

A. E. H. Creswicke, Barrie, for defendants.

W. D. Gwynne, for plaintiffs.

The judgment of the Court (BOYD, C., FERGUSON, J., MACLAREN, J. A.) was delivered by

BOYD, C.—The taxing officer disallowed defendants' costs of examining an officer of plaintiffs for discovery. While it is competent to have such examinations in mechanics' lien actions, it is for the taxing officer to say whether the costs of them should be taxed against the opposite party. In this case he ruled that the examination was not a reasonable thing under the circumstances of the case, and from that there is not an appeal (see also sec. 43 of the Mechanics' Lien Act).

A matter of more difficulty is, whether under sec. 42 the defendants can tax counsel fees as actual disbursements. The provision is, that when costs are awarded against the plaintiff, such costs shall not exceed an amount in the aggregate equal to 25 per cent. of the claims, besides actual disbursements. Where, as in this case, the solicitor is also the counsel, no question of actual disbursements can arise. The hand to pay and the hand to receive is the same. Disbursements are contrasted with costs in the section, and "disbursements" is used with reference to the solicitor, and not to the client. The taxing officer was right in holding that counsel fees could not be included in "disbursements." A small sum of \$5 was said to have been actually paid by the solicitor to a Toronto counsel on some interlocutory application, and that is, in fact, a disbursement, though not such a disbursement as would be properly payable by the solicitor by virtue of his office, but as agent of his principal: *Armour v. Kilmer*, 28 O. R. 618. The distinction between payments as agent and professional payments as solicitor is well marked in England as expounded in *In re Remnant*, 11 Beav. 603, 611; *In re Kingdon and Wilson*, [1902] 2 Ch. 242; *In re Backwell and Berkeley*, ib. 596. The "disbursements" of sec. 43 R. S. O. ch. 153, are restricted to professional disbursements, and do not include fees paid to counsel by the solicitor as agent of his client. The special Act as to liens incorporates by reference the ordinary procedure of the Court except as varied by the Act. Rules 1178 and 1179 provide for costs and for disbursements respectively, and refer to the tariffs in the appendix. Tariff A. is that as to costs, and includes in its provisions the scale allowed as to counsel fees. Tariff B., as to fees and disbursements, provides, among other things, for the allowances to be paid to witnesses, which are strictly professional disbursements. Counsel fees are often the largest item in the bill