

Appl Steedman v Golden Fleece Petroleum Ltd 73 ALR 317	Cons Keith Hercules & Sons v Steedman 17 FCR 290	Disced/Appl Burgundy Royale Invest- ments v West- pac Banking Corp (No2) 28 FCR 308	Appl/Foll McInnes v Twigg (1992) 16 FamLR 185	Foll Walton v McBride (1995) 36 NSWLR 440	Cons Pryles & Defteros (a firm) v Green (1999) 20 WAR 541	Foll Johnson Tiles Fty Ltd v Esso Aust Ltd (1999) 166 ALR 731	Appl Merrin v Cairns Port Authority [2004] 1 QdR 271
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[HIGH COURT OF AUSTRALIA.]

WOOLF APPLICANT ;

AND

SNIPE AND OTHERS RESPONDENTS.

*Costs—Taxation—High Court—Taxation by solicitor of his bill against his clients—
No order for taxation—Authority of Registrar to tax such bill—Judiciary Act
1903-1927 (No. 6 of 1903—No. 9 of 1927), sec. 86—High Court Rules 1928 (S.R.
1928, No. 118), Order LIV., r. 10.*

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Order LIV., rule 10, of the High Court Rules 1928, does not authorize the Registrar of the High Court on the application of a solicitor to tax a bill of costs rendered by the solicitor against his own client in respect of business transacted in the High Court in a cause pending therein, save under some judgment or order directing taxation, and does not give a new, or enlarge the former, jurisdiction, or confer upon the solicitor or client a new right of taxation.

Powers of the superior Courts of law and equity to direct the taxation of solicitor's bills of costs considered.

MOTION.

This was a motion by a solicitor for an order directing the Principal Registrar to tax his bill of costs against his clients in respect of business transacted in the High Court in a cause pending therein. The Principal Registrar, who gave an appointment for the taxation subject to any objection to his authority by any of the parties, upheld an objection by the clients that he had no authority, upon the mere application of the solicitor and without any order of the Court or other reference, to tax a bill delivered by a solicitor to his

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client against the client. He accordingly refused to proceed with the taxation.

Hogan, for the applicant.

Smithers, for the respondent.

Cur. adv. vult.

Feb. 27.

DIXON J. delivered the following written judgment:—

This is a motion by a solicitor for an order directing the Principal Registrar to tax his bill of costs against his clients in respect of business transacted in this Court in a cause pending therein. The Principal Registrar, who gave an appointment for the taxation subject to any objection to his authority by any of the parties, upheld an objection by the clients that he had no authority, upon the mere application of the solicitor and without any order of the Court or other reference, to tax a bill delivered by a solicitor to his client against the client. He accordingly refused to proceed with the taxation.

The superior Courts of law and equity possess a jurisdiction to ascertain, by taxation, moderation, or fixation, the costs, charges, and disbursements claimed by an attorney or solicitor from his client, and that jurisdiction is derived from three sources and falls under three corresponding heads.

First, a jurisdiction exists founded upon the relation to the Court of attorneys and solicitors considered as its officers. This jurisdiction, commonly called the general jurisdiction of the Court, enables it to regulate the charges made for work done by attorneys and solicitors of the Court in that capacity, and to prevent exorbitant demands. That such a jurisdiction was exercised by the Court of Chancery was never doubted. (See *Beames, Doctrine of the Courts of Equity with respect to Costs* (1840), pp. 168 *et seqq.*; *Bignol v. Bignol* (1); *In re Barker* (2).) The Courts of law appear to have exercised a like jurisdiction (*Ex parte Bearcroft* (3); *Anon* (4); *R. v. Bach* (5); *Wilson v. Gutteridge* (6); and compare *In the Matter*

(1) (1805) 11 Ves. 328; 32 E.R. 1114.

(2) (1834) 6 Sim. 476; 58 E.R. 673.

(3) (1767) 1 Doug. 200 n.

(4) (1817) 2 Chitty 155.

(5) (1821) 9 Price 349; 147 E.R. 115.

(6) (1824) 3 B. & C. 157; 107 E.R. 693.

of *Aitkin's Executors* (1)), but the existence of the authority was disputed by the Court of King's Bench in *Dagley v. Kentish* (2), and for a few years it fell into disuse: see the argument of *Jervis* in *Williams v. Griffith* (3), in which case the decision in *Dagley v. Kentish* was questioned by *Alderson B.*, and compare *Cowdell v. Neale* (4). After the *Judicature Act* the existence of the Court's general jurisdiction was completely established (*In re Johnson and Weatherall* (5); *Storer & Co. v. Johnson and Weatherall* (6)).

Second, when a contested claim for costs comes before the Court it has jurisdiction to determine by taxation or analogous proceeding the amount of costs. (See *In re Park*; *Cole v. Park* (7); *In re Foss, Bilbrough, Plaskitt & Foss* (8); *Jones & Son v. Whitehouse* (9).)

Third, there is a statutory jurisdiction derived at first from 2 Geo. II. c. 23, and afterwards from 6 & 7 Vict. c. 73, secs. 37-43, the provisions of which form the foundation of Part V. of the New South Wales *Legal Practitioners Act* 1898 and of Division 2 of Part VIII. and sec. 92 of the Victorian *Supreme Court Act* 1928. Under these provisions a solicitor may obtain an order for taxation of his bill (*sc.*, after the expiration of a month from its delivery), but the Court has no general jurisdiction to refer a solicitor's bill to taxation upon his own application (*Sayers v. Walond* (10)).

In the present case, it is plain that the Principal Registrar had no authority to tax the bill unless under some statutory jurisdiction given to this Court, or to him as its officer. The provision of statutory force relied on by the solicitor as conferring such a jurisdiction is rule 10 of Order LIV. of the High Court Rules made pursuant to sec. 86 of the *Judiciary Act* 1903-1927. Unless this rule gives it, the High Court has no statutory jurisdiction to tax the costs of a solicitor against his own client. The rule is as follows:—“(10) (1) The fees payable to barristers and solicitors, whether entitled or admitted to practice by virtue of the *Judiciary Act* 1903-1926 or

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(1) (1820) 4 B. & Ald. 47; 106 E.R. 855.

(5) (1888) 37 Ch. D. 433, at pp. 442-443.

(2) (1831) 2 B. & Ad. 411; 109 E.R. 1195.

(6) (1890) 15 A.C. 203, at p. 206.

(3) (1840) 6 M. & W. 32; 151 E.R. 310.

(7) (1889) 41 Ch. D. 326, at pp. 331-335; 338-340.

(4) (1856) 1 C.B. (N.S.) 332, at p. 334; 140 E.R. 137, at p. 138.

(8) (1912) 2 Ch. 161, at pp. 164-165.

(9) (1918) 2 K.B. 61.

(10) (1822) 1 Sim. & St. 97; 57 E.R. 39.

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otherwise, in respect of business transacted by them in the Court or the offices thereof, in causes or matters pending at the date these Rules come into operation, or commenced after that date shall as well between party and party as between solicitor and client, unless otherwise ordered, be taxed allowed and certified by the Registrar or a Deputy Registrar or some other officer duly appointed for the purpose, and shall, unless otherwise ordered, be allowed in accordance with the scale set forth in Part II. of the Schedule to these Rules. (2) The provisions of all Acts and Rules in force in any State in which a practitioner resides, relating to the delivery to a client of a bill of costs, or the costs of taxation as between solicitor and client, shall apply, *mutatis mutandis*, to such taxation."

The rule appears upon its face to contemplate taxation of a solicitor's bill against his own client as well as a taxation between parties, and at first I was impressed with the view that it should therefore be read as conferring a statutory jurisdiction exercisable by the Court's officer entitling solicitor or client to proceed to tax costs in respect of business done in the Court. Upon consideration, however, I have come to the conclusion that it should not be interpreted as giving a new, or enlarging the former, jurisdiction, or as conferring upon solicitor or client a new right to taxation. The rule deals alike with taxations between party and party and between solicitor and client. In the first case, it presupposes that costs must be taxed, e.g., under some judgment or order. In the second case, the rule appears to be founded upon a like supposition, namely, that occasion will arise for taxing costs between solicitor and client. In both cases, it specifies the officer by whom the taxation is to be done and prescribes the scale in accordance with which the costs are to be allowed. The rule has a full operation if its application is confined to the existing jurisdiction of the Court. Sub-rule 2 is very limited. It applies to the taxation the provisions of State law relating to the costs of taxation and delivery of bills. The words "the provisions . . . relating to the delivery to a client of a bill of costs . . . shall apply . . . to such taxation" will not bear a construction by which they would adopt and apply the whole State law governing the right of solicitor and client to a taxation and of the client to delivery of a bill. Taxation

is assumed and the State law relating to delivery of a bill is to apply to it. No doubt, if, in the exercise of its general jurisdiction, the Court referred a solicitor's costs for taxation, the rule would enable it to order him to deliver a bill. But it is not expressed in such a way as to confer upon the High Court the independent statutory jurisdiction of the Supreme Court to order the delivery of a bill, much less the powers of that Court relating to the taxation of bills already delivered. Rules of Court ought not to be construed as enlarging or conferring jurisdiction or affecting substantive rights. Many difficulties would ensue if this general principle were neglected and the rule were read, not as operating only within the existing jurisdiction of the Court, but as conferring upon both solicitor and client a new right to taxation in this Court. Under State law a client may tax his solicitor's bill as of course within a month of its delivery. Thereafter within twelve months an order may be made for taxation upon the application of solicitor or client. After twelve months, or after payment, or the entry of judgment, an order for taxation may be made only if special circumstances appear. Terms may be imposed. Payment into Court may be directed. In every case the solicitor may be restrained from taking proceedings to recover the costs. Further, where the retainer is not disputed, judgment may be directed for the amount shown by the certificate or allocatur. The relations of the solicitor and his client are, apart from rule 10, governed by these provisions of State law whether the services for which remuneration is claimed include work in the High Court or not. But, if rule 10 has the operation contended for, then although a month has not elapsed and without any order, the solicitor may tax his bill against his client, and, although twelve months have elapsed or the bill has been paid and, perhaps, although judgment has been entered, the client may tax the solicitor's bill as of course. I attach little or no importance to the inclusion in the operation of the rule of practitioners admitted to practise in Federal Courts only. It is not clear that they are outside these provisions of State law, but in any case the general jurisdiction of this Court is adequate to protect the client.

The rule is silent upon the effect of the allocatur, and it would be difficult to maintain that it could operate as a judgment creating

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a *res judicata*. If the Registrar taxed the bill, judgment could not be entered on his allocatur in this Court. What would be its effect if an action were brought in a State Court to recover the amount certified? Indeed, the difficulty is well illustrated in the facts of the present case. For, according to the file of the Supreme Court of Victoria in action No. 1090 of 1932 which, with the assent of the parties, I read upon this motion, the solicitor has brought an action upon a promissory note given by a company on account of costs included in the bill sought to be taxed. The company has obtained leave to defend on grounds which go to the quantum of the costs. If the rule received the construction contended for, then in this action would an allocatur given under it by the Registrar of this Court be conclusive in respect of amount? If it would not, such an interpretation of the rule would indeed be unfortunate. But, in my opinion, the rule does not confer upon the solicitor any right to taxation before the Registrar of this Court. I think the ruling of the Principal Registrar was right.

The order will be: Motion dismissed with costs including the costs of the application in chambers.

Motion dismissed accordingly.

Solicitor for the applicant, *Joseph Woolf*.

Solicitors for the respondent, *Percy J. Russell & Kennedy*.

H. D. W.