[HIGH COURT OF AUSTRALIA.]

CLARK, TAIT AND COMPANY AND ANOTHER APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1931.

SYDNEY, *Aug.* 8, 9.

Rich J.

*Costs—Taxation—Appeal from Registrar—Land tax—Crown leaseholds in Queensland—Hearing in Sydney—Witnesses from Queensland—Expenses—Counsel—Melbourne counsel employed—Fees for days before hearing commenced—Refreshers for Saturday and Sunday—Fees disallowed—Melbourne solicitor attending taxation in Sydney—Costs allowed.*

The appellants successfully appealed to the High Court against an assessment to land tax of certain Crown leaseholds in Queensland and obtained an order for costs in their favour. The appeal was heard in Sydney, and Melbourne senior and junior counsel were employed by the appellants. The District Registrar who taxed the appellants' bill of costs disallowed certain items, some wholly and others in part. The appellants took out a summons to review the Registrar's decision.

*Held*, (1) that the appellants were entitled to (*a*) the costs of typing copies of evidence in another similar case relating to land tax; (*b*) the costs of a Queensland stock and station agent and valuer for qualifying fees, collection of evidence, travelling expenses and attendance in Sydney, though he was not called as a witness; and (*c*) the costs of a station manager from Queensland who attended in Sydney for the purpose of assisting counsel and solicitors in dissecting station books and records, but who was not called, though available to give evidence; (2) that the Registrar had properly disallowed part of the amounts claimed as the costs of copying documents including addresses by counsel and evidence of witnesses in another similar case and of preparing brief to second counsel; (3) that counsel's fees for the days before the hearing of the case began and refreshers paid for Saturday and Sunday should not be allowed, but that an allowance should be made in respect of fees paid to counsel during an adjournment (except for Saturday and Sunday) granted for preparation of counsel's addresses and that in determining the amount to be allowed for counsel's fees regard should be had to the complexity of the case and to

the fact that counsel from another State were engaged in it; (4) that this was a proper case for the attendance on taxation in Sydney of the appellants' Melbourne solicitor.

REVIEW of Taxation of Costs.

Clark, Tait and Co. and the Northampton Pastoral Co. Ltd. (hereinafter called "the appellants") had appealed to the High Court against assessments to land tax upon Crown leaseholds in the Northampton Downs group, Bimerah and Barcaldine Downs. In the earlier assessments the taxpayers were Clark, Tait & Co., and in the later assessments were Northampton Pastoral Co. Ltd. The hearing of the case, which was of a lengthy and complicated character, took place in Sydney, and senior and junior Melbourne counsel were engaged by the appellants. The appeal was allowed, and an order for costs was made in the appellants' favour. The District Registrar who taxed the appellants' bill of costs disallowed certain items as hereinafter appears, and the appellants took out a summons to review his decision.

The items to the disallowance of which objection was taken were as follows:—(1) Item 107—Paid L. E. Watson for typing two copies of evidence in *McLeod* v. *Commissioner of Taxation* and postage, £15 1s. 5d. (2) Item 107 — Paid C. M. Pegler, Blackall, Queensland, stock and station agent and valuer, qualifying fees, collection of evidence, travelling expenses and attendance in Sydney for the purpose of giving evidence, £434 15s. 5d. It appeared that C. M. Pegler was a witness whom it was intended to call in support of other witnesses on behalf of the appellants as to the value of the relevant properties. He had fully qualified to give evidence and was present in Sydney during the hearing as a witness but, owing to his ill-health, he was not called. (3) Item 107—Paid J. H. Cameron, Barcaldine Downs Station, manager, travelling and hotel expenses, £82 0s. 7d. It appeared that J. H. Cameron was present in Sydney during the hearing for the purpose of assisting counsel and the instructing solicitor in dissecting the books and records of the station and supplying information regarding its working. He was also available to give evidence to the Court if required regarding these matters. (4) Item 110—Copy documents to accompany brief, consisting of statement as to average cost

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per head of live stock 1915-1922 and summary, 148 folios; land tax returns, 58 folios; assessment notices, &c., 678 folios; correspondence, 210 folios; addresses by Mr. Owen Dixon K.C., and evidence of C. W. Mitchell and D. Hannah in Jowett's Appeal, 938 folios; Land Court determinations, 27 folios; Mr. Mitchell's reports, &c., and analysis of assessments, 417 folios: making a total of 2,476 folios—£82 10s. 8d. It appeared that the District Registrar disallowed this item to the extent of £44 4s. 8d. and it was objected that in so doing he had not properly exercised his discretion, and that all the documents were necessary and proper to accompany brief. Item 113—Brief for second counsel, 3,809 folios, £63 9s. 8d. This item was disallowed to the extent of £22 2s. 4d. (5) Items relating to the payment of counsel's fees:—Item 131, 26th July, paid Mr. Ham K.C. fee and clerk, £43; paid Mr. Martin fee and clerk, £32 10s. Items 132, 133, 145, 146, 153, 155, 156, 163 and 164 related to similar payments for the dates 27th and 28th July and 3rd and 4th and 8th to 11th August. Item 176 related to similar fees paid to Mr. Ham K.C. and Mr. Martin for 13th August which were disallowed to the extent of £37 14s. 6d. and £29 16s. 9d. respectively. Items 203 and 205 related to fees of £11 and £7 12s. paid to Mr. Ham K.C. and Mr. Martin on the continuation of the hearing of the appeals, which amounts were disallowed in full. As to these items it was contended that the District Registrar was wrong in deciding that he could not allow fees to counsel for days other than those in Court, and that he was wrong in allowing counsel's fees on the scale applicable to Sydney counsel; alternatively, that the District Registrar did not properly or at all exercise his discretionary powers in regard to fees to counsel, the amounts allowed being inadequate in the circumstances. Items 134, 137, 139, 141, 143, 147, 149 and 151 related to five refresher fees paid to Mr. Ham K.C. of £43 each and to Mr. Martin of £32 10s. each for 29th, 30th and 31st July and 1st and 2nd and 5th to 7th August 1930. As to these amounts it was contended that the District Registrar did not properly exercise his discretion in disallowing refresher fees to Mr. Ham K.C. to the extent of £21 5s. per day and to Mr. Martin to the extent of £18 7s. per day, the amounts allowed being, it was alleged, grossly inadequate in the circumstances;

alternatively, it was contended that the District Registrar had acted upon a wrong principle in limiting refresher fees to such as would be applicable to Sydney counsel and so disregarding the fact that the counsel engaged were from another State. (6) Items 248-250 were as follows:—248. Journey from Melbourne to Sydney for taxation of costs. Attending taxing. Return journey from Sydney to Melbourne. 249. Paid fares. 250. Paid expenses. As to these items it was objected that the District Registrar had allowed only £21 in respect of item 248 and nothing in respect of items 249 and 250; that he acted upon a wrong principle in deciding that he could not allow the costs of representation from Melbourne on the taxation of costs; that he acted upon a wrong principle in deciding that a fee should not be allowed for attendance of counsel on the taxation, and that he had not properly exercised his discretionary power in that the amount allowed was grossly inadequate in the circumstances. (7) Item not numbered which was as follows:—C. W. Mitchell, Brisbane, Pastoral Inspector for Queensland Trustees—Qualifying fees and out-of-pocket expenses, £225 8s. 4d. Witnesses expenses, £210. Travelling expenses, &c., £23 4s. 8d. Use of room at Hotel Metropole, Sydney, £9. Total, £467 13s. It was contended that the District Registrar had acted upon a wrong principle or, alternatively, had not properly or at all exercised his discretionary power in disallowing these fees to the extent of £212 18s. 4d., and that the amount allowed in this item was grossly inadequate in the circumstances.

The summons came on for hearing before *Rich* J.

*Ferguson*, for the appellants.

*De Baun*, for the respondent.

*Cur. adv. vult.*

Aug. 9.

The following written judgment was delivered:—

RICH J. I have had the advantage not enjoyed by the learned Registrar of hearing a number of land tax cases, and am therefore in a better position to appreciate matters which perhaps have not been brought to the attention of the Registrar: the discretion of the Court is to be exercised upon its own knowledge of the circumstances of the particular case (*Western Australian Bank* v. *Royal Insurance Co.* (1)). I am at all times loath to interfere with the

(1) (1908) 7 C.L.R. 385, at p. 388.

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decisions of experienced taxing officers, but the case under consideration was exceptional—one of great importance and complexity, and I think that the learned Registrar has, in some of the items under review, proceeded on a wrong principle, although the Court may control any decision of a taxing officer (*Saddington, Taxation of Costs between Parties*, at p. 135).

Item 107 (*McLeod's Case* (1)). For some years the method of land valuation under the *Land Tax Acts* had been under discussion in the Queensland Lands Commission and in a series of cases which came before me. In *Jowett* v. *Federal Commissioner of Taxation* (2) I pointed out that the Commissioner was not employing the right method, and I endeavoured to lay down what was required by the *Land Tax Acts*. The next cases set down for hearing in Brisbane were *McLeod's Case* and the case now under review. This case was adjourned to Sydney and *McLeod's Case* was then heard and determined. I found that the Commissioner had profited by my suggestions. The cases mentioned were interconnected and inter-dependent—concerned with the same subject. Whether the land be freehold or leasehold the principle of valuation is the same although the arithmetical calculation—a matter which does not come before the Court—is different. When, therefore, the present case came on for hearing it was important for the appellants to know what tactics (adopting the word used by the Registrar) the Commissioner had employed in *McLeod's Case*. That being so, I do not consider that it was unnecessary or overcautious on the part of the appellants to incur the expense of the copies of evidence in *McLeod's Case*. I allow the objection.

(Pegler). The fact that a witness was not examined does not disentitle a party to the costs attendant on his proof and attendance (*London, Chatham and Dover Railway Co.* v. *South-Eastern Railway Co.* (3); *Levetus* v. *Newton* (4); *Gregg & Co.* v. *Gardner* (5)). Counsel conducting a case may, seeing the course it is taking, in his discretion see fit not to call a witness (compare *Clark* v. *Malpas* [*No.* 2] (6)). Pegler was no doubt suffering from influenza but his recovery was

(1) Unreported.
(2) (1926) 38 C.L.R. 325.
(3) (1889) 60 L.T. 753.
(4) (1883) 28 Sol. J. 166.
(5) (1897) 2 I.R. 122.
(6) (1863) 31 Beav. 554, at p. 558; 54 E.R. 1253, at p. 1255.

probable. The case was of such importance that another expert witness was not over-burdening the case or in the nature of a luxury. I allow the objection.

(Cameron). During the hearing of cases of this class the number of sheep carried on the subject land, travelling sheep, agisted sheep, mortality, weight of clip, prices, costs and a number of other details are discussed and the books of the taxpayer are of the greatest importance in determining these matters. Cameron as the manager of part of the subject land and intimately acquainted with its working was essential to the proper and prudent conduct of the case even although he was not called as a witness. I allow the objection.

Items 110, 113 (Documents). I am not disposed to interfere with the Registrar's decision with regard to these items.

Items 131-133, 145, 146, 153, 155, 156, 163, 164. I think the Registrar was quite right in disallowing the fees paid for 26th-28th July before the hearing of the case began. They are or should be covered by the fee on the brief. Similarly I disallow refreshers paid for Saturday and Sunday. On the other hand I shall allow the fees paid during the adjournment (except Saturday and Sunday) which I granted after the taking of evidence was concluded. Land tax cases are usually very long and complicated—there is a mass of oral evidence and exhibits—the latter comprising comparative tables of figures prepared by both sides which require careful analysis. I have found during a long experience that addresses are much shortened and more effective if counsel are allowed a breathing space for preparation. I treat it as part of the hearing. This, I think, covers 8th and 9th August. I also think that the Registrar has not sufficiently taken into consideration the complexity of the case and the fact that counsel from another State were engaged in it. I consider, therefore, that the refreshers or increased fees paid to senior counsel should be 35 guineas and those for junior counsel should be on a proper proportion. To sum up, the Registrar was right in disallowing the increased fees and refreshers paid to counsel on 26th, 27th and 28th July and 3rd, 4th, 10th, 11th and 13th August. On the other days such fees and refreshers should be allowed on the scale I have mentioned.

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Items 203 and 205. I make no order.

Items 248-250. I consider this was a proper case for the attendance on taxation of the Melbourne solicitor.

The item as to Mitchell's fees and expenses was properly not pressed.

I allow the objections specified and refer the matter back to the taxing officer to vary his certificate accordingly. There will be no order as to costs.

*Order accordingly.*

Solicitors for the appellants, *Whiting & Byrne.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

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[HIGH COURT OF AUSTRALIA.]

TAYLOR . . . . . APPELLANT;
INFORMANT,

AND

THORN . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1932.

MELBOURNE, *Sept.* 23.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

*Public Service (Cth.)—Postal employee—Offence—Wilfully delaying postal article—Omission to deliver—Intention to deliver at later time—Post and Telegraph Act* 1901-1923 (*No.* 12 *of* 1901—*No.* 17 *of* 1923), *sec.* 109.

Sec. 109 of the *Post and Telegraph Act* 1901-1923 provides that "Any person employed by or under the Department or in the conveyance of mails who negligently loses or who wilfully detains or delays . . . any mail or any postal article shall be liable to a penalty not exceeding twenty-five pounds."

The respondent, a postman, inadvertently failed to deliver a letter and, having discovered his omission, did not return and deliver it, but took it