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MARSHALL AND ANOTHER v. THE COLONIAL BANK OF AUSTRALASIA.

*Appeal allowed with costs. Judgment for appellants, with costs.*

Solicitor, for appellants, *C. J. McFarlane*, Melbourne.

Solicitors, for respondent, *Moule, Hamilton & Kiddle*, Melbourne.

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[HIGH COURT OF AUSTRALIA.]

DONOHOE . . . . . APPELLANT;

AND

BRITZ . . . . . RESPONDENT (No. 2).

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SYDNEY, *Sept.* 17.

Barton, J.

IN CHAMBERS.

*Practice—Costs—Review of taxation—Costs of three counsel—Costs of preparing fresh briefs for appeal.*

The Registrar, on taxation as between party and party, disallowed the costs of a third counsel, in an appeal to the High Court, which involved a large sum of money, and raised difficult and important questions of constitutional law, on the ground that the employment of three counsel is not justifiable unless, in addition to the above elements of difficulty and importance, the case involves the consideration of a large and complex mass of evidence. On a summons for a review of taxation, the Court, not being satisfied that the Registrar was clearly wrong, or that the case was of such an exceptional nature as to render it essentially necessary, for the purpose of doing justice, that three counsel should be employed, refused to direct a review, and dismissed the summons with costs.

*Kirkwood* v. *Webster*, 9 Ch. D., 239, applied.

*Semble*, that a case may be of sufficient difficulty and importance to justify a party in engaging three counsel to argue the appeal, although the three elements of difficult and intricate points of law raised, a very large amount of money involved, and a complicated and voluminous body of evidence to be considered, are not all present together.

The costs of preparing, for the purposes of an appeal to the High Court, fresh copies of the briefs used by counsel when the case was argued before the Supreme Court, were not allowed to the party successful on the appeal.

SUMMONS for review of taxation.

In this case an appeal from the Supreme Court had been dismissed with costs (*ante*, p. 391). On taxation the District Registrar

of the High Court disallowed certain items in the respondent's bill of costs, viz., the costs of and incidental to the preparation of fresh briefs for counsel, and the fees of a third counsel on the appeal to the High Court. The respondent thereupon took out a summons for a review of the taxation. The affidavit filed on behalf of the respondent, in support of the summons, after stating the course of the proceedings, which it is unnecessary to report here, set out the following grounds of objections to the taxation :—First, that the respondent was entitled to have fresh briefs made up on the appeal to the High Court from the Supreme Court, and that the taxing officer was not entitled to take into consideration the fact that briefs were in existence, which had been used on the application for a rule absolute for a prohibition to the Supreme Court of New South Wales; second, that the respondent was entitled to the services of a third counsel on the hearing of the appeal to the High Court, as the appeal involved intricate and novel questions of law on grave constitutional points, and also the consideration of voluminous evidence and difficult matters of law arising therefrom; and third, a general objection to the reductions and disallowances throughout the bill, which were founded upon the same principles and reasons as the disallowance of the main items above mentioned, and which might be considered to be consequential to such disallowance. The affidavit filed on behalf of the appellant, in opposition to the summons, denied that the evidence which had to be considered was of a voluminous or complex nature, and that the questions of law involved were of unusual difficulty or intricacy for cases on appeal to the High Court, and stated that the hearing of the appeal occupied less than four hours, and that the amount involved was only a fine of £25. It appeared also from the affidavit that the Registrar on taxation had allowed to the respondent the cost of all extra matter added to the briefs for the purposes of the appeal to the High Court, and only disallowed so much as was a charge for copying the briefs used before the Supreme Court.

The report of the Registrar upon the taxation, which was before the Court on the hearing of the summons, was as follows:—

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"The appellant is applying to review the taxation of his bill of costs herein upon two grounds:—

"1. That I was wrong in not allowing for fresh copies of the briefs used when the case was argued before the Supreme Court of New South Wales.

> "It is the duty of a taxing officer (in order that the expense of litigation may, as far as is reasonably possible, be diminished) not to allow unnecessary copies of any documents. In my opinion counsel in this case could well use the briefs which had been prepared for and used in the argument before the Supreme Court of New South Wales and I therefore disallowed the charges for the fresh copies.

"2. That I was wrong in disallowing the fees of a third counsel.

> "I had previously had to consider a similar question in another appeal argued before the High Court, *Delohery* v. *The Permanent Trustee Co.* In that case three counsel had been briefed by the appellant, and although it involved, in my opinion, a more difficult question than the case under review, and the High Court was occupied double the length of time taken by the present case, I disallowed the fees for third counsel.

"The question of the allowance or otherwise of such fees in that case was argued before me at length, and the following cases were cited." [Here followed a list of the cases, most of which are referred to in the report below].

"A consideration of these cases led me to the conclusion that the allowance of third counsel is only permissible in exceptional cases, where there are difficult questions of law, coupled with complexity of facts and a large volume of evidence. None of the cases cited justifies the allowance of a third counsel where only difficult questions of law are involved. There being only a question of law, without complexity of facts or voluminous evidence, in *Delohery* v. *The Permanent Trustee Co.*, I disallowed the third counsel.

"When the question of third counsel arose in the case now under review, I stated what my decision had been, in view of the cases cited, in *Delohery* v. *The Permanent Trustee Co.* No further

cases affecting that decision were cited, and, as in this case there was no voluminous evidence, but only a point of law, I disallowed the charges for third counsel.

C. R. WALSH,
District Registrar."

"Sept. 16th, 1904.

*Mitchell* for the respondent, in support of the summons. This was a case in which the respondent was justified in engaging the services of three counsel. Although the amount of the fine was only £25, the value of the goods which were liable to forfeiture was £9,000, and the amount of duty claimed was £2,000. It was a test case, affecting all importers of this class of goods. There was a great mass of evidence, the hearing at the Police Court occupying five days. The importance of the case was shown by the employment of eminent counsel on each side in that Court. Two counsel on each side were engaged before the Supreme Court. Before the High Court one day was occupied by an argument on a motion to rescind the special leave to appeal, and then a new constitutional point was raised for the first time in the case, necessitating an adjournment. This point was of very great importance to the public and the Commonwealth, and entailed a large amount of additional work and research, and, in view of that fact, a third counsel was engaged on each side. The Registrar has acted on a wrong principle. It is not necessary that the three elements mentioned by him should concur in order to justify a party in retaining a third counsel. The case should be looked at as a whole, and the costs of third counsel allowed, if under the circumstances it was reasonable and prudent to engage his services. This was a reasonable and prudent step to take, in this case, and the successful party should be allowed the costs occasioned thereby; *Kirkwood* v. *Webster*, 9 Ch. D., 239. [He cited, also, *Downing College Case*, 3 My. & Cr., 474; *Aaron's Reefs Limited* v. *Twiss*, (1894) 2 Ir. Rep., 242; *McBride* v. *McBride*, (1894) 2 Ir. Rep., 76; *Workman* v. *Belfast Harbour Commissioners*, (1899) 2 Ir. Rep., 619; *Pearce* v. *Lindsay*, 1 D., F. & J., 573; *London Chatham and Dover Railway Co.* v. *South-Eastern Railway Co.*, 60 L.T., 753; *The Mammoth*, 9 P.D., 126; *Dashwood* v. *Magniac*, (1892) W.N., 54; *Robb* v. *Connor*, Ir. Rep., 9 (Eq.), 373; and *Snow, Burney & Stringer, Ann. Prac.*, 1903, p. 980.]

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Fresh counsel were employed on the appeal to the High Court, and fresh briefs had therefore to be prepared. The respondent should be allowed the costs of and incidental to their preparation.

*Blacket*, for the appellant, in opposition to the summons. The allowance of these costs was in the discretion of the Registrar, and the Court will not review his decision unless satisfied that he was clearly wrong, or that he acted on a wrong principle; *Wakefield* v. *Brown*, L.R. 9 C.P., 410, *per Brett*, J., at p. 411; *Goode* v. *Onslow*, 2 N.S.W.L.R., 278. It cannot be said that in this case the decision was clearly wrong. The costs of three counsel should only be allowed in exceptional cases.

In *In re Anglo-Austrian Printing and Publishing Union* (1894), 2 Ch. 622, the ground upon which the costs of three counsel were allowed was stated to be that it was "essential to justice" that they should be engaged. The present case does not come within the rule laid down in the cases for the allowance of such costs; *Smith* v. *Effingham*, 10 Beav., 378, at p. 388; *A. G.* v. *Munro*, 1 Mac. & G., 213; *Smith* v. *Buller*, L.R. 19 Eq., 473; *Kirkwood* v. *Webster*, 9 Ch. D., 239; *Mason* v. *Brentini*, 42 L.T., 726; *North-Eastern Railway Co.* v. *Jackson*, 22 W.R., 629; *Rigney* v. *Dangar*, 2 (N.S.W.) S.C.R., 9; *Deane* v. *Railway Commissioners*, 14 N.S.W. W.N., 26; *Jeanneret* v. *Hixson*, 7 N.S.W. W.N., 30.

The respondent should not be allowed the costs of preparation of new briefs for the appeal, so far as it was mere copying of the old briefs. The Registrar having disallowed the item, his decision should not be disturbed.

If this application is dismissed, it should be with costs, and the costs should be set off against the costs of the appeal to the High Court; *Adams* v. *Young*, 16 N.S.W. W.N., 58.

BARTON, J. It is a general rule that, as between party and party, the luxuries of litigation must be paid for by those who indulge in them, the necessaries only are to be paid for by the losing side. Various considerations arise in the application of this proposition. Here, for instance, an allowance beyond the ordinary practice is asked for because it is said that it was

"necessary" that the respondent should have the protection of extra counsel. But it has been urged that in such a case three factors must concur, viz., a great mass of evidence to be dealt with, a large sum of money involved, and difficult points of law raised, in order that a litigant should hesitate to go into Court with less than three counsel. The question is whether the engagement of so many was reasonable and prudent, and therefore necessary. It is conceded that, if the case had rested where it did before the Supreme Court, this application might not have been well founded; but now it is contended that the expense of a third counsel is a justifiable charge upon the losing party, because a very important question arose, involving the reading together of the Constitution and the *Customs Act*, and involving most serious considerations as to whether certain provisions of law operate retroactively to create offences.

I am not going to decide this case upon the necessity of the concurrence of the three elements I have mentioned. Applying the principle laid down in *Kirkwood* v. *Webster* (*supra*), I am not satisfied that this is a case in which the facts justify any interference with the decision of the Registrar. I do not say what would have been my decision had he allowed three counsel. It is enough to say that he does not appear to have acted contrary to right principle. There was certainly a large amount at stake, but the most important element was the constitutional question, and the extent to which the transactions of the Customs Department would be guided by the result. I admit fully the importance of the case, but I do not think the circumstances justify me in ordering the Registrar to review his decision.

It often happens that there is more room for three counsel in anterior than in ulterior proceedings. Usually the points of the case are sifted before the hearing of the appeal, when the debate is narrowed down to certain main questions, and, in this case, taking in view the research already made up to that stage, I cannot say that, on the appeal, the mental and physical strain on two counsel was of such a nature as to justify the retaining of a third. The case was argued below by two on each side, and I do not see that even there the strain on their minds was such as to render it likely that two counsel would have been overweighted

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with the case on appeal. Claiming credit for merely ordinary prudence, I should not have considered myself in any danger if I had come into Court with any two of the counsel who held briefs for the respondent.

Now, as to the copying of the briefs. This part of the claim of costs is not insisted on with respect to two of the briefs. As to the third brief, the claim fails with the failure of the portion relating to third counsel, and therefore I do not disturb the Registrar's finding in that respect.

As the application has failed, the costs must fall upon the applicant. Also, they must be set off against his costs of the appeal.

*Application dismissed with costs. Costs of the application to be set off against the general costs of appeal.*

Solicitor for the respondent (applicant), *Mark Mitchell.*

Solicitor for the appellant (respondent in this application), *The Crown Solicitor of New South Wales.*

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HIGH COURT OF AUSTRALIA.]

E. D. MILLER . . . . . PLAINTIFF

AND

THE COMMONWEALTH . . . . DEFENDANT.

H. C. OF A. 1904.

MELBOURNE, *Nov.* 7, 8.

Griffith, C.J., Barton and O'Connor, JJ.

*The Public Service Act* 1900 (*Victoria*) (*No.* 1721), *sec.* 19—*Public servant—Salary—Increments.*

Sec. 19 of the *Public Service Act* 1900 (Victoria) which provides that "From the commencement of this Act every officer of the Trade and Customs, Defence, and Post and Telegraph Departments shall be entitled to receive a salary equal to the highest salary then payable to an officer of corresponding position in any Australian colony," only entitled such an officer to receive a present salary equal to the highest salary which, on the day the Act came into force, was then actually payable