

Friday, July 7.

OUTER HOUSE.

[Lord Stormonth Darling.

LORD ADVOCATE v. STEWART.

*Expenses—Crown—Liability of Unsuccessful Litigant for Fees of Crown Counsel—Objection that Fees Not Paid.*

In an account of expenses the Crown claimed fees for the attendance of the Solicitor-General, who appeared for the Crown. The Auditor allowed the fees. The defender objected on the ground that the fees had not been sent to the Solicitor-General, who was paid a salary for his services.

*Held* that the Crown, if successful, is entitled to recover expenses as between subject and subject, although the counsel who appears for the Crown receives a fixed yearly salary.

This was an information brought by the Lord Advocate as representing the Commissioners of Inland Revenue against John Stewart, dealer in spirits, Fountainbridge, Edinburgh, for contraventions of the prohibition against "grogging" spirit casks contained in section 4 of the Finance Act 1898 (61 and 62 Vict. c. 10). The Lord Ordinary (STORMONTH DARLING), after a proof, found the defender guilty of all the contraventions charged, and awarded expenses to the pursuer. At the proof the Solicitor-General (Scott Dickson, Q.C.) appeared for the Crown. The pursuer, in his account of expenses, claimed fees for the attendance of the Solicitor-General which the Auditor allowed. The defender lodged a note objecting to the fees on the ground that they had not been sent. The Solicitor-General is paid a salary to cover all business done by him in virtue of his office or on the instructions of any Government department. It was admitted the fees claimed had not been and would not be sent.

On 7th July the Lord Ordinary having heard counsel on the defender's objection, approved of the Auditor's report.

*Note.*—"By the Exchequer Court (Scotland) Act 1856 (19 and 20 Vict. c. 56), section 24, the Crown is entitled, when it succeeds in a litigation, to recover expenses of process 'in the like manner as, and under the like rules, regulations, and provisions as are or may be in force touching expenses of process in proceedings between subject and subject.'

"Now, the rules as regards counsel's fees in proceedings between subjects are pretty well ascertained. The fees must be of reasonable amount, and it is no objection to recovering them from an opponent that they have not been sent till after judgment, but they must be sent before taxation, and evidence of that, if required, must be produced.

"These rules afford little help to the solution of the question here raised, because the fees to the Solicitor-General

proposed to be charged against the defender have admittedly not been sent, and there is no intention to send them, the reason being that the Solicitor-General is a salaried officer of the Crown, and that by a Treasury Minute of 1894 he is bound, in consideration of his salary, to appear in all Crown cases without fee. His position is thus assimilated to that of the Solicitor of Inland Revenue and other salaried Crown officials practising as law-agents, who receive none of the fees which are nevertheless charged against the Crown's unsuccessful opponents. And yet the right of the Crown to recover these fees was judicially determined by the English Courts fifty years ago in the case of *Shillibeer*, 4 W. H. & G. 606; it has been acknowledged in both countries ever since; and it is not disputed in the present case.

"Is there then such a distinction between the cases of agent and counsel as to make that long course of practice inapplicable? I do not think so. There is plainly no hardship to the losing party in either case. So long as the fees proposed to be charged are reasonable in amount (and the contrary is not alleged here) there is no reason why he should escape part of the consequences of his unrighteous litigation merely because of this arrangement between the Crown and its officers. In one sense, no doubt, he does not cause any additional expense to the Crown, because the salaries would have to be paid whether he litigated or not. But it is to be presumed that the salaries have been calculated on the footing of there being an average amount of litigation, and each salary therefore may be said to contain the equivalent of each separate fee. If so, there is no injustice in the Crown being recouped to that extent by the losing party.

"I do not overlook the broad distinction between agent and counsel, that the one is entitled to charge fees and the other is not. Hence, while an arrangement that salary shall cover fees might well exist between a private litigant and his solicitor, it is hardly possible to conceive of such an arrangement with a member of the bar. If such a case were to arise, it would not be covered by anything that I am now deciding. For I confine myself strictly to the case in hand, which is that of an arrangement between the State and its officers, recognised by the profession to which these officers belong, and presumably conducive to the public interest.

"I shall therefore repel the defender's objections to the Auditor's report, but inasmuch as the point was a new one, I shall find no expenses due."

Counsel for the Pursuer—Young. Agent—Solicitor for Inland Revenue.

Counsel for the Defender—Baxter. Agents—Menzies, Bruce-Low, & Thomson, W.S.