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Isaacs J.

a mine under the sea, or other means of that kind, has never been judicially determined." The doubt still exists: *Hindson* v. *Ashby* (1).

The respondent, in my opinion, fails as to his claim for the totality of the land comprised in his application for registration. This was the only question actually fought, and the appeal ought to be allowed.

It may, however, be not unfairly considered that the pleadings include a claim to some accretion short of the whole lagoon, and based not on the existence of the sand-bar, but of gradual internal additions to the shores of the lagoon. Upon just terms it is certainly convenient, if the respondent so desires, that this limited claim should be disposed of in the present action, and I agree in the order proposed by the learned Chief Justice.

Appeal allowed.

Solicitor, for appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for respondent, *Robson & Cowlishaw.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

CITY BANK OF SYDNEY . . . . APPELLANTS;

AND

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McLAUGHLIN . . . . . RESPONDENT.

SYDNEY, *April* 4.

Griffith C.J.

IN CHAMBERS.

Costs—Costs of appeal—Fee for counsel's opinion as to advisability of appeal—Costs between solicitor and client—Costs of order for repayment of deposit for security—Review of taxation.

Upon an appeal to the High Court the appellant's costs begin with the

(1) (1896) 2 Ch., 1, at pp. 13 and 28.

instructions to appeal, and the costs of obtaining counsel's opinion as to the advisability of an appeal, though allowable as between solicitor and client, are not allowable as between party and party.

The High Court, in allowing an appeal, ordered that the sum paid by the appellants as security for costs of the appeal should be paid out to the appellants. Under the Rules of the Supreme Court of New South Wales in Equity, from which the appeal was brought, the appellants were unable to obtain payment of this sum without an order of that Court.

Held, that the appellants were entitled to the costs of attending to receive the deposit, together with the costs of an *ex parte* application to the Judge of the Equity Court, if necessary.

SUMMONS on behalf of respondent for review of taxation.

This was a summons in Chambers by John McLaughlin against the City Bank of Sydney, for review of taxation as to certain items of the costs of an appeal in which the City Bank of Sydney, the appellants, were the successful parties (1). Upon the hearing of the appeal the High Court ordered that the sum of £50 lodged as security for costs of the appeal, should be paid to the appellants or their solicitors.

Upon taxation the appellants were allowed the costs (*a*) of a fee to counsel to advise whether there should be an appeal; (*b*) of taking out an order for payment of the money paid in as security for the appeal.

It appeared that in accordance with the practice of the Supreme Court of New South Wales in its equity jurisdiction, from which the appeal was brought to the High Court, it was necessary under the decree made in the suit to take out an order for repayment of the security to the appellants.

The respondent, in person.

Leibius, solicitor, for the City Bank of Sydney.

GRIFFITH C.J. I think that the charges for counsel's opinion as to the advisability of an appeal cannot be allowed. It appears that under the Rules of the Supreme Court of New South Wales in its equity jurisdiction such costs may be allowed as between party and party, but the costs now under consideration are costs

(1) 9 C.L.R., 615.

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incurred in respect of proceedings in the High Court. In the precedents of bills of costs given in *Safford and Wheeler* such costs are included in costs as between solicitor and client, and not in appellant's costs. If it had appeared to be the recognized practice of the Privy Council to allow such costs as between party and party I might have entertained some doubt on the point, but as the practice appears to be the other way, I adhere to my first impression that the appellant's costs begin with the instructions to appeal, and that the costs of obtaining counsel's opinion as to the advisability of an appeal, although allowable as between solicitor and client, are not allowable as between party and party.

With regard to the costs of obtaining a repayment of the deposit of £50 for security, it is plain that the appellants were entitled to a return of their deposit. This is so plain that this Court has frequently refused to make a formal order for the return of the deposit of a successful appellant. In the present case, however, the appellants were in fact unable to obtain a return of the deposit, although this Court had declared their right to it, without an order of the Supreme Court.

A consent order was taken out, in respect of which the appellants claim the ordinary costs of such an order in the Supreme Court. I do not think they can be allowed on that basis. They are, however, entitled to the expenses of obtaining repayment of the deposit, which should not exceed the costs of attending to receive it, together with the costs of an *ex parte* application to the Judge, if necessary.

I therefore direct a review of taxation by omitting the charges in respect of counsel's opinion as to appeal, and all charges in respect of obtaining a refund of the deposit beyond those which I have described. The bill of costs may be amended for this purpose. The appellants must pay the costs of the summons.

Application granted.

Solicitors, for appellants, *Leibius & Black.*

C. E. W.