

[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR HOME AFFAIRS PLAINTIFF ;

AND

BEALE DEFENDANT.

H. C. OF A. *Costs—Taxation—Acquisition of land by Commonwealth—Compensation proceedings*
1916. *—Counsel's fee for view of land—Discretion of Taxing Officer—Lands Acquisition*
~ *Act 1906 (No. 13 of 1906), sec. 38—Rules of the High Court 1911, Part I.,*
SYDNEY, *Order LIV., r. 14.*
May 5.
Rich J.
IN CHAMBERS.

On the taxation of the costs of proceedings in the High Court to determine the amount of compensation payable for land acquired by the Commonwealth under the *Lands Acquisition Act 1906*, the Taxing Officer has an unfettered discretion to allow a fee to counsel to view the land acquired, and the question he should consider is whether, under the circumstances of the particular case, the fee was necessary or proper for the attainment of justice.

REVIEW of taxation.

Certain land having been acquired by the Commonwealth under the *Lands Acquisition Act 1906*, and Octavius Charles Beale having made a claim for compensation in respect of his interest therein, an originating summons in the High Court was taken out in the New South Wales Registry by the Minister for Home Affairs pursuant to sec. 38 of the Act for the purpose of determining the amount of compensation payable. The summons was heard by *Rich J.*, who determined the amount of compensation payable, and ordered the defendant, Beale, to pay the costs of the proceedings. On the taxation of the costs the Deputy Registrar disallowed a fee paid to counsel for the plaintiff on a brief to view the land in question. The plaintiff objected to the disallowance of the fee on the grounds : (1) that it was necessary for counsel to have the said

view before the hearing so that he might be thoroughly cognizant with the subject land and its salient features ; (2) that the said view was essential not only for the purpose of cross-examining the defendant's expert witnesses but for more completely understanding the proofs of evidence of the plaintiff's expert witnesses ; (3) that the said view was necessary in order that counsel might be better able fully and adequately to present the case for the plaintiff ; and (4) that the fee was an item properly and fairly chargeable in the circumstances by the plaintiff against the defendant in the costs ordered to be paid by the defendant.

The Deputy Registrar disallowed the objection, and gave his reasons, as follows :—“The question in this case which I had to decide was whether the plaintiff was entitled to charge as against the respondent a fee paid to counsel for a view of the land the subject matter of this proceeding. The same question is being raised by the Commonwealth Crown Solicitor in five or six other cases in which the value of large blocks of land had to be ascertained, in connection with land tax appeals. In the first place, a fee to counsel to view the *locus* is never allowed in New South Wales in an action at common law, and in the case of *O'Rourke v. Commissioners for Railways* (1) Mr. Justice *Stephen* stated that, in the absence of authority, the costs of qualifying counsel to conduct a case could not be allowed against an unsuccessful party ; consequently, I disallowed the fee paid in this case and the consequential attendance. In the next place, assuming I had a discretion to allow such a fee, as I will have in all matters regulated by the Rules of the Supreme Court of New South Wales of 18th November 1915, this does not appear to me to be a case in which such a fee ought to be allowed. In cases of this nature a qualifying fee is always allowed to the experts who are required to give evidence as to the value of the land, and was so allowed in this case, whilst in some of the cases to which reference was made before me, in which the same question is being raised, a fee had also been allowed for a survey or making an elaborate plan of the properties concerned. In England it appears that a fee to counsel for a view is usually disallowed : *Masters' Practice Notes*, Costs, item 38 (*Annual Practice* 1916, p. 1759).

H. C. OF A.
1916.

THE
MINISTER
FOR HOME
AFFAIRS
v.
BEALE.

(1) 10 W.N. (N.S.W.), 49.

H. C. OF A.
1916.
~
THE
MINISTER
FOR HOME
AFFAIRS
v.
BEALE.

See also *King on Costs on the High Court Scale*, where it is stated, at p. 97, that the allowance of a fee to counsel to view before trial will, as between the parties, be only sparingly made, but, if allowed, will not be interfered with. In the case of *Leeds Forge Co. Ltd. v. Deighton's Patent Flue and Tube Co. Ltd.* (1) *Farwell J.* held that such a fee might be allowed whether the view was held for the purpose of a trial or for the purpose of an appeal. A similar fee for the inspection of machinery was also allowed in *Ashworth v. English Card Clothing Co. Ltd.* (2), where the Master thought the fee was properly paid but had disallowed it because he thought he had no power to allow it without an express direction from the Court. If a fee to view the land in a case of this nature were allowed, it would have to be allowed in every case where the question at issue was the value of a large block of land. It also appears to me that, where the sole question is the value of a large area of ground, counsel is quite capable of conducting a case without first seeing the land—an opinion in which I am confirmed by the fact that senior counsel did not find it necessary to inspect the land in question, and no view fee was paid to him. In the circumstances I am of opinion that the fee paid to counsel in this case to view the land was not necessary or proper for the attainment of justice, and have accordingly disallowed it.”

A summons was thereupon taken out by the plaintiff to review the taxation.

Pike, for the plaintiff. The Deputy Registrar had a discretion as to allowing the fee, and he has failed to exercise it. *O'Rourke v. Commissioners for Railways* (3) is not an authority for the proposition that such a fee is never allowed in New South Wales. The correct principle is stated at the beginning of the judgment in that case, as follows:—“A party may charge against another whatever costs have been necessarily incurred for the establishment of his case.” See also *Smith v. Buller* (4).

Bavin, for the defendant. It is admitted that the Deputy Registrar had a discretion, and an examination of his reasons shows

(1) (1903) 1 Ch., 475.

(2) (1904) 1 Ch., 702.

(3) 10 W.N. (N.S.W.), 49.

(4) L.R. 19 Eq., 473, at p. 475.

that he has exercised it. In exercising his discretion he has not acted on any wrong principle, and therefore the Court will not interfere.

Pike, in reply. The discretion must be unfettered.

[RICH J. referred to *Bartlett v. Higgins* (1).]

The Deputy Registrar considered that he was bound by *O'Rourke v. Commissioners for Railways* (2). The grounds on which he states that in the exercise of his discretion, if he had one, he would have disallowed the fee are chiefly grounds for allowing it.

RICH J. It is admitted that the taxing officer had a discretion in regard to the allowance or otherwise of this particular item. The question I have to determine is whether he has exercised his discretion.

I am satisfied from the written reasons furnished by the taxing officer that he has not exercised untrammelled discretion. He appears to have disallowed the item on the ground that such a fee is never allowed in the State of New South Wales.

In exercising his discretion the taxing officer must consider whether, under the circumstances of the particular case, the fee was necessary or proper for the attainment of justice.

I have had the advantage of hearing the case and of inspecting the land, and I am of opinion that in this case a view by counsel was necessary and proper, and not in the nature of a luxury. Counsel was enabled to see for himself the subject matter of the case he had to conduct, and to ascertain its nature at first hand, and so weigh the evidence of the experts and other witnesses proposed to be called. In the result I am satisfied the case was considerably shortened, and great waste of time and expense prevented.

I would add a word or two with regard to the reasons that the taxing officer states would have actuated him if he had a discretion. It does not follow that because the fee is allowed in this particular case it must be allowed in every case where the question at issue is the value of a block of land : there is no such general rule. Every case must be dealt with on its own merits, having regard to the

H. C. OF A.
1916.

THE
MINISTER
FOR HOME
AFFAIRS
v.
BEALE.

(1) (1901) 2 K.B., 230, at p. 235.

(2) 10 W.N. (N.S.W.), 49.

H. C. OF A.
1916.

THE
MINISTER
FOR HOME
AFFAIRS
v.
BEALE.
Rich J.

principles I have already stated. It would be difficult to imagine a case dealing with the valuation of a large area (involving as it does complex classification of elements of value) where such a fee would not be necessary and proper.

The facts that experts have valued the land and that a plan of it has been prepared do not, in themselves, render a view by counsel unnecessary. One of the objects of the view is that counsel may thoroughly understand the reports of the experts and the plan before he embarks on the conduct of the case. Experts differ considerably; a plan is a mere scrap of paper with certain lines drawn on it, which a view converts into a live thing.

The fact that one counsel only had a view indicates, to my mind, no more than that the parties desired to keep down expense, and junior counsel could inform his senior on all necessary points.

So far as the English practice is concerned, having regard to the different conditions prevailing here in regard to land and land valuation, little or no assistance can be gathered from such practice.

I allow the objections, and refer the matter back to the taxing officer to vary his certificate accordingly. I make no order as to costs, as costs are not asked for.

Objection allowed. Matter sent back to the taxing officer to vary his certificate accordingly.

Solicitor for the plaintiff, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the defendant, *R. A. Munro King, Dowd & Barry*.

B. L.