[HIGH COURT OF AUSTRALIA.]

SMITH AND ANOTHER . . . . . APPLICANTS;
PLAINTIFFS,

AND

MADDEN AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

Costs—Review of taxation—Action in High Court—Original jurisdiction—Two counsel—Claim and counterclaim—Costs of action—Costs of counterclaim—Apportionment—Division of charges—Common items.

In a superior court, the employment of two counsel upon the trial of a substantial action is reasonable and proper and the taxing officer should treat the briefing of two counsel as usual and proper unless the proceedings are simple involving no questions of consequence.

Kroehn v. *Kroehn*, (1912) 15 C.L.R. 137, applied.

On the taxation of the costs of an action in which judgment has been given for the plaintiff on the claim with costs and for the defendant on the counterclaim with costs, the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it.

Medway Oil and Storage Co. Ltd. v. *Continental Contractors Ltd.*, (1929) A.C. 88, followed and applied.

Although there can be no apportionment of items of costs between the claim and the counterclaim, it may be necessary to divide a single charge for work, if a severable part of the work relates to the claim and the other severable part relates to the counterclaim.

Observations as to common items.

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BRISBANE, *June* 20.

MELBOURNE, *July* 19.

DIXON J.

REVIEW OF TAXATION.

This was an application, under Order LIV., rule 55, of the High Court Rules, by the plaintiffs in an action to review a taxation of costs by the taxing officer of the District Registry, Brisbane. The action, which involved a counterclaim, was heard before *Dixon* J.

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sitting in original jurisdiction at Brisbane. Judgment was entered for the plaintiff on the claim with costs and for the defendant on the counterclaim with costs: *Smith Brothers* v. *Madden Brothers* (1).

Kennedy Allen, for the applicants.

Lukin, for the respondents.

Cur. adv. vult.

The following written judgment was delivered:—

DIXON J. This is an application to review the taxation by the District Registrar, as taxing officer, of certain items in two bills of costs.

The application is on the part of the plaintiffs in the action and one bill was brought in by the plaintiffs, who had obtained judgment on their claim with costs, and the other by the defendants, who had obtained judgment on their counterclaim with costs.

In the plaintiffs' bill, the taxing officer disallowed a second counsel and the matter for decision upon the review of the taxation of that bill is whether he was justified in holding that the plaintiffs ought not to recover the costs of employing two counsel upon the trial of the cause.

In the defendants' bill, which purported to relate to the defendants' costs of the counterclaim only, the taxing officer allowed items, in whole or in part, which the plaintiffs contend cannot, upon a proper application of principle, be recovered as costs of a counterclaim under an order awarding the costs of the action to one party and the costs of the counterclaim to the other party. The question to be decided in respect of that bill is whether, in allowing such items, the taxing officer has proceeded according to correct principle.

The action, which was tried before me in Brisbane on five days in June last year, arose out of the sale by the defendants to the plaintiffs of merino wethers. The number delivered under the sale was 4,176 and the price was 8s. a head. The plaintiffs gave bills at six months for the price and interest. The sheep were driven a long distance from where they had been depasturing on land of the defendants in New South Wales to land of the plaintiffs in Queensland, and, on their arrival, the plaintiffs were dissatisfied with the state and description of the sheep. The plaintiffs made some attempt to treat the contract as disaffirmed and sued the defendants for fraud and breach of warranty or condition. The relief specifically sought by the statement of claim was rescission of the agreement and delivery

(1) (1945) Q.W.N. 33.

up for cancellation of the document containing it, delivery up of the promissory notes for cancellation, and damages. This pleading comprised a narrative of fact interspersed with a statement of the written terms of sale and with allegations of a variety of representations and express and implied promises and of their falsity or breach.

The defence, besides setting out the written agreement in full and alleging the giving of the promissory notes, raised various issues of fact and then, by way of counterclaim, repeated the paragraphs of the defence and claimed payment of the amounts of the promissory notes with further interest.

I was not satisfied that the fraudulent representations alleged had been made, but I was satisfied that there had been two breaches of condition or warranty, viz. broken mouth sheep had been delivered, though the contract was for full mouthed wethers, and sheep with wrong ear marks had been delivered. I considered that it had not been open to the plaintiffs to rescind the contract when they attempted to disaffirm it and, on the footing that the sheep had passed to them and they were liable for the price, I assessed the damages they had sustained from the two breaches of warranty at £750.

As to costs, I said that I had some misgivings but I thought that the plaintiffs, although they had made a charge of fraud which they had not succeeded in establishing, should recover the costs of the action, less a deduction of what I estimated to be the added costs due to the charge on which they failed, and, on the whole, I thought that the added costs of that charge represented one full day's hearing on the trial. I said that I did not think that that affected the process before the trial and the interlocutory proceedings. Judgment was then given for the plaintiffs upon the claim for £750, and for the defendants upon the counterclaim for £1,718 15s., the amounts being set off, so that the defendant recovered £968 15s., and it was ordered that the plaintiffs should recover from the defendants their costs of the action less the costs of one day's hearing and that the defendants should recover from the plaintiffs their costs of the counterclaim, and that the costs should be set off. On its being asked by counsel for the plaintiffs whether the deduction of the costs of one day affected the costs of the counterclaim, I said that I had taken that into consideration, and remarked that defendants who counterclaim seldom get the costs which they think they should on the counterclaim and that taxation usually reduces the costs of the counterclaim very much, because you begin with the costs of the action. This observation was made to some extent in anticipation of the kind of thing that has arisen on the defendants' bill. But, before dealing with the

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objection to the costs allowed in that bill, it is convenient to dispose of the disallowance on the plaintiffs' bill of the costs of a second counsel, a matter upon which the view of the taxing officer cannot, in my opinion, be sustained.

Although the case turned, as I thought, upon questions of fact, it was anything but simple or insubstantial. It was a matter of consequence to the parties, the trial involved a considerable body of evidence covering many matters of contested fact and disputed inferences and not a little conflict of testimony. In a superior court, the employment of two counsel upon the trial of a really substantial suit or action is usual and is regarded as a reasonable and proper precaution on the part of a suitor. The present case was one which I think clearly warranted two counsel.

The taxing officer was not requested under Order LIV., rule 54, by either party to state the grounds and reasons for his decision on any of the objections, and I have not the advantage of knowing precisely what actuated his disallowance of the costs of a second counsel, but I can see no element in the case providing a justification, valid in principle, for such an exercise of discretion. In the present case, the allowance of two counsel is, in my opinion, plainly required by the application of the test suggested by *Griffith* C.J. in *Kroehn* v. *Kroehn* (1). But, apart from that, I think that in this Court taxing officers ought not to treat the briefing of two counsel upon a trial as exceptional and as requiring something special in the case to warrant it, but, on the contrary, should treat it as usual and proper unless it happens that the proceedings are simple and not heavy and involve no question of consequence, a thing which, of course, may quite well happen, particularly when the jurisdiction depends, as here, on diversity of residence: See *Porter & Wortham, Guide to Costs*, 13th ed., pp. 902-3; *Halsbury's Laws of England*, 2nd ed., vol. 2, p. 551; and per *Madden* C.J., *Ward* v. *Roberts & Co.* (2).

I shall, therefore, direct that the costs of employing two counsel shall be allowed in the taxation of the plaintiffs' bill.

The objection to the allowance of items in the defendants' bill depends upon what is now the well settled rule for the taxation of the costs of a counterclaim independently of the costs of the action and on the footing that the latter costs are separately disposed of. It often happens that one party is to pay the costs of the action and the opposite party to pay the costs of the counterclaim. There may be, as in this case, judgment for the plaintiff upon the claim in the action with costs and for the defendant upon the counterclaim with costs, or there may be judgment for the defendant upon the

(1) (1912) 15 C.L.R. 137.

(2) (1897) 23 V.L.R. 182, at p. 185.

claim with costs and judgment for the plaintiff upon the counterclaim with costs, and, no doubt, there may be other orders disposing in one way of the costs of the action and in some other way of the costs of the counterclaim. In such cases the rule is that, in the absence of special order, there is no apportionment of costs. Apportionment of costs was a principle followed in the Courts of Equity before the *Judicature Act*. If a decree or order of the Court of Chancery discriminated for the purposes of costs between different portions of a suit or proceeding and made an award of costs in respect of one subject or object different from that made in respect of another, then, subject to any express direction in the decree, the taxation proceeded according to the principle that, after the costs exclusively referable to the respective parts of the cause or matter had been ascertained, an apportionment should be made between them of the general costs of the suit. The ground assigned for the rule was that, as each of the respective parts had received the full benefit of the suit or proceeding, the general costs had been occasioned as much by one as by the other and each such part, therefore, ought to bear a proportionate part of the general costs.

But at common law apportionment was not practised. If issues were found, some for one party, some for the other, then that party who was considered to have succeeded in the result became entitled to the general costs of the action and the costs of the issues upon which he had nevertheless failed went to his adversary. In the common law courts in such circumstances, upon a taxation, the party entitled to the general costs of the action received all the costs necessarily or reasonably incurred in order to enable him to achieve the success in result and the party entitled to the costs of the issues on which the former had failed received only the extra costs caused to him by the inclusion of those issues.

Counterclaims were a product of the *Judicature Act* and, at first, there seems to have been some uncertainty as to the manner in which costs were to be taxed under orders disposing of the costs of the action or claim in one way and of the costs of the counterclaim in another. But the analogy was soon adopted of the common law practice in dealing with the general costs of an action and the costs of issues found against the party succeeding in the action. In such a case the taxation of the costs of the action and of the counterclaim is governed by the principle that the party receiving the costs of the claim should recover the general costs and whatever was reasonably incurred in bringing and maintaining or defending the action, as the case may be, considered as if there had been no counterclaim, and that the party receiving the costs of the counterclaim should recover

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the further or increased costs reasonably incurred in bringing and maintaining or defending the counterclaim. This principle has been established by a long but not completely uniform line of cases: *Saner* v. *Bilton* (1); *Mason* v. *Brentini* (2); *Baines* v. *Bromley* (3); *In re Brown* (4); *Shrapnel* v. *Laing* (5); *Atlas Metal Co.* v. *Miller* (6); *James Crean & Son Ltd.* v. *M'Millan* (7); *Wilson* v. *Walters* (8); *Medway Oil & Storage Co. Ltd.* v. *Continental Contractors Ltd.* (9); *The Stentor* (10); *N. V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies Ltd.* (11); *Cinema Press Ltd.* v. *Pictures & Pleasures Ltd.* (12).

It is not completely uniform because some departure from the principle appeared in *Christie* v. *Platt* (13), if not in the decision, in the reasons given for it by *Atkin* and *Younger* L.JJ.

The case was one in which a landlord sued successfully for rent and the tenant successfully counterclaimed for damages for breach of a term implied in the lease that the demised premises should be reasonably fit for occupation. Judgment was given for the plaintiff for the amount of the rent on the claim in the action with costs and for the defendant for an amount exceeding the rent on the counterclaim. But the defendant had relied on the implied term not only in his counterclaim. In his defence he had set it up as a condition broken, as if an answer to the claim for rent. As a defence it had no legal foundation, but, since the same allegations as sustained the counterclaim formed part of the defence, in the taxation of costs the Master treated the whole issue concerning the state of the premises and the implication of the term as belonging to the action. The result was that, notwithstanding that it had formed the substantial contest between the parties and the defendant had succeeded upon it, and had succeeded to such an extent that the damages had drowned the plaintiff's claim for rent, nevertheless the defendant obtained none of the costs it involved, nothing in fact but insubstantial costs, while the plaintiff recovered from the defendant almost the whole costs of the cause. This appeared to the Lord Justices to show that the principle of the taxation was wrong.

In *Medway Oil & Storage Co. Ltd.* v. *Continental Contractors Ltd.* (14), Lord *Blanesburgh* justified and explained the decision, to which as *Younger* L.J. he had been a party, and it is informative to consider the ground on which he did so. That ground was that, in spite of the

(1) (1879) 11 Ch. D. 416.
(2) (1880) 15 Ch. D. 287.
(3) (1881) 6 Q.B.D. 691.
(4) (1883) 23 Ch. D. 377.
(5) (1888) 20 Q.B.D. 334.
(6) (1898) 2 Q.B. 500.
(7) (1922) 2 I.R. 205.
(8) (1926) 1 K.B. 511.
(9) (1929) A.C. 88.
(10) (1934) P. 133.
(11) (1940) 1 All E.R. 587.
(12) (1945) K.B. 356.
(13) (1921) 2 K.B. 17.
(14) (1929) A.C. 88, at pp. 106-108.

inclusion in the defence of the allegation that a condition of fitness implied in the lease had been broken, it was an irrelevant plea and a matter really belonging to the counterclaim, so that the costs incurred by the defendant in establishing the issue were incurred in maintaining the counterclaim and not in defending the claim. This means no more than that, before proceeding to tax the costs of claim and counterclaim, it is necessary to ascertain what matters of substance belong to the action and what to the counterclaim and that the place where a fact is first alleged in a defence and counterclaim is not to be treated as necessarily decisive. It is, perhaps, inevitable that, even upon such a matter, the form of his pleading should not now be considered decisive of the rights of a party, but some support for the position is to be found in the practice at common law. For under that practice substance was regarded in ascertaining what was reasonably incurred in maintaining the action and what in supporting a particular issue found against the party succeeding in the action.

Scrutton L.J., however, in *The Stentor* (1), treated *Christie* v. *Platt* (2) as a case which had induced *Atkin* and *Younger* L.JJ. to think that the principle of *Saner* v. *Bilton* (3) was wrong and to direct apportionment; though in *Wilson* v. *Walters* (4) his Lordship appears to have accepted the reconciliation of the decision with the rule.

Atkin L.J. himself, when he came to decide the *Medway Oil & Storage Co.'s Case* in the Court of Appeal (5), made it clear that his view impugned the now firmly established rule and that he considered the decision in *Wilson* v. *Walters* (4) was irreconcilable with that of *Christie* v. *Platt* (2).

Atkin L.J. in plain words adopted the principle, the Chancery principle, of apportionment. His reasons are instructive because they show how opposite are the conceptions from which the two rules arise.

His Lordship takes the case of a claim and counterclaim arising out of and depending upon the same events and involving the same evidence. From the commencement of the action the plaintiff is prepared to prove the events as he alleges them. "It appears to me," says Lord *Atkin* (6), "that after the counterclaim is put in the plaintiff is in a different position. On the claim alone he had to incur expense to support his claim; with the counterclaim delivered he has to incur expense to resist his opponent's claim. The claim involves recoupment of loss, the counterclaim exposes him to further loss possibly affecting his whole fortune. The determination of the

(1) (1934) P. 133, at pp. 139-140.
(2) (1921) 2 K.B. 17.
(3) (1879) 11 Ch. D. 416.
(4) (1926) 1 K.B. 511.
(5) (1928) 1 K.B. 238.
(6) (1928) 1 K.B., at p. 255.

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event has a double interest to him, and in seeking to prove it the expenses he incurs are occasioned not by the claim alone or by the counterclaim alone, but by both . . . He seems to me obviously to incur the cost because of both; in other words the costs are occasioned by both. And it is quite irrelevant as to such costs to consider what he would have incurred if there were no counterclaim, that is with no other cause operating. The result of the rule now laid down is that where there is a substantial counterclaim involving common evidence, the Master will apportion."

This reasoning was expressly overruled by the House of Lords (1) and the contrary doctrine re-established, namely, "that the claim should be treated as if it stood alone and the counterclaim should bear "(i.e. have ascribed to it) "only the amount by which the costs of the proceedings have been increased by it." The meaning and application of this rule is made plainer by an understanding of the contrary doctrine by which Lord *Atkin* desired to replace it and for that reason I have thought it helpful to cite his Lordship's statement and to say something concerning *Christie* v. *Platt* (2).

But, although there can be no apportionment of items of costs between the two parts of the cause, it may be necessary to divide an item of costs in two parts. This will occur when there is a single charge for work but a severable part of that work relates to the claim and the other severable part of the work relates to the counterclaim. It will then be necessary to divide the single charge in accordance with the two classes of work it covers. Division of charges in this way must be distinguished from apportionment, but it is easy to see that, under cover of division, apportionment in the sense of the Chancery practice may really be applied. The likelihood of a disguised apportionment thus occurring is not lessened by the use of the word "apportion" to describe the division necessary. Indeed the subject is embarrassed by the ambiguity, generality and indefiniteness of much of the terminology employed in the cases. Some attempt, however, has been made to find more specific terms. Charges which cover without discrimination work referable to the action and work referable to the counterclaim have been called "mixed" by *O'Connor* L.J. in *James Crean & Son Ltd.* v. *M'Millan* (3) in the course of a judgment which has been referred to with approval more than once: see particularly per Lord *Haldane* in the *Medway Oil & Storage Co.'s Case* (4), and per *Scrutton* L.J. in *Wilson* v. *Walters* (5). An example of such a mixed item is a fee of a pleader

(1) (1929) A.C. 88.
(2) (1921) 2 K.B. 17.
(3) (1922) 2 I.R. 105.
(4) (1929) A.C., at p. 100.
(5) (1926) 1 K.B., at p. 516.

for drawing the defence and counterclaim or drawing a reply that includes a defence to a counterclaim. Such a fee covers work that belongs to the claim and severable work that belongs to the counterclaim. In contrast to such mixed items, there are items that serve as much the purpose of the claim as the counterclaim. These are "common" items. Thus the costs of witnesses whose evidence relates to an issue arising both on the claim and on the counterclaim would be a common item and so would be an attendance to enter the cause, to obtain an adjournment, to hear judgment and so on. But there are many items, notably costs incurred in steps in the proceedings before the filing of the counterclaim, which are not common but are incurred only in bringing and maintaining or, in the case of the defendant, in defending the action. Writ, appearance and statement of claim are examples of this class of item. They, of course, all form part of the costs of the action, but so do the common items. The mixed items must, however, be divided and a proper part attributed to so much of the work covered by the charges as belongs to the counterclaim and the rest to the action. *O'Connor* L.J. has pointed out that it is possible that a charge or item may cover some work belonging to the claim, some work belonging to the counterclaim and some that is common to both. In such a case the division should be of the amount properly attributable to the work relating to the counterclaim from that representing the work with reference to the claim and from the work common to both. The two latter form part of the costs of the action.

The plaintiffs' objections to the taxation of the defendants' bill in the present case do not, as they should, specify by a list the items or parts of items objected to (Order LIV., rule 53). A general objection is taken to the principle upon which the bill was taxed and the objection is supported by reasons. A perusal of the bill, however, shows that it was constructed in a manner quite out of accord with the principle I have stated and as if the existence of the claim might be ignored in considering what costs would necessarily be incurred in supporting the counterclaim. The taxing officer disallowed many items and taxed off part of the amount charged for others.

I have not the advantage of a statement of his grounds for overruling the objections, but, in the course of doing so, the notes show that he said that he was of opinion that it was his duty to divide the costs and in so doing he had treated the counterclaim not only as a counterclaim pure and simple but he had allowed a certain amount of costs for the defendants' successfully resisting the issue of fraud. This view of the matter does not appear to me to give effect to the

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appropriate principle of taxation in carrying out the order made in respect of costs. If the plaintiffs had fully succeeded in their action and obtained cancellation of the promissory notes, they must have defeated the counterclaim by, so to speak, anticipatory relief. Apart from the difficulty or impossibility of restoration of the sheep or *restitutio in integrum*, in order to obtain some such relief it would have been enough for the plaintiffs to establish breach of condition, which they did, or fraud, which they did not. Having regard to the circumstances of the case, I do not know that even if fraud had been established rescission could have been ordered. But it was not proved, and rightly or wrongly I treated that as all involved in the action and dealt with the costs of the charge of fraud by depriving the plaintiffs of a day's costs. It is clear that the issue of fraud arose on the claim and must have been tried and dealt with in the same way if there had been no counterclaim. The best that can be said is that it was an issue common to both claim and counterclaim, although as it happens the reply failed expressly to raise it.

I have gone through the items allowed in the bill and it appears to me that many of them could not be supported upon a proper application of the principles I have described. I shall not discuss them in detail. It is sufficient to mention some of the more important. For instructions for brief £75 was claimed and £33 allowed. Such a sum can hardly be warranted as that part of a mixed item which relates to suing on two promissory notes on the footing that the facts affecting consideration, condition and fraud all arise on the claim. The items for drawing and engrossing the brief are exposed to the same observation. In the disbursements, the expenses of the witnesses, McKensey, Ireland, Dufty and Wellard as well as of the defendant O. R. Madden, the evidence of all of whom related to the action, form a large amount which ought not to have been allowed.

I shall, therefore, allow the plaintiffs' objections in respect of this bill and refer the matter back to the taxing officer to review his certificate.

The order will be :—

Objections of the plaintiffs to the taxation of the plaintiffs' bill of costs allowed and the bill referred back to the taxing officer to review his certificate on the footing that the employment of two counsel upon the trial of the action was reasonable and proper and the costs thereof should be allowed.

Objections of the plaintiffs to the taxation of the defendants' bill of costs allowed and the bill referred back to the taxing officer to review his certificate.

Defendants to be at liberty, if so advised, to withdraw such bill and bring in another in substitution therefor within twenty-one days.

Defendants to pay the costs of the application, which are fixed at ten guineas.

Certify for counsel.

Objections of the plaintiffs to the taxation of the plaintiffs' bill of costs allowed and the bill referred back to the taxing officer to review his certificate on the footing that the employment of two counsel upon the trial of the action was reasonable and proper and the costs thereof should be allowed. Objections of the plaintiffs to the taxation of the defendants' bill of costs allowed and the bill referred back to the taxing officer to review his certificate. Defendants to be at liberty, if so advised, to withdraw such bill and bring in another in substitution therefor within twenty-one days. Defendants to pay the costs of the application, which are fixed at ten guineas. Certify for counsel.

Solicitors for the applicants, *R. J. Leeper* (Warwick) by *McSweeny & Leeper.*

Solicitors for the respondents, *R. J. O'Halloran* (Tamworth) by *Morris Fletcher & Cross.*

B. J. J.