H. C. OF A. 1956.

THE QUEEN v. FOSTER; EX PARTE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

Dixon C.J.
McTiernan J.
Williams J.
Webb J.
Fullagar J.
Kitto J.
Taylor J.

Unfortunately for the argument that dispute is not about an industrial matter as defined.

The reasons which have already been given suffice to dispose of the case and it is better not to go beyond them.

The order nisi should be made absolute for a writ of prohibition prohibiting further proceedings with or upon the order or proposed order described in the order nisi.

That order was not the result of a direct or express application of the unions concerned, who were named in the order nisi as parties to be served. It is a case in which it seems proper to make no order as to costs.

Order nisi for a writ of prohibition made absolute.

Solicitors for the prosecutors, *Malleson, Stewart & Co.*

Solicitor for the respondent judge of the Court of Conciliation and Arbitration, *H. E. Renfree,* Crown Solicitor for the Commonwealth of Australia.

Solicitors for the organizations of employees, *Sullivan Bros.*, Sydney, by *Macpherson & Kelley.*

R. D. B.

[H. C. OF A. 1953. SYDNEY, Feb. 9, 10; May 8. Kitto J.]

AUSTRALIAN COAL AND SHALE EMPLOYEES' FEDERATION AND ANOTHER } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . . DEFENDANTS.

Practice—Taxing officer—Bill of costs—Taxation—Certificate—Signed immediately after completion of taxation—Effect—Objections—Re-opening of taxation—Alteration—Application to High Court for order to review—Decisions involving discretionary judgments—Presumption in favour of correctness—Affirmation unless clearly wrong—High Court Rules, O. LIV., rr. 53, 54, 55, 67.

Under the *High Court Rules*, the taxing officer's general power to extend the time for any proceeding before him does not enable him to grant an extension after he has signed his certificate or *allocatur*, he then being *functus officio*.

The signing of a certificate or *allocatur* so soon after the completion of the taxation as to deprive a party of the opportunity which the rules contemplate to deliver and carry in objections is irregular and may be set aside.

The taxing officer's duty to reconsider and review his taxation upon objections carried in relates only to the items objected to; but he has power to re-open his taxation in respect of any item in the bill at any time before, though not after, he signs his certificate or *allocatur*. Until then he has not completed the taxation of the bill and is at liberty to change his decision upon any item as to which he thinks he has made an error.

On an application to a justice for an order to review a taxation, only items covered by objections carried in before the taxing officer may be considered.

A decision of the taxing officer as to *quantum* is, generally speaking, final. The principle upon which it will be reviewed by a justice, discussed.

REVIEW OF TAXATION.

AN ACTION in the High Court between the Australian Coal and Shale Employees' Federation and Idris Williams, plaintiffs, and the Commonwealth of Australia, the Prime Minister of the Commonwealth for the time being, and the Attorney-General of the Commonwealth for the time being, defendants, was commenced by writ of summons issued out of the Principal Registry, Melbourne, on 23rd October 1950.

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The plaintiffs' claim, in common with that of plaintiffs in seven other actions, was for a declaration that the *Communist Party Dissolution Act* 1950, assented to on 20th October 1950, was ultra vires, and for certain injunctions against the defendants in relation to the operation of that Act.

The defendants were the same in each of the eight actions.

Upon the actions coming on to be heard *Dixon* J. stated a case raising questions of law for the High Court pursuant to O. XXXII, r. 2, reserving such for the consideration of the Full Court pursuant to s. 18 of the *Judiciary Act* 1903-1948.

The Full Court held (1) (a) that the decision of the validity or invalidity of the provisions of the *Communist Party Dissolution Act* 1950 did not depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth to ninth recitals (inclusive) of the preamble of that Act; (b) that the plaintiffs were not entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth; and (2) that the *Communist Party Dissolution Act* 1950 was wholly invalid: *Australian Communist Party* v. *The Commonwealth* (1). The defendants were ordered to pay the taxed costs of the plaintiffs.

On 18th July 1952 the taxing officer gave an appointment to tax the bill of costs on 29th and 30th July 1952. The plaintiffs brought in their bill of costs for taxation at the sum of £3,037 5s. 10d. including certain items specified in a notice of objections annexed thereto.

The amount allowed on taxation was £1,813 6s. 10d. and the taxing officer, at the conclusion of the taxation on 30th July 1952, signed a certificate on the bill to that effect, but later on that day he purported to grant an application made to him by the plaintiffs' solicitor for an extension of time in which to carry in objections. Within that time the taxing officer considered the objections, and gave his decision, with the grounds and reasons therefor, in a document signed by him on 23rd October 1952. He added to each of four items the sum of £5 12s. 6d. and deducted from forty-seven items sums totalling £565 4s. 4d., the net further amount deducted as a result of the re-consideration being the sum of £542 14s. 4d. which said sum deducted from the sum of £1,813 6s. 10d. mentioned above left remaining the sum of £1,270 12s. 6d. The taxing officer, on 23rd October 1952, certified and allowed the bill of costs at the sum of £1,270 12s. 6d.

(1) (1951) 83 C.L.R. 1.

The plaintiffs on 11th November 1952 took out a summons for review of the taxation by a justice of the High Court.

The summons came on for hearing before *Kitto* J.

Further facts appear in the judgment hereunder.

G. T. A. Sullivan, for the plaintiffs.

B. B. Riley, for the defendants.

Cur. adv. vult.

The following written judgment was delivered by :—

KITTO J. The plaintiffs in this action apply by summons for a review of the taxation of a bill of costs brought in under an order made by *Dixon* J. on 29th March 1951. The Rules of Court which are applicable are those which were in force prior to 1st January 1953, and it is to them alone that I shall refer.

The taxation took place on 29th and 30th July 1952. On the latter date, after the taxation had been completed, the taxing officer signed a certificate at the foot of the bill stating that he had taxed the bill and allowed it at the sum of £1,813 6s. 10d. The rules gave to a party dissatisfied with the disallowance of the whole or any part of any items of a bill a right to object to such disallowance and to apply to the taxing officer to review the taxation in respect of the same: O. LIV, r. 53. This right, however, was conferred subject to a time limit: the objection had to be delivered to the other party and carried in before the taxing officer before the signing of the certificate or *allocatur* or such earlier time as might be fixed by the taxing officer. In this case, the taxing officer signed his certificate on the very day on which he completed the taxation, and no objection had at that time been delivered or carried in. Later on the same day, however, the taxing officer purported to grant an application made to him by the plaintiffs' solicitor by telephone, for an extension of time for fourteen days in which to carry in objections. On 11th August 1952, the plaintiffs' objections were received by the taxing officer, under cover of a letter dated 8th August 1952, in which the plaintiffs' solicitor requested the taxing officer to consider the objections and furnish his decision thereon, with grounds and reasons, within one month. The taxing officer referred, in letters to the parties dated 11th August, to the question of receiving further evidence. He eventually fixed 27th August 1952 for the hearing of the objections, and the plaintiffs' solicitor informed him by letter that he did not desire to adduce any representations other than those made on taxation and those contained in the objections.

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The taxing officer, having considered the objections, gave his decision, with the grounds and reasons therefor, in a document signed by him on 23rd October 1952. This document included a certificate allowing the bill of costs at the sum of £1,270 12s. 6d. The explanation of the difference between this sum and the sum mentioned in the certificate which had been placed at the foot of the bill of costs on 30th July 1952 is that the taxing officer not only had considered and dealt with the objections made by the plaintiffs but also had reconsidered the whole of each item in respect of which the disallowance of a part had been objected to, and had in several instances increased the amount taxed off.

On 11th November 1952, the plaintiffs took out the present summons for review of the taxation. On the hearing of the application the plaintiffs contended, *inter alia*, that the taxing officer exceeded his powers in adopting the course which I have just described, and contended that his function on consideration of the objections was confined to reconsidering and reviewing the taxation "upon such objections" and giving "his decision thereon".

It must first be observed that the action of the taxing officer in signing his certificate of taxation on 30th July 1952 ended the time within which the plaintiffs might deliver and carry in objections: *R.* v. *Kingston-upon-Hull District Registrar*; *Ex parte Norton* (1). The taxing officer had a general power under r. 67 to extend the time for any proceeding before him, but in my opinion this power did not enable him to grant the extension which he purported to grant on 30th July, because he had already signed his certificate. Upon so doing he became *functus officio* and no longer had power to modify his taxation upon consideration of objections. (Even if the rules had enabled him to grant the extension it would not have been proper to do so on an *ex parte* application: *In re Barrett* (2).)

But the signing of the certificate was irregular, because it was done so soon after the completion of the taxation that the plaintiffs' solicitor did not have the opportunity which the rules contemplate to deliver and carry in objections. The taxing officer, needless to say, acted in complete good faith, as he showed very clearly by agreeing later on the same day to the plaintiffs' request for further time for objections. He did not intend to deprive the plaintiffs of their right of objection, but that was the actual result of his signing the certificate when he did. In these circumstances the certificate could, and doubtless would, be set aside if an application for that purpose were made, so as to restore to the plaintiffs

(1) (1944) 1 All E.R. 546.

(2) (1894) 20 V.L.R. 11.

the right of which they had been inadvertently deprived: *In re Furber* (1); *Re Brougham* (2); *Dowden* v. *Shire of Cranbourne* (3). But it is unnecessary to set it aside, because the action of the taxing officer in purporting to extend the time for objections and proceeding to consider them when eventually they were carried in, considered in the light of the fact that the defendants have all along acquiesced in that course, amounted in my opinion to a revocation of the taxing officer's certificate by consent of the parties; and I shall deal with the matter on that footing.

What, then, is the power of a taxing officer who, not yet having given his certificate of taxation, is considering objections to his disallowance of portions of particular items? Clearly the rules governing objections do not provide for his considering anything but the objections. The words "upon such objections" in r. 54 are not surplusage; they plainly limit the scope of the duty which the rule creates. Indeed it has been pointed out that objections ought to be carefully framed, for it is to those and those alone that the taxing officer's answers are directed: *Perry & Co. Ltd.* v. *T. Hessin & Co.* (4). But apart altogether from the duty to reconsider the allowance or disallowance objected to, the taxing officer has power, in my opinion, to re-open his taxation in respect of any item in the bill at any time before he signs his certificate or *allocatur*. Until then he has not completed the taxation of the bill: *Chitty's Archbold*, 12th ed. (1866), vol. 1, p. 125, and he is therefore at liberty to change his decision upon any item as to which he thinks that he has made an error. I take the view, however, that when objections have been carried in a taxing officer ought not to alter his taxation adversely to the objecting party, unless he forms a clear opinion that the interests of justice so require. The possibility that unfortunate misconceptions may arise should be recognized as an important restraining consideration.

But where, in respect of any item, the taxing officer does decide to tax off still more than the amount which is the subject of objection, he should appreciate that it is incumbent upon him to afford to the party adversely affected an opportunity to carry in objections to the new disallowance.

This the taxing officer omitted to do in the present case. The effect of incorporating in the one document his certificate and the grounds and reasons for his decision on the objections was that his fresh disallowances could not be made the subject of objection and application for review. His decision to overrule objections to

(1) (1898) 2 Ch. 538, at pp. 539, 540.
(2) (1926) S.A.S.R. 423.
(3) (1933) V.L.R. 255, at p. 260.
(4) (1913) 30 R.P.C. 193, at p. 199.

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original disallowances gave rise to a right in the plaintiffs under r. 55 to apply to a justice for an order to review the taxation as to the item or part of an item to which the objections had related. But under the rule, the plaintiffs could not apply for an order for review in respect of a part of any item if the opportunity to object to the disallowance of that part had been inadvertently denied them by the immediate signing of the certificate. As Lord *Esher* M.R. said in *Shrapnel* v. *Laing* (1): "Upon such an application (i.e. for review) it is necessary that the person who seeks a review should shew that he has taken his objections to the taxation when before the master. The applicant is bound by those objections, and the only question for the Court is whether they are to be sustained or negatived. In all other respects the taxation must be taken to have been right" (2). See also *Bates* v. *Gordon Hotels Ltd.* (3). The authorities I have cited in reference to the certificate of 30th July 1952 show that in these circumstances there is jurisdiction in the court to set aside the certificate of 23rd October 1952; and I am prepared to make an order to that effect if an application for the purpose is made to me. The effect of making such an order would be that the present application would become incompetent, for the *locus standi* of the plaintiffs to maintain the application is that they are parties dissatisfied with a certificate of the taxing officer: r. 55. As things stand at the moment (and on the footing that the certificate of 30th July 1952 is out of the way), I can decide the objections now on the file, in so far as they have not already been acceded to by the taxing officer, but I cannot give any binding decision as to the additional disallowances, to which, for want of opportunity, no objections have yet been brought in. As, however, the whole matter has been fully argued before me, I think the course which is most in the interests of the parties is that I should express my views on all outstanding questions, and then adjourn the application to enable the plaintiffs to apply for an order setting aside the certificate of 23rd October 1952, to carry in such objections as they may be advised to the new disallowances, and to apply for a review, if necessary, in respect of those objections in addition to the objections already before me. I should expect, of course, that the parties would endeavour to shorten this procedure as much as possible by agreement.

Argument was addressed to me on the general topic of the attitude which ought to be adopted, on an application such as the present, to decisions of the taxing officer on questions of *quantum*. No

(1) (1888) 20 Q.B.D. 334.
(2) (1888) 20 Q.B.D., at p. 337.
(3) (1913) 1 K.B. 631, at pp. 636, 637.

doubt there are to be found, in some of the cases on the subject, statements to the effect that the discretion of a taxing officer will not be interfered with by a judge unless the taxing officer has erred on a question of principle, and not at all on a mere question of *quantum* ; see, for example, *Alsop* v. *Lord Oxford* (1) ; *Re Catlin* (2) ; *In the Estate of Ogilvie* (3) ; *Coon* v. *Diamond Tread Co.* (1938) *Ltd.* (4). So, too, there are to be found in many of the cases decided upon the wider question as to the proper attitude of a court of appeal to any judgment given in exercise of a discretion, statements appearing to limit the function of the appellate court to correcting errors of principle. Yet in that wider area it is clear that such statements are not exhaustive. I shall not repeat the references I made in *Lovell* v. *Lovell* (5) to cases of the highest authority which appear to me to establish that the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance : *House* v. *The King* (6). So, too, in my opinion, the exercise of the jurisdiction to review a taxation of costs is subject to no narrower limitation than that which was stated by *Bovill* C.J. and *Brett* J. in *Hill* v. *Peel* (7) :—"A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful consideration of the particular circumstances of each case ; and where, after properly considering the matter, the master has arrived at a decision, it lies upon those who impeach his decision to satisfy the Court that he is wrong. Where a principle is involved, the Court will always entertain the question, and, if necessary, give directions to the master ; but, where it is a question

(1) (1833) 1 My. & K. 564 [39 E.R. 794].
(2) (1854) 18 Beav. 508 [52 E.R. 200].
(3) (1910) P. 243, at p. 244.
(4) (1950) 2 All E.R. 385.
(5) (1950) 81 C.L.R. 513, at pp. 532-534.
(6) (1936) 55 C.L.R. 499, at pp. 504, 505.
(7) (1870) L.R. 5 C.P. 172.

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of whether the master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with the judgment of its officer, whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to shew that the officer is wrong in the judgment which he has formed " (1).

I take it to be true that the decision of the taxing officer as to *quantum* is generally speaking final, and that it must be a very exceptional case in which the Court will even listen to an application to review such a decision: *In the Estate of Ogilvie* (2). But the authorities as a whole (not omitting to notice *White* v. *Altrincham U.D.C.* (3)), do not establish as an absolute proposition that a judge will never review a taxing officer's decision on a question of *quantum* only. *Swinfen Eady* L.J. said in *Slingsby* v. *Attorney-General* (4), after quoting the passage from *Ogilvie's Case* (2) to which I have referred: " The decision of the taxing master is not absolutely final, even on a question of *quantum* "; and so it has been held several times in Victoria, where the view has been accepted for many years that a taxing officer's decision on *quantum* will be corrected if the judge concludes that " he has clearly made a mistake ": *In re Melbourne Parking Station Ltd.* (5); *House* v. *Life Insurance Co. of Australia Ltd.* (6); *Dwyer* v. *National Trustees Executors & Agency Co. of Australasia Ltd.* [*No.* 3] (7); *Carrazzo* v. *Weyman* (8); *McCoughtry* v. *Schrick* (9); see also, *Russo* v. *Russo* (10). I respectfully adopt the summary of the law on this matter which was made by *Jordan* C.J., with the concurrence of *Harvey* C.J. in Eq. and *Street* J., in *Schweppes' Ltd.* v. *Archer* (11). His Honour said:—" In appeals as to costs, the principles to be applied are these. The Court will always review a decision of a Taxing Officer where it is contended that he has proceeded upon a wrong principle, for the purpose of determining the principle which should be applied; and an error in principle may occur both in determining whether an item should be allowed and in determining how much should be allowed. Where no principle is involved, and the question is, whether the Taxing Officer has correctly exercised a discretion which he possesses and is purporting to exercise, the Court is reluctant to interfere. It has undoubted jurisdiction to review the Taxing Officer's decision even where an exercise of

(1) (1870) L.R. 5 C.P., at pp. 180, 181.
(2) (1910) P., at p. 245.
(3) (1936) 2 K.B. 138.
(4) (1918) P. 236, at p. 239.
(5) (1929) V.L.R. 5, at p. 89.
(6) (1930) V.L.R. 165.
(7) (1940) V.L.R. 366.
(8) (1944) V.L.R. 207.
(9) (1947) V.L.R. 342.
(10) (1953) V.L.R. 57.
(11) (1934) 34 S.R. (N.S.W.) 178; 51 W.N. 71.