

[HIGH COURT OF AUSTRALIA.]

FEALY APPELLANT ;

AND

THE PUBLIC TRUSTEE (NEW SOUTH)
WALES) RESPONDENT.ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Solicitor—Costs—Taxation—Power of taxing officer—Costs of proceedings by wife against husband—Bill of costs rendered to representative of deceased husband—Necessaries—Legal Practitioners Act 1898 (N.S.W.) (No. 22 of 1898), secs. 21, 25, 39—Regulæ Generales of Supreme Court (N.S.W.), Nov. 18, 1915, regs. 42, 50.

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SYDNEY,
August 7.

A solicitor, acting for a wife, instituted on her behalf against her husband a suit for restitution of conjugal rights in which a decree was made in favour of the wife. In the course of the proceedings applications were made (*inter alia*) for alimony *pendente lite* and for permanent alimony, for an order charging the alimony upon the husband's property, and for an order restraining the husband from selling his property. The husband having died before the applications came before the Court, the solicitor rendered his bill of costs in respect of those applications to the husband's executor, and an order was made for its taxation. The taxing officer disallowed all the costs (other than out-of-pocket expenses) on the ground that the applications were unreasonably made and were therefore not necessities, and the Supreme Court of New South Wales, on review of taxation, held that the taxing officer had power to determine whether the applications were necessities.

Barton, Isaacs,
Gavan Duffy
and Rich J.J.

The High Court refused to grant special leave to appeal.

Special leave to appeal from the Supreme Court of New South Wales refused.

APPLICATION for special leave to appeal.

Mr. David Fealy was the solicitor for Agatha Agnes Ramsay in a suit by her in the Supreme Court of New South Wales against

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her husband, Henry George Ramsay, for restitution of conjugal rights, which was instituted by a petition filed on 19th July 1917. On 15th September 1917 the solicitor filed on behalf of the wife a petition for alimony *pendente lite*, for an order securing the amount of the alimony on the property of her husband and for an order restraining her husband from selling his property. On 23rd October 1917 the motion on that petition was ordered to stand over generally. On 22nd March 1918 a decree for restitution of conjugal rights with costs was made in favour of Mrs. Ramsay. The husband having failed to obey the decree, the solicitor on the wife's behalf filed a petition for permanent alimony, and the motion on that petition asked that certain property of the husband should be charged with the payment of alimony and of maintenance for the four children of the marriage, that the proceeds of a sale of some of the property of the husband should be paid into Court and that that sale should be set aside. On 16th May this motion and the motion for alimony *pendente lite* were consolidated by Gordon J., and were directed by him to stand over to be heard by Harvey J.

On 3rd August 1918 the husband died, and the solicitor on 12th December 1918 handed to the Public Trustee, who was the executor of the husband's will, his signed bill of costs in connection with the various proceedings instituted by him on behalf of the wife, and requested payment of it. On 17th January 1919, on the application of the solicitor, an order was made for the taxation of the bill of costs. That order directed that the bill of costs should be referred to the proper officer of the Court to be taxed, and that Mr. Fealy should give credit for all sums of money by him received for or on account of the bill and that he should refund to the executor what might on such taxation appear to have been overpaid. By the order it was then ordered "that the taxing officer do certify and direct to be paid what shall be due to or from either party in respect of the bill of costs and of the taxation to be paid according to the event of taxation pursuant to the Statute."

Before the taxing officer it was contended by Mr. Fealy that the taxing officer should not go into the question of whether the applications for alimony *pendente lite* and for permanent alimony were necessities; but he did go into that question, and decided that the

proceedings were unreasonably taken and were therefore not necessities, and he disallowed all the costs of those applications except the out-of-pocket expenses. On a motion to review taxation the Full Court held that the taxing officer had jurisdiction to determine whether the applications were necessities, and was not bound to tax the items of the bill of costs as if those proceedings were necessities leaving it to a Court to determine whether the proceedings were necessities. The Court therefore dismissed the motion.

An application was now made on behalf of Mr. Fealy for special leave to appeal from that decision.

McTague, in support of the application. The taxing officer should have taxed the various items in the bill of costs on the assumption that the proceedings in respect of which the charges were made were properly and reasonably taken and were necessities, leaving it to a Court of law to determine whether those proceedings were necessities so as to be recoverable against the husband's representative.

[During argument reference was made to *Allen v. Allen and D'Arcy* (1); *Wilson v. Ford* (2); *Ex parte McLaughlin*; *In re Freehill* (3); *Ex parte Harper*; *In re McCulloch* (4); *In re Hooper*; *Baylis v. Watkins* (5); *Legal Practitioners Act* 1898 (N.S.W.) (No. 22 of 1898), secs. 21, 25, 39; *Regulæ Generales of Supreme Court* (N.S.W.), 18th November 1915, regs. 42, 50.]

PER CURIAM. We do not think that this is a case in which special leave should be granted.

Special leave to appeal refused.

Solicitor, *David Fealy*.

B. L.

(1) 2 Sw. & Tr., 107.

(2) L.R. 3 Ex., 63.

(3) 8 S.R. (N.S.W.), 158.

(4) 8 N.S.W.L.R. (L.), 167.

(5) 33 L.J. Ch., 300.

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