[HIGH COURT OF AUSTRALIA.]

DOWLING AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

BLYTH AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1917.

HOBART, *Feb.* 19.

Griffith C.J., Barton and Gavan Duffy JJ.

Trustee—Breach of trust—Costs—Special leave to appeal to High Court.

In a suit against trustees for breaches of trust the suit was dismissed except as to one breach of trust in respect of which an inquiry was directed, and the trustees were ordered to pay the costs relating to the claim in respect of that breach of trust. It was alleged that no evidence had been given in support of that claim.

An application by the trustees for special leave to appeal to the High Court was refused.

Special leave to appeal from the decision of the Supreme Court of Tasmania: *Blyth* v. *Dowling*, 12 Tas. L.R., 21, refused.

APPLICATION for special leave to appeal.

A suit in equity was instituted in the Supreme Court of Tasmania by a bill of complaint by Caroline Annie Blyth, her son Robert Trevor Blyth and her daughter Effie Norma Blyth against William Archer Dowling, George Dalrymple Gleadow and Ernest Granville Miller, trustees of the estate of Robert De Little, deceased, whereby the plaintiffs alleged that the defendants, as such trustees, had been guilty of certain breaches of trusts, and claimed (*inter alia*)

repayment of all sums of money in respect of which breaches of trust had been committed and which had been lost to the estate, removal of the trustees, and such further or other relief as the nature of the case might require. The suit was heard by the Full Court, and a decree was made dismissing the bill of complaint except that portion of it which sought relief against the action of the defendants in applying the income of the tenant for life, Caroline Annie Blyth, to restore to capital moneys belonging to the plaintiffs those sums which had been advanced out of capital for the purpose of salvaging a certain security; directing an inquiry as to what amount had been withheld from the tenant for life to restore to capital the moneys so advanced, and what portion of the moneys so advanced were properly chargeable to the tenant for life; and ordering that the costs of the tenant for life so far as they related strictly to seeking relief in respect of the wrongful application of her income to the restoration of capital should be paid by the defendant trustees, and that the costs of the trustees as to the rest of the suit should be paid out of the funds belonging to the plaintiffs (see *Blyth* v. *Dowling* (1)).

The trustees now applied for special leave to appeal to the High Court from so much of the decree as ordered them to pay the costs of the tenant for life. During the hearing of the application it was altered to an application for special leave to appeal from the substantial order made against the trustees.

In the affidavit in support of the application it was stated that no evidence was given as to any part of the income of the tenant for life having been withheld from her to restore capital.

Waterhouse, for the trustees, in support. There was no evidence to support the order for an inquiry, nor was there evidence of any misconduct on the part of the trustees which would justify an order against them to pay costs. Such an order is always open to appeal (*Amos* v. *Fraser* (2)).

[GRIFFITH C.J. If the Court made a mistake it was only one of fact.]

The Court was wrong in ordering the trustees to pay costs.

(1) 12 Tas. L.R., 21.

(2) 4 C.L.R., 78.

H. C. OF A. 1917.

DOWLING v. BLYTH.

[GRIFFITH C.J. The costs they have been ordered to pay could not amount to more than about five pounds.]

PER CURIAM. Special leave to appeal will be refused.

Special leave to appeal refused.

Solicitors for the applicants, *Ritchie & Parker, Alfred Green & Co.*, Launceston, by *Simmons, Wolfhagen, Simmons & Walch.*

B. L.

[HIGH COURT OF AUSTRALIA.]

WARD . . . . . PLAINTIFF;

AND

C. W. McFARLANE & COMPANY . . . DEFENDANTS.

H. C. OF A. 1917.

MELBOURNE, *March* 6.

Griffith C.J.

IN CHAMBERS.

Practice—High Court—Discovery, Application for—Issue joined—Notice—Rules of the High Court 1911, *Part I., Order XXIX., r.* 8.

An application for discovery of documents made after issue joined must, in general, be made upon notice to the other party.

APPLICATION.

In an action brought in the High Court by Harold Seymour Kellam Ward against C. W. McFarlane & Co., an application was made on behalf of the plaintiff to *Griffith* C.J. in Chambers *ex parte*, and without affidavit, for an order for discovery of documents.