necessary drill. I think this objection is as thin as anything of the kind that has come before us.

In my opinion, both of the objections fail, and the appeal must be dismissed.

H. C. OF A. 1912.

KRYGGER v. WILLIAMS

Appeal dismissed.

Solicitor, for the appellant, *E. E. Dillon.*

Solicitor, for the respondent, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

COCK AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

AITKEN AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

Trustee—Life tenant and remainderman—Corpus and income—Costs paid by trustee under order of High Court—Decision of High Court reversed on appeal by one party to Privy Council—Effect on rights of parties not appealing—Indemnity of trustees—Rights of assignee of life tenant.

H. C. OF A. 1912.

MELBOURNE, *Oct.* 11, 14, 21, 22.

Griffith C.J., Barton and Isaacs JJ.

An action was brought in the Supreme Court by a life tenant under the will of A. against the trustees of A.'s estate and the trustees of B.'s estate, claiming against the latter trustees in respect of breaches of trust whereby the income of A.'s estate was diminished, and against the former trustees the determination of the respective rights of himself and the remaindermen. The Court having dismissed the action with costs, the High Court on appeal gave relief against both sets of trustees and directed the costs of the plaintiff and the remaindermen to be provided for out of the corpus of A.'s estate.

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The trustees of B.'s estate appealed to the Privy Council against so much only of the order of the High Court as applied to them. The Privy Council reversed the order of the High Court, directed the judgment of the Supreme Court to be restored and dismissed the action with costs in both Courts. The plaintiff before bringing the action had assigned his interest in A.'s estate by way of mortgage. Prior to the appeal to the Privy Council the trustees of A.'s estate, pursuant to the judgment of the High Court, had paid certain costs to the plaintiff, had retained certain of their own costs, and had incurred certain other costs in taking accounts in connection with the claim against the trustees of A.'s estate.

Held, that, notwithstanding the order of the Privy Council, the trustees of A.'s estate were entitled to be indemnified for such costs, except such of the plaintiff's costs as were attributable to the plaintiff's appeal to the High Court in respect of his claim against the trustees of B.'s estate, out of the corpus and not out of the income of A.'s estate :

By *Griffith* C.J. and *Barton* J., on the ground that although the order of the High Court must be treated as non-existent, the order of the Privy Council left the rights of the trustees of A.'s estate open to determination.

By *Isaacs* J., on the ground that the order of the Privy Council, although it authorized the trustees of A.'s estate to apply the income to the payment of the costs, did not permit the income to be so applied to the disadvantage of the plaintiff's assignee.

Decision of the Supreme Court: *Aitken* v. *Cock*, (1912) V.L.R., 433; 34 A.L.T., 81, reversed.

APPEAL from the Supreme Court of Victoria.

An originating summons was brought in the Supreme Court the parties to which were as follows :—The plaintiffs, William Aitken and James Nicolas Buzolich, were the trustees of the estate of Lucy Smith, deceased. The defendants were Charles Matthew Germain Cock, the life tenant of the residue of the income of the estate of Lucy Smith, subject to certain payments; John McAlister Howden, the assignee under a deed of arrangement of the estate of C. M. G. Cock ; the National Mutual Life Association of Australasia Limited (hereinafter called the " Association "), the assignee by way of mortgage of the life interest of C. M. G. Cock in the estate of Lucy Smith ; Emily Elizabeth Cock, Lucy Lillian Cock and Charles Linwood Meredith Cock, children of C. M. G. Cock, and remaindermen under the will of Lucy Smith ; and John Matthew Vincent Smith, remainderman under the will of Lucy Smith in certain events. Lucy Smith, by her will and codicil,

after directing certain payments to be made, gave the residue of the income of her estate to C. M. G. Cock for his life, with remainder to his children, or, failing such children, to J. M. V. Smith. The estate of Lucy Smith consisted in part of an interest under the will and codicil of her father, John Matthew Smith.

By deed dated 22nd June 1905, C. M. G. Cock assigned to the Association by way of mortgage his life interest in the estate of Lucy Smith, and, at all material times, the Association was entitled to receive the residue of the income.

On 17th October 1907, an action (No. 570 of 1907) was commenced by C. M. G. Cock against—(a) The trustees of the estate of John Matthew Smith; (b) the trustees of the estate of Lucy Smith; (c) Alice Smith, a beneficiary under the wills of J. M. Smith and Lucy Smith; and (d) Emily Elizabeth Cock and Lucy Lillian Cock, who were then the only children of C. M. G. Cock. The action was heard by *Hood* J., who on 8th February 1909 gave judgment for the defendants and directed their costs to be paid by the plaintiff C. M. G. Cock.

On 20th February 1909, Cock, by deed of arrangement under the *Insolvency Act* 1897, assigned his estate to Howden.

Against the judgment of *Hood* J., C. M. G. Cock appealed to the High Court, Howden being joined as co-appellant by order of a Justice of the High Court, and on 11th October 1909, the High Court reversed the judgment of *Hood* J., and, after making certain declarations and orders in relation to the trustees of the estate of J. M. Smith and certain other declarations and orders in relation to the trustees of the estate of Lucy Smith, and directing certain accounts and inquiries to be taken, directed that the taxed costs of action and of the appeal of C. M. G. Cock and Howden, and of Emily Elizabeth Cock and Lucy Lillian Cock, and of the trustees of Lucy Smith's estate, should be paid or retained out of the capital of the estate of Lucy Smith (see *Cock* v. *Smith* (1)). This order of the High Court was subsequently on summons amended, and the costs of the summons were directed to be taxed and paid or retained out of the capital

(1) 9 C.L.R., 773.

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of the estate of Lucy Smith in like manner as above mentioned with regard to the costs of the action and of the appeal.

Pursuant to the above orders, and before the appeal to the Privy Council hereinafter mentioned, the trustees of the estate of Lucy Smith paid or retained out of the capital of the estate the costs of the appeal to the High Court and of the summons to amend the order of the High Court of the appellants, C. M. G. Cock and Howden, and of the respondents, Emily Elizabeth Cock and Lucy Lillian Cock, and themselves, the trustees. Pursuant to the above directions of the High Court certain accounts and inquiries were commenced to be taken and made before the Chief Clerk of the Supreme Court, and were proceeded with until the reversal, hereinafter referred to, by the Privy Council of the judgment of the High Court, when they were discontinued. The trustees of the estate of Lucy Smith incurred certain costs in connection with such accounts and inquiries, but no costs of the other parties to such accounts and inquiries had been claimed against the estate of Lucy Smith and no order of any Court had been made in relation to any of such costs.

The trustees of the estate of J. M. Smith appealed to the Privy Council against so much of the orders of the High Court as affected their testator's estate, but neither the trustees of Lucy Smith's estate nor any other parties to the action so appealed. The Order in Council, dated 4th February 1911, reversed the order of the High Court, directed the judgment of *Hood* J. to be restored, and dismissed the action with costs in both the Supreme Court and the High Court. (See *Smith* v. *Cock* (1)).

On 22nd December 1911, the High Court, on appeal from an order made by *Madden* C.J. on an originating summons, made an order which, in effect, restored that part of the order made by the High Court on the appeal from *Hood* J., and on the before-mentioned summons to amend, as to which there had been no appeal to the Privy Council. (See *Cock* v. *Aitken* (2)). Upon the basis of the direction contained in such last-mentioned order of the High Court, the trustees of the estate of Lucy Smith and C. M. G. Cock and Howden arrived at an adjustment of the accounts of the estate of Lucy Smith as between life tenant and

(1) 12 C.L.R., 30; (1911) A.C., 317. (2) 13 C.L.R., 461.

remaindermen. Under that adjustment the trustees paid to the Association, with the concurrence of C. M. G. Cock and Howden, certain sums on account of the residue of the income of Lucy Smith's estate, but retained in hand the approximate amount of the taxed costs ordered by the High Court to be paid or retained out of capital as above-mentioned, together with a sum in respect of their costs in settling the transcript of the appeal to the Privy Council, as to which last-mentioned costs there was no order of any Court.

The question asked by the present originating summons was as follows :—

In what manner and whether against income or corpus or in what proportions as between income and corpus or how otherwise ought the trustees to charge the several items hereinafter mentioned of costs of the appellate proceedings in action No. 570 of 1907 in the High Court of Australia and of an order amending the judgment of the High Court and of proceedings in Chambers under such amended judgment and of settling the transcript on appeal to the Privy Council from such amended judgment all of which items were paid retained or incurred by the trustees prior to the reversal of such amended judgment by the Privy Council that is to say :

(*a*) Costs of appeal to High Court—

(1) Of the defendants C. M. G. Cock and Howden,

(2) Of the defendants Emily Elizabeth Cock, Lucy Lillian Cock and Charles Linwood Meredith Cock,

(3) Of the plaintiffs, trustees of the estate of Lucy Smith;

(*b*) Costs of order amending judgment of High Court—

(1) Of the defendants C. M. G. Cock and John McAlister Howden (life tenant),

(2) Of the defendants Emily Elizabeth Cock, Lucy Lillian Cock and Charles Linwood Meredith Cock,

(3) Of the plaintiffs, trustees of the estate of Lucy Smith ;

(*c*) Costs of proceedings in Chambers under Judgment of High Court of the plaintiffs ;

(*d*) Costs of settling transcript for Privy Council appeal of the plaintiffs ?

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The Supreme Court held that all the costs referred to in the question should be borne by income: *Aitken* v. *Cock* (1).

From this decision C. M. G. Cock and Howden and the Association now appealed to the High Court.

Mitchell K.C. (with him *Schutt*), for the appellants. The order of the Privy Council should be read as affecting only the parties to the appeal: *Cheyne* v. *Shire of East Loddon* (2); *Tasker* v. *Small* (3); *Cock* v. *Aitken* (4).

[ISAACS J. referred to *Beckett* v. *Attwood* (5).

GRIFFITH C.J. referred to *West* v. *Downman* (6).]

The intention was not to make C. M. G. Cock and Howden pay the costs of those parties against whom an order for costs had been made by the High Court and who did not appeal against that order. If the order of the Privy Council entitles the parties who did not appeal to recover their costs from C. M. G. Cock and Howden, it did not entitle the trustees of Lucy Smith's estate to deduct those costs from the income which was payable to the Association under the assignment to them. The case of *In re Knapman* (7), does not support the contrary contention, for there the assignment was made during the litigation and no notice of it was given to the trustees. [He also referred to *Lewin on Trusts*, 12th ed., p. 893; *Stephens* v. *Venables* (*No.* 1) (8); *In re Harrald*; *Wilde* v. *Walford* (9).]

Davis, for the trustees of Lucy Smith's estate.

Owen Dixon, for the remaindermen. The money in question has actually been expended by the trustees and the expenditure should fall on income. The effect of the order of the Privy Council is, at least, that the order of the High Court that the costs should be paid out of corpus no longer exists. That being so, there has been a diminution of the trust estate which should be attributed to the interest of the *cestui que trust* who caused that diminution, and the assignee is in no better position than the

(1) (1912) V.L.R., 433; 34 A.L.T., 81.
(2) 28 V.L.R., 503; 24 A.L.T., 105.
(3) 1 Coop. *temp.* Cotten., 61*n*.
(4) 13 C.L.R., 461.
(5) 18 Ch. D., 54, at p. 57.
(6) 27 W.R., 697.
(7) 18 Ch. D., 300.
(8) 30 Beav., 625.
(9) 51 L.T.N.S., 441.

cestui que trust: *In re Knapman*; *Knapman* v. *Wreford* (1); *Ingpen on Executors*, p. 530; *In re Jones*; *Christmas* v. *Jones* (2); *Hopkins* v. *Gowan* (3); *Cumming* v. *Austin* (4).

Mitchell K.C., in reply.

GRIFFITH C.J. The question we are called upon to decide on this appeal is one that I suppose no Court was ever before called upon to decide. In the original suit between the present appellants and the trustees of the estates of John Matthew Smith and Lucy Smith, this Court made an order allowing an appeal from the judgment of *Hood* J. In that suit two entirely different matters were involved, one a complaint of alleged misconduct on the part of the trustees of J. M. Smith's estate, the other a question of the several rights *inter se* of the tenant for life and the remaindermen under Lucy Smith's will. The trustees of J. M. Smith's estate presented a petition for special leave to appeal to His Majesty in Council, which was granted, and an Order in Council was afterwards made allowing the appeal. In that Order it is recited that the petitioners had petitioned for special leave to appeal to His Majesty in Council "except in regard to the first declaration and direction contained" in the order of the High Court, "the direction as to the costs in regard thereto and the accounts and inquiries consequent thereon." Those were matters in which the trustees of Lucy Smith's estate were interested, and with which the trustees of J. M. Smith's estate had no concern whatever. The Order in Council further recited that the petitioners prayed that, with that exception, the order of this Court might be reversed. Then it went on to recite that the Lords of the Judicial Committee had taken "the said petition and appeal" into consideration, and had agreed to report "that this appeal ought to be allowed and the order of the High Court of Australia dated 11th October 1909 reversed, the order of the Supreme Court of Victoria dated 8th February 1909 restored and that the said action ought to be dismissed with costs in both

(1) 18 Ch. D., 300.
(2) (1897) 2 Ch., 190, at p. 203.
(3) 1 Mol., 561.
(4) 28 V.L.R., 622, at p. 628; 24 A.L.T., 141.

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Courts," and that certain consequences should follow as to costs. The Order in Council then proceeds:—"His Majesty having taken the said report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that this appeal be and the same is hereby allowed." Stopping there, what would anybody suppose that meant? What appeal was allowed? Any ordinary person would say—The appeal already recited, namely, the appeal of the trustees of J. M. Smith's estate as against the order of the High Court so far as it affected them, but expressly excepting the rest of the judgment of this Court. But, strangely enough, the Order in Council went on to order "that the said order of the High Court of Australia dated 11th October 1909 be and the same is hereby reversed, that the said order of the Supreme Court of Victoria dated 8th February 1909 be and the same is hereby restored and that the said action be and the same is hereby dismissed with costs in both Courts."

Taken literally, that means that the whole action is dismissed, including the claim dealt with in the part of the judgment not appealed from, so as to absolve the parties who were satisfied with the judgment and who had not appealed and did not desire to do so. I think that the Order must have been drawn up in this form *per incuriam*. But we have to construe the Order in Council as we find it. I think it is only consistent with the respect which is due to so august a tribunal to say that, when it ordered that the action should be dismissed with costs, it meant costs in favour of the appellants, not costs in favour of persons not before the tribunal. I think it is proper to construe the Order in Council in such a way, if possible, as not to affect the rights of absent parties. It is not unusual for the Judicial Committee when allowing an appeal to leave an order for costs undisturbed. Nevertheless, as I have said, the Order in Council was in form that the order of the High Court should be reversed, and it must, I suppose, be taken that it was set aside and that the parties were, *quoad hoc*, left—so to say—in the air. I think, on the whole, although probably it was not intended, that we must treat the order of the High Court as now non-existent.

But the Judicial Committee, having done so much, perhaps *per*

incuriam, went no further, but left the rights of the other parties to be determined on general principles applicable to such cases. In the meantime the trustees of Lucy Smith's estate had in obedience to the order of the High Court paid certain costs to the plaintiffs and to the infant remaindermen and retained certain of their own costs, and they had also incurred certain costs in taking accounts ordered by the High Court. For that expenditure they are entitled to be indemnified, and the question on these proceedings is from what source. If this Court had dismissed the appeal from *Hood* J. as against the trustees of J. M. Smith's estate, as the Judicial Committee did, it would probably have apportioned the appellant's costs and have directed him to bear his own costs of the appeal so far as they related to J. M. Smith's estate. For the rest it would probably have made the same order as it actually made.

The question whether the costs of litigation as to the respective rights of the tenant for life and remaindermen under Lucy Smith's will should be charged to income or corpus was decided by this Court not only in the original appeal, but also in *Cock* v. *Aitken* (1). The Court decided that they should be borne by corpus. The costs incurred in the first suit were not wasted, although they were left in the air by the Order in Council. The question now is—From what source should the trustees be indemnified ? In my opinion, the right of recourse for indemnity for those costs should be decided on the same principles, and in the same manner as the right to indemnity for costs of actual and effective litigation. This principle does not, however, cover the plaintiff's costs of the appeal to the High Court, so far as regards their claim against the trustees of J. M. Smith's estate, which, as a matter of abstract justice, he ought to bear himself. But it is very doubtful whether there is any rule of law under which costs paid under such circumstances can be recovered back in the absence of an express order of some Court. It occurs to me, under those circumstances, to suggest that the assignees of his life interest, who have certainly been gainers by the litigation, should consent to an order for payment of a portion of those costs out of the life estate. I should think £150 would cover them.

(1) 13 C.L.R., 461.

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[Mr. *Mitchell* having consented to an apportionment being made by the trustees—]

GRIFFITH C.J. The order will be varied by declaring that the costs should be taken out of corpus with the exception of such part as the trustees may think reasonably attributable to the costs of the appeal to this Court so far as they related to the charge against the trustees of J. M. Smith's estate.

BARTON J. I concur.

ISAACS J.—The Privy Council order (1) reversed, not merely discharged, the order of this Court, (2) restored the order of the Supreme Court, (3) dismissed the action with costs in both Courts, (4) directed Cock and Howden to pay the costs of the appeal to the Privy Council.

The language of the order is so general that, taken alone, I do not see any escape from the construction that all the defendants in the action were to get their costs from the plaintiffs. The reasons for judgments, however, say: "The respondents Cock and Howden must pay the *appellants'* costs in the Courts below, and of this appeal." That would limit the costs to the appellants, the trustees of J. M. Smith's will; and leave the costs of the trustees of Lucy's will and the infants unprovided for.

On the whole I think that unlikely. The language is distinct. The whole of the curial part of the order of this Court was reversed with the express inclusion of the first part. This is in accordance with the rule exemplified in *Wilson* v. *Bell* (1) and thus stated in the headnote:—"If a case wholly destructive of the foundation of the plaintiff's title is put forward in the answer of one defendant, and established, the Court will not give effect to it as between the plaintiff and that defendant merely; but it shall enure to the benefit of the other defendants, though they have not made that case by their answers."

The necessary effect of the Privy Council order was to annul the part of the judgment directing costs, it being absurd that a successful defendant should pay the costs to the unsuccessful

(1) 5 Ir. Eq., 501.

plaintiffs; and there is no reason why a just order should not be made, not against a party absent, but against a party present in favour of other parties formally included, even though not actually represented on the hearing, and more particularly if they are infants, who, as recited in the Order in Council "submitted their rights and interests in all the matters in the action to the care and protection of the said Supreme Court," and for whom in common with the other defendants judgment had been entered with costs. Unless otherwise ordered, restitution of all that was lost by a judgment follows when it is reversed. As pointed out in *Chitty's Archbold's Practice*, 14th ed., at p. 993, before the Judicature Acts a writ of restitution could be had; but under the present practice an application to the Court would be the proper course. There can be no difference between a substantive amount and costs in this respect. Therefore, in my opinion, all that was paid by any party to Cock and Howden by virtue of the order of the Court, Cock and Howden were bound to restore; and, further, I think they are bound to pay all costs of that action, including the costs of inquiries, to the parties who by their unsuccessful proceedings were compelled to incur them. But can the trustees of Lucy's will make the deduction from the income payable in respect of Cock's share? If they can, that relieves the corpus.

They can do so, unless the assignment to the National Mutual prevents it. Notice of this was given two years before the action was begun, and the point is raised whether the trustees' costs or the mortgagee's debt takes priority.

The Supreme Court determined in favour of the trustees on the authority of *Knapman's Case* (1), and thought that *In re Jones*; *Christmas* v. *Jones* (2) bore in the same direction. Mr. *Dixon* rightly placed great reliance on the words of *Hall* V.C., which certainly, if correct, establish his position. And so it comes to this: Is the statement of the law correct on p. 307? The learned Vice-Chancellor says first (3), "that every person taking an assignment from a *cestui que trust* of a portion of the testator's estate, at all events takes it subject to the liability to make good

(1) 18 Ch. D., 300, at p. 304. (2) (1897) 2 Ch., 190.
(3) 18 Ch. D., 300, at p. 307.

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all breaches of trust on the part of the assignor if he fill the fiduciary position of a trustee, even though the breaches of trust be subsequent to the assignment, as in *Morris* v. *Livie* (1) and cases of that class. They take subject to all those risks." That is the first statement of the Vice-Chancellor. Then he proceeds to the second. He says (2):—"I think they must, upon an analogous principle, take subject to the risk of the legacy assigned not being properly payable to the extent to which the legatee is liable to make good to the estate expenses incurred in an administration of the estate, that is, the loss occasioned to the estate by reason of expenses incurred in the administration of the estate by the residuary legatee."

With the greatest respect to the very learned Vice-Chancellor, the principle to which he refers in his second case—the material one here—is not analogous.

The essence of the first is wanting. The case of *Morris* v. *Livie* (1) to which he refers shows that where a legacy is given to a trustee there is a condition implied by law and attaching to the legacy until due, that he shall fulfil his fiduciary obligations.

That condition, as *Knight-Bruce* V.C. says, accompanies the legacy until its discharge, and applies as much to it after as before assignment. That is the risk the assignee runs.

But an ordinary legatee has no fiduciary obligation, and therefore there is no such condition, and consequently there is wanting the analogy of principle on which *Hall* V.C. relied.

The Master of the Rolls in the Court of Appeal placed the case on a totally different ground—namely, the pendency of the suit, subject to which, the assignee took.

And the position is shown by *Stephens* v. *Venables* (*No.* 1) (3), where the language of Sir John *Romilly* is direct upon the point under consideration.

The result so far is, that assuming the Privy Council order enables Cock's income to be applied to payment and recoupment of costs, yet it does not enable that to be done to the disadvantage of the National Mutual Company's mortgage.

(1) 1 Y. & C.C.C., 380. (2) 18 Ch. D. 300, at p. 307.
(3) 30 Beav., 625, at p. 627.

That ground failing, the matter falls within the decision in *Cock* v. *Aitken* (1).

In the complicated state of affairs I think the proposals made by the learned Chief Justice are fair and should be followed.

Appeal allowed. Order varied by declaring that all the costs should be charged on corpus except such part of the plaintiff's costs of the appeal to the High Court in Cock v. *Smith* (*No.* 570 *of* 1907) *as the trustees may in their discretion think were attributable to the plaintiff's charge against the trustees of the estate of J. M. Smith, which latter costs are to be recouped from income. Costs of all parties in the Supreme Court and the High Court to be paid out of corpus, those of the trustees as between solicitor and client.*

Solicitor, for the appellants, *J. W. Dixon.*

Solicitors, for the respondents, *Madden & Butler, J. E. Dixon.*

B. L.

(1) 13 C.L.R., 461.