1912. Aug. 14. „ 15. Lambert *vs.* Incorporated Law Society.

done it for a period of eighteen months I should have thought many more than three cases of misappropriation would have come to light; and with regard to one of these three cases, I have no reason to doubt the applicant's statement that it was he himself who brought it to light and communicated the facts to the Law Society. Under all these circumstances, and having regard to the fact that I think the misappropriation was not so much criminal as due to neglect of his business, and that it was a temporary lapse on the part of the applicant owing to domestic troubles and to his having taken to drink, which reasons seem now to have been removed, I think that we are justified in making the order of re-instatement.

[Respondents' Attorney, FRED KLEYN.]

[Reported by GEY VAN PITTIUS, Esq., Advocate.]

WESSELS, J. In Chambers. Aug. 12th and 16th, 1912.

JOS. CROSFIELD & SONS, LTD. *vs.* NILS TESTRUP.

Costs.—Taxation.—Party and Party Bill of Costs.—Appeal Pending.

The Taxing Master is bound to tax a party and party bill of costs notwithstanding that an appeal has been noted against the judgment which awarded the costs.

1912. Aug. 12. „ 16. Jos. Crosfield & Sons, Ltd. *vs.* Nils Testrup.

Application for an order directing the Taxing Master to tax the party and party bill of costs in the patent application of *Nils Testrup* vs. *Jos. Crosfield & Sons, Ltd.*

Nils Testrup applied for a certain patent, against the granting whereof Jos. Crosfield & Sons, Ltd., successfully objected, the application being refused with costs (see *supra* p. 509). Nils Testrup subsequently noted an appeal to the Appellate Division against this judgment, and at the time of the present application the appeal was still pending. The Taxing Master refused to tax the bill of costs, and stated the following reasons for his refusal: "I am of opinion that when a judgment is suspended by

reason of an appeal having been noted, the Taxing Master has no authority under the suspended order to tax the bill of costs. . . . I consider that I have no authority to tax and I therefore declined to tax."

Crosfield & Sons, Ltd., now applied for an order calling upon the Taxing Master to tax the party and party bill of costs of the objectors notwithstanding the notice of appeal lodged on behalf of the applicant (Nils Testrup), and that the costs of the motion be costs in the cause.

D. de Waal, for the applicants: As respondents in the appeal we are entitled to demand security from Nils Testrup who is not an *incola* of the Transvaal. In order to ascertain what the amount of the security will be it is necessary that the bill of costs in question should be taxed. Execution of a judgment is stayed pending an appeal. *Hallis & Co.* vs. *Chase* (8 S.C. 3). I am only asking to be allowed to tax so as to fix the amount of security allowable. He referred to *Beattie* vs. *Lord Ebury* (28 L.T.R. 458); *Wilson* vs. *Church* (12 Ch. D. 454); *Barker* vs. *Lavery* (14 Q.B.D. 769).

The Taxing Master in person said that there must under the circumstances be a direction from the Court ordering him to tax, as the effect of allowing a taxation pending an appeal would allow reviews of taxation to be brought pending appeal, which was undesirable.

A. Davis, for Nils Testrup, adopted the Taxing Master's argument. The order for costs is part of the judgment and taxation is merely intended to ascertain the amount of the bill of costs for purposes of execution. A writ can be taken out on a taxed bill of costs, and in this case there is nothing to show that the taxation is merely intended to fix the amount of security required.

Cur. adv. vult.

Postea (16th August).

WESSELS, J.: The patent case of *Testrup* vs. *Joseph Crosfield & Sons, Limited,* came before me, and I adjudi-

1912.
Aug. 12.
" 16.

Jos. Crosfield & Sons, Ltd. *vs.* Nils Testrup.

cated upon the matter. An appeal was noted, and the successful party in this Court applied to have his bill of costs taxed. The Taxing Master objected to tax the bill, on the ground that, as there was an appeal pending, there could be no execution of the judgment, as according to his view the taxation of a bill of costs was a step towards execution. It is not quite clear what attitude was taken up by the other party at the taxation; but I take it that the statement of the Taxing Master is correct, because he says that he submitted a written memorandum on the matter to the other party, and no objection was taken to its terms. I think, therefore, that the other party did not at that time consent to the taxation. The first question to decide is whether the contention of the Taxing Master is correct, that when a case is under appeal no taxation of costs can take place. There is no doubt that execution is stayed pending appeal, and there is also no doubt that if a bill of costs is taxed execution can follow in the ordinary course. But whether the bill is taxed or not, if there is an appeal pending, no execution can take place upon the bill. The arguments advanced on behalf of the applicants in this matter are briefly these. Mr. *de Waal* says that as respondents in the appeal they are entitled to demand security from the appealing party, and that they cannot definitely say what the amount of the security should be until they know exactly what amount has to be paid in respect of costs. He also argues that taxation is in no way a step towards execution, but that it is merely for the purpose of ascertaining the exact amount of costs due. The Taxing Master's contention is that the taxation of costs is a step towards execution, and in order to strengthen that view he puts, very pertinently, the case where, for instance, some dispute takes place with reference to a particular item of a bill of costs and the matter had to be referred from the Taxing Master to a Judge. In such a case costs may be incurred which the losing party should not have had to pay, by reason of the fact that he succeeded on appeal. The matter is not free from difficulty, but I think that the proper way of looking at it is this. If the Court knew, at the time when it gave its judgment, what the exact amount of costs would be

between the parties, it would add to the judgment that exact amount of costs. In other words, the judgment with regard to costs is a mere accessory; it is part and parcel of the actual judgment of the Court. It so happens that the Court is not as a rule in a position to determine what the exact amount of the costs is at the time when it gives its judgment, and therefore when it gives judgment for payment of a certain amount of money, or that a certain thing shall be done, and adds that the plaintiff, or defendant, is to pay the costs of the proceedings, it means that the costs are part and parcel of the judgment but that the Court is not at any moment in a position to say what the exact amount of costs is. If, for instance, the parties were to agree that the losing party should pay a certain amount of costs, then the Court might *instanter* give a judgment including those costs. That being so, it seems to me that the real function of the Taxing Master is to ascertain a matter which at the time the judgment was delivered was not yet ascertained. He conducts the taxation for the purpose of rendering certain what was not certain at the time when judgment was given. That is his first and his important function. The other facts which flow from the taxation are merely subordinate; they do not constitute the principal part of the duty of a Taxing Master. His principal function is to ascertain the amount of the costs. Under these circumstances, I think that the applicants are right in their contention that they are entitled to ask the Taxing Master to tax their bill of costs. By consent, the costs of the application will be costs in the cause.

[Attorneys for Crosfield & Sons, Ltd., RCOTH & WESSELS.
Attorneys for Nils Testrup, WAGNER & KLAGSBRUN.]

[Reported by ADOLF DAVIS, Esq., Advocate]