[HIGH COURT OF AUSTRALIA.]

EMMA MARIE KROEHN . . . . APPELLANT;
PETITIONER,

AND

ERNST ERDMANN GUSTAV KROEHN . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1912.

ADELAIDE, *June* 7, 10.

MELBOURNE, *June* 21.

Griffith C.J., Barton and Isaacs JJ.

Costs—Taxation—Exercise of discretion by master on wrong principle—Appeal—Duty of Court—Costs of second counsel—Suit for judicial separation—Appeal as to costs only—Special leave to appeal to High Court—Married Women's Protection Act 1896 (*S.A.*) (59 & 60 *Vict. No.* 664), *secs.* 2, 4—*Matrimonial Causes Act* 1867 (*S.A.*) (31 *Vict. No.* 3), *sec.* 60.

Under sec. 2 of the *Married Women's Protection Act* 1896 (S.A.) an order having the effect of a decree for judicial separation may be made by a Court of summary jurisdiction on the ground of cruelty committed during the six months preceding the complaint.

In a suit in the Supreme Court by a wife for judicial separation on the ground of cruelty extending over a period of two years the Judge made a decree for judicial separation with costs against the husband. On taxation of the wife's costs the Master disallowed the costs of a second counsel on the ground that the case was one that could have been inexpensively decided by a Court of summary jurisdiction. On review, the Full Court, while of opinion that the Master's reason was erroneous, declined to interfere with the exercise of his discretion.

Held, that the Master had exercised his discretion on a wrong principle, that the Supreme Court had not independently exercised its discretion, and that therefore the High Court should exercise its own discretion.

The test for determining whether the costs of a second counsel should be allowed is whether a prudent man not compelled by poverty would have ventured into Court without two counsel.

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Sec. 60 of the *Matrimonial Causes Act* 1867 contains a proviso that in a suit under the Act there shall be no appeal on the subject of costs only.

Held, that, where the complaint is that the Supreme Court has not really exercised its discretion but has proceeded on erroneous principles, that proviso does not afford a reason why the High Court should refuse special leave to appeal as to costs only.

Decision of the Supreme Court of South Australia reversed.

APPEAL from the Supreme Court of South Australia.

Emma Marie Kroehn by petition instituted a suit for judicial separation against her husband, Ernst Erdmann Gustav Kroehn, on the ground of cruelty extending over a period of two years.

The suit was heard before *Gordon* J. and a jury, and, the jury having found the respondent guilty of cruelty towards his wife, *Gordon* J. made a decree for a judicial separation and ordered the respondent to pay the petitioner her costs of the suit.

On taxation of the petitioner's costs the Master disallowed (*inter alia*) the charges for a second counsel on the hearing of the suit, and gave the following reason:—"Seeing that the case was one which could have been inexpensively decided by a Court of summary jurisdiction, I did not consider a second counsel necessary or proper to be allowed against the respondent."

The petitioner applied by summons to *Gordon* J. for an order to review the taxation, and that summons being referred to the Full Court was dismissed by a majority of the Court (*Way* C.J. and *Homburg* J., *Gordon* J. dissenting).

From this decision the petitioner now by special leave appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Cleland (with him *Cruickshank*), for the appellant. The appellant could not have taken proceedings in a Court of summary jurisdiction because the cruelty she relied on extended over a period of two years, and the jurisdiction given by sec. 2 of the *Married Women's Protection Act* 1896 only extends to cruelty within six months before the complaint. The Master's reason was therefore wrong and he did not exercise his discretion. The Supreme Court should therefore have reviewed his decision: *In*

re Ogilvie; *Ogilvie* v. *Massey* (1). The Court will review an exercise of discretion when a question of principle is involved. The Full Court did not exercise their discretion on proper grounds for, although the majority of the Court recognised that the Master acted upon a wrong principle, they refused to interfere with his decision because they thought the case a trumpery one, and having regard to the means of the respondent. The Judge who heard the suit having awarded costs to the appellant she was entitled to her proper costs of the suit. The case was a proper one for two counsel: *In re Maddock*; *Butt* v. *Wright* (2). If it is a case for leading counsel, two counsel will ordinarily be allowed: *King on Costs*, p. 102.

[GRIFFITH C.J. referred to *Smith* v. *Buller* (3); *Kirkwood* v. *Webster* (4).

ISAACS J. referred to *Peel* v. *London and North-Western Railway Co.* (*No.* 2) (5); *Boswell* v. *Coaks* (6).]

The matter should be referred back to the Master. He also referred to the Supreme Court Rules, Schedule F., Part III., r. 32; *Daniell's Chancery Practice*, 7th ed., p. 1033; *Seton on Decrees*, 6th ed., p. 295; *Wheeler* v. *Fradd* (7); *Turner* v. *Turner* (8).

Parsons (with him *R. Homburg*), for the respondent. Under rules 128-133 of the Rules in the First Schedule to the *Matrimonial Causes Act* 1867 the Master is a designated person to tax bills of costs, and there is no provision for any review of his decision although the Judges might make provision by rules.

[ISAACS J. referred to *Giles* v. *Giles* (9).]

The Master took into consideration the nature and the importance of the case, and upon that he might properly refuse to allow the costs of a second counsel. The Full Court was not influenced by the matter which the Master ought not to have taken into consideration, and on the facts came to the conclusion that it was not a case for a second counsel. No question of general public importance is raised by this appeal, and therefore the special

(1) (1910) P., 243.
(2) (1899) 2 Ch., 588.
(3) L.R. 19 Eq., 473.
(4) 9 Ch. D., 239.
(5) (1907) 1 Ch., 607, at p. 612.
(6) 36 Ch. D., 444, at p. 452.
(7) 14 T.L.R., 440.
(8) 5 Jur. N.S., 839.
(9) (1900) P., 17.

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leave to appeal should be rescinded. He also referred to *Bond* v. *The Commonwealth* (1); *Ginn* v. *Robey* (2).]

Cleland in reply.

Cur. adv. vult.

Melbourne, June 21.

GRIFFITH C.J. read the following judgment:—The history of the proceedings in this case is somewhat unusual. The suit was a suit for judicial separation brought by the appellant against the respondent in the Supreme Court of South Australia. The ground set up was cruelty alleged to have extended over a period of two years, some of which was of an aggravated character.

By the *Married Women's Protection Act* 1896 of South Australia an order having the effect of a decree for judicial separation may be made by a Court of summary jurisdiction consisting of a special magistrate and two justices on the ground of cruelty committed during the six months preceding the complaint.

The present appellant could not, therefore, have had recourse to that tribunal without abandoning part of her grounds of suit. The case was tried before *Gordon* J. and a jury. The trial extended on different days over about twenty hours, and there was much conflict of evidence. The jury found for the petitioner, and the learned Judge pronounced a decree for judicial separation and ordered the respondent to pay her costs of suit.

Sec. 60 of the *Matrimonial Causes Act* 1867 provides that the Court on the hearing of any suit under the Act and the Court of Appeals of South Australia may make such order as to costs as may seem just, with a proviso that there shall be no appeal on the subject of costs only. The proviso was apparently intended primarily to apply to the case of an appeal to the Court of Appeals constituted by the Governor and Executive Council, but the words are wide enough to cover an appeal from a single Judge to the Full Court.

The result is that by the decree of *Gordon* J., which was *quoad hoc* unappealable, the appellant became entitled to her costs of suit. The question now raised relates to those costs. It is not a question whether full costs of suit should have been awarded, or

(1) 1 C.L.R., 13. (2) (1911) W.N., 28.

costs on some lesser scale. That matter was entirely within the discretion of the learned Judge of first instance, and whatever costs he awarded are the costs recoverable.

The petitioner had employed two counsel on the hearing, which does not seem surprising when the nature of the case is considered. On taxation the Master disallowed (*inter alia*) the costs of the second counsel, and on considering objections carried in by the petitioner's solicitor disallowed the objections on this point "because, seeing that the case was one which could have been inexpensively decided by a Court of summary jurisdiction, I did not consider a second counsel necessary or proper to be allowed against the respondent." This reason for disallowance, however, proceeded upon a misapprehension of fact, for, as I have already pointed out, a Court of summary jurisdiction would have had no jurisdiction to entertain the suit as brought. Moreover, the costs awarded by *Gordon* J., were, as I construe the decree, such costs as were reasonably necessary in the suit regarded as a suit in the Supreme Court. The test for determination whether costs of a third counsel are reasonably necessary, as stated by *Fry* J. in *Kirkwood* v. *Webster* (1), and adopted by *Parker* J. in *Peel* v. *London and North Western Railway Co.* [*No.* 2] (2) is whether a prudent man would have ventured to come into Court without three counsel.

A similar but somewhat less rigid rule may be applied in considering whether two counsel should be employed. I am disposed to state it thus: Would a prudent person not compelled by poverty come into Court in such a case without two counsel?

In answering that question regard must be had, *inter alia*, to the importance of the case, the probable duration of the trial, the probability of conflict of evidence entailing the necessity of careful cross-examination, and the general practice as to employing two counsel.

It is clear that the Master did not apply his mind to these matters at all.

The petitioner then applied by summons for a review of taxation upon four different points, of which the question of a second counsel is the only one before us. *Gordon* J. referred the

(1) 9 Ch. D., 239.

(2) (1907) 1 Ch., 607, at pp. 612, 613.

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summons to the Full Court, which by majority (*Way* C.J. and *Homburg* J.) dismissed the appeal, *Gordon* J. dissenting. Judgment was given on 20th June 1911. *Gordon* J. stated his reasons as follows:—

"A pauper, unless suing *in formâ pauperis*, went into Court on the same footing as a millionaire. The question was what was the nature of the case. It was a jury case in which many facts relevant to the issue had been threshed out. In his opinion a case before a Judge and jury involving complications and conflict of fact was one in which two counsel should fairly be allowed, because it was too much strain for one to follow the law and the facts. The costs should go back to the Master on the ground mentioned as to the two counsel."

The learned Judges who formed the majority did not give their reasons in writing. They agreed that the reasons given by the Master were erroneous, but, as reported in the daily press, "The Chief Justice came to the opposite conclusion (*i.e.* from that of *Gordon* J.). He had to look at the substance of the case, which was a trumpery quarrel between husband and wife. It would be a terrible infliction if a case of that character were allowed to run up to so large an amount. The Court should not interfere with the discretion of the Master or with the order."

After special leave to appeal had been given, and after the lamented death of *Homburg* J., the learned Chief Justice wrote a memorandum headed "Reasons for Judgment," of which the first paragraph is as follows:—

"Chief Justice and *Homburg* J. The Master's decision upon the objections carried in on this taxation came on for review on a summons in Chambers before Mr. Justice *Gordon*, who referred such summons to the Full Court. The late Mr. Justice *Homburg* and I were of opinion (Mr. Justice *Gordon* dissenting) that the items in dispute were in the Master's discretion, and that his discretion had not been improperly exercised. We therefore held that we ought not to interfere with his decision. In the Master's certificate the grounds for reducing the items in question are not fully and accurately stated, but on examination the grounds upon which he acted are plain enough."

From other parts of the learned Chief Justice's memorandum

it is made still clearer that the majority thought that the matter in dispute was one for the exercise of the discretion of the taxing officer, and that the Court ought not to interfere unless satisfied that it had been wrongly exercised. He referred to the case of *Wheeler* v. *Fradd* (1), a case of employing a second counsel. He also referred on another point to *In re Ogilvie*; *Ogilvie* v. *Massey* (2), which involved a matter of quantum only, and in which both *Cozens-Hardy* M.R. and *Buckley* L.J. pointed out that if a question of principle was involved the rule of not interfering did not apply. He further referred to a Rule of the Supreme Court which is a transcript of the English Order LXV., r. 27 (38). From this memorandum I infer that the learned Judges who formed the majority regarded the matter as being substantially a question of quantum on which the Master had exercised his discretion, and thought also that the status in life and means of the husband were material, if not governing, considerations in determining whether two counsel should be allowed. They do not appear to have considered the matter from the point of view of the rule which I have stated—whether a prudent person would have employed two counsel in such a case. I may observe incidentally that, according to respondent's own account of his means, he was worth about £3,000.

So far as regards the exercise of the Master's discretion, it had not really been exercised at all. So far as regards the means of the respondent, it is not, in my judgment, a governing element in the case, although I am not prepared to say that it is altogether irrelevant.

I am, therefore, reluctantly compelled to the conclusion that the only member of the Court who applied his mind to the substantially relevant question to be decided was *Gordon* J. So applying it, he indicated the manner in which he would exercise his discretion if the matter rested with him. In the absence of any independent exercise of discretion by the majority on the right material, I think that we ought to exercise our own. I agree with the opinion of *Gordon* J., and think that two counsel were properly employed.

The proviso to sec. 60 of the *Matrimonial Causes Act* 1867

(1) 14 T.L.R., 440. (2) (1910) P., 243.

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has no application to appeals to this Court, and when the substantial complaint is that the Court has not really exercised its discretion, but has proceeded on erroneous principles, in which case an order for costs is ordinarily appealable, I do not think that it affords a rule of conduct to be followed in the exercise of our own discretion as to giving special leave to appeal.

I think, therefore, that the leave to appeal should not be rescinded, and that the appeal should be allowed and a review directed. The order should be prefaced by a declaration that in the opinion of the Court the suit was one in which the costs of two counsel should be allowed.

In the case of *Maiden* v. *Maiden* (1) this Court, being of opinion that the Judge of first instance who had awarded costs to a plaintiff had taken an erroneous view of the legal rights of the parties, although they did not substantially vary the judgment, yet, having arrived at that result on quite different grounds, varied the order as to costs.

This being a matrimonial suit, there is no reason why the respondent should not pay the costs of the appeal.

BARTON J. I am of the same opinion. I think the question for the Master was whether the employment of two counsel was reasonably necessary for the proper presentment of the appellant's case—whether, to use the words of *Fry* J. in *Kirkwood* v. *Webster* (2), with a slight alteration, a reasonable man, acting with ordinary prudence, would have ventured to come into Court not so prepared. The Master in his allocatur does not seem to have paid any regard to this question but, so far as we may judge from his own words, he had regard principally to the question whether two counsel should be allowed in view of the fact that there was a summary jurisdiction in applications of this kind. Now resort to that summary jurisdiction is open for six months after the cruelty alleged, and as the acts of cruelty were in this case alleged to have extended over two years, it is evident that the petitioner could not safely have had recourse to it. But when that reason has gone, there does not appear to be any evidence that the Master acted on any principle at all.

(5) 7 C.L.R., 727.

(6) 9 Ch. D., 239, at p. 242.

When we come to the decision of the majority of the Supreme Court, it practically amounted to a refusal to interfere with the discretion of the Master. On that point I think the words of *Parker* J. in *Peel* v. *London and North Western Railway Co.* (*No.* 2) (1) are applicable. He said:—"I think it is the duty of the Court on the decisions to come to a conclusion itself upon a summons to review the taxing Master's decision in a matter of this sort" (which was a matter of the employment of three counsel), "and that it is impossible for the Court to shelter itself behind the taxing Master's discretion in considering the point." Without saying that the majority of the Supreme Court sheltered themselves behind the Master's discretion, it is obvious that they considered that the Master's discretion ought not to be reviewed by them. But so far as we have any evidence of the principle on which the Master exercised his discretion, it appears that he exercised it upon a wrong principle.

Then the matter comes before us, and we cannot shelter ourselves behind the Master's discretion; but, if we think the Supreme Court was wrong, we have to make the order which the Supreme Court should have made; we are bound to decide the question with regard to which the Master should have exercised his discretion properly. That means that we must exercise our discretion.

Upon the materials before us it seems to me that it was sensible and proper for the petitioner to employ two counsel in this case. It was a case which took a long time, involved a good deal of evidence, and was of a serious nature, in which for the petitioner to launch her case relying upon the exertions of one counsel only would have been scarcely wise. Notwithstanding the different rules which apply to costs as between husband and wife, I think the same considerations which prevail as between other parties must in a case of this kind be taken into account by the Court. That being so I think the employment of two counsel was a reasonably necessary precaution for the proper conduct of the petitioner's case. As the matter comes before us in such a way that we must do what should have been done

(1) (1907) 1 Ch., 607, at p. 612.

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by the Supreme Court, I think our discretion should be exercised on that principle.

Without deciding, for it is not necessary to decide, that the means of a party defending may not be taken into consideration in any case, I think it should not be the guide in the exercise of the discretion of the Court in this case, because, if the employment of two counsel was reasonably necessary, then the fact, if it is a fact, that the respondent is a man of small means was not to prevent the appellant from acting for her own safety.

I therefore think that the appeal should be allowed and that the order proposed should be made.

ISAACS J. read the following judgment:—I am of the same opinion. The rule as to appellate revision of those decisions of a primary tribunal which rest on discretion has been stated in many cases, but in none more clearly than in *Golding* v. *Wharton Salt Works Co.* (1). There *James* L.J. says:—"The Court of Appeal does not in general interfere with that discretion. Not that the Court of Appeal has not complete jurisdiction over such cases, or that the decision of the Court below would not be overruled where serious injustice would result from that decision; but, as a general rule, the Court of Appeal declines to interfere." So in *Kent Coal Concessions Ltd.* v. *Duguid* (2) Lord *Loreburn* L.C. says:—"This House is of course open for the reconsideration of an exercise of discretion, but it is a very exceptional case in which the House will entertain the revisal of a discretion exercised by the Court of Appeal confirming the opinion of the learned Judge." Lord *James of Hereford* thought no injustice would be inflicted by the decision appealed from, and Lord *Atkinson* said the decision had not gone on a wrong principle. There is, therefore, jurisdiction to revise the decision, even if both the Master and the Supreme Court had exercised discretion on unchallengeable grounds; though I then should have been slow to exercise it. But the fact is that the Supreme Court exercised no discretion of its own as to the matter in hand, except to say that the Master having exercised his discretion the Court in the circumstances did not feel called upon to disturb it. The question then

(1) 1 Q.B.D., 374, at p. 375.

(2) (1910) A.C., 452, at p. 463.

is, did the Master in law exercise discretion? In one sense he did, as did the Vice-Chancellor in *In re Martin*; *Hunt* v. *Chambers* (1), but the Court of Appeal in that case overruled the Vice-Chancellor because he took an erroneous view as to the burden of proof. That, as *Lindley* L.J. said (2), "affected the whole of his view." And it is clear that, if a tribunal purporting to exercise a discretion takes into account in arriving at its decision some consideration which by reason of an erroneous view of the law or of irrelevancy ought not to have been allowed to weigh with it at all, then the whole decision is vitiated, and cannot be relied on as lawful exercise of discretion: *R.* v. *Adamson* (3) and *R.* v. *Board of Education* (4). The Master's written reason, stating what influenced his mind, seems to me to go outside the limits of the order of the Court as made by *Gordon* J. That order settled the right of the petitioner to costs, on the basis of the case being reasonably brought in the Supreme Court, and therefore the circumstances of another avenue being open, even if it had been fully open, was foreign to the proper determination of the question before the Master, and so his decision falls within the principle of *R.* v. *Adamson* (3). The matter then stands thus: that no one has so far in law exercised discretion as to whether two counsel should be allowed; and it is impossible to decide lawfully against the successful petitioner except by the exercise of discretion. The shortest and cheapest way now is for this Court to settle it at once. The principle to be applied is that stated by *Fry* J. in *Kirkwood* v. *Webster* (5), namely, "that the case was one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into Court without" two counsel. I am fortified in this view by the opinion of *Gordon* J., who tried the cause, and think the order now suggested by the learned Chief Justice the correct one.

Appeal allowed. Order appealed from discharged. Order to review the taxation of the petitioner's costs. Matter referred back to the Taxing Master with a

(1) 20 Ch. D., 365.
(2) 20 Ch. D., 365, at p. 374.
(3) 1 Q.B.D., 201.
(4) (1910) 2 K.B., 165, at p. 180.
(5) 9 Ch. D., 239, at p. 242.

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declaration that in the opinion of the Court the case is one in which it was proper to employ two counsel. Respondent to pay the costs of the appeal.

Solicitor, for the appellant, *E. E. Cleland.*

Solicitor, for the respondent, *Robert Homburg.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SHORT . . . . . APPELLANT;
PLAINTIFF,

AND

THE CITY BANK OF SYDNEY . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1912.

SYDNEY, *August* 19, 20, 21, 22.

Barton, O'Connor and Isaacs JJ.

Conversion—Assertion of claim to goods—Possession—Procuring breach of contract—Evidence.

A company offered to store all wheat consigned to it free of storage charges on condition that the wheat when sold should bear a net commission of 2½ per cent. and that the company should have eight months in which to sell the wheat unless the consignor instructed the company to sell earlier, and the company promised to make liberal advances on all consignments. All wheat when received by the company from the consignors was placed in one large stack which also included wheat belonging to the company, and when a sale was made by them wheat was taken indiscriminately from the stack. The company made advances to consignees upon the wheat received, borrowing the money from the defendant Bank and giving the Bank as security in respect