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ter of Justice, who argued the appeal on behalf of the Crown. On behalf of the appellants, an appeal from this order was taken and heard in chambers before MacLennan J.

*Burbidge* appeared for the appellants.

*Pownell* for the respondent.

MACLENNAN J.—This is an appeal by the company from the taxation of the costs awarded to the Crown on the dismissal of the appeal, as noted in the Supreme Court reports(1), in 1902.

The registrar has taxed counsel fees to the Attorney-General and the deputy minister of justice, who argued the appeal on behalf of the Crown, and it is objected that those fees cannot be allowed inasmuch as both the Attorney-General and the deputy minister are salaried officers of the Crown and must be regarded as having acted officially in conducting the appeal.

The statute, R.S.C. (1906) ch. 4, fixes the salary of the Minister of Justice, and the Act, R.S.C. (1906) ch. 21, sec. 2(2), declares that the Minister of Justice shall be ex officio Attorney-General; sec. 53 of R.S.C. (1906) ch. 16, "The Civil Service Act," fixes the salary of the deputy Minister of Justice; and sub-secs. 2 and 3 of sec. 59, of that Act are as follows:—

(2) He (the deputy head) shall give his full time to the public service, and shall discharge all duties required by the head of the department, or by the Governor in Council, whether such duties are in his own department or not.

(3) No deputy head shall receive any pay, fee or allowance in any form in excess of the amount of the salary hereinbefore authorized to be paid to him.

(1) 33 Can. S.C.R. 252.

I am of opinion that counsel fees ought not to be taxed either to the Attorney-General or the deputy minister, or rather to the Crown, in respect of fees paid to either of those officers.

So far as the Attorney-General is concerned, he represented the Crown in this litigation. He might have employed other counsel, but, instead of doing so, he chose to act himself. In doing so he was performing one of the ordinary functions of his office; and, if the Crown had been unsuccessful and had not been awarded costs, it is not conceivable that he would, or could legally claim or receive any compensation for his service, other than, or in addition to, the salary prescribed by statute.

The costs awarded are not the costs of the counsel or solicitor, but the costs of the client, incurred by him, independently of the result of the litigation, and if the client has not incurred or is not liable for costs, or any particular item or fee, he cannot recover them as costs of the litigation.

I think, therefore, that the fees taxed as paid to the Attorney-General ought not to have been allowed.

And it is, *a fortiori*, as to the deputy minister, for he is required to give his full time to the public service, etc., and is not to receive any pay, fee or allowance in any form in excess of his fixed salary.

No English authority was cited to me, which may be accounted for by the fact that, except as prescribed by different statutes, the Crown in England neither pays nor receives costs of litigation; *The King v. The Archbishop of Canterbury* (1) at pages 569, 571.

The point here in question was decided in the Province of Ontario, nearly fifty years ago, in *Jarvis v.*

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*The Great Western Railway Co.* (1), a decision which has been followed ever since in the courts of that province.

In that case, the company's solicitor was employed at a salary, and it was held that the company, not having incurred any costs in the litigation, so far as it was conducted by their solicitor, could recover nothing in respect of his services, upon a judgment in their favour with an award of costs.

The same point was decided in this court, in 1880, Fournier and Henry JJ. dissenting, in *The Charlevoix Election Case; Valin v. Langlois* (2).

In that case, the respondent, an advocate, argued the appeal in person, and it was held that a counsel fee could not be taxed to him.

The appeal should, therefore, in my opinion, be allowed with costs.

*Appeal allowed with costs.*

1) 8 U.C.C.P. 280.

(2) Cass. Dig. (2 ed.) 677; Cout. Dig. 388; Cass. S.C. Prac. (2 ed.) 140; Masters S.C. Prac. 167.