

further evidence—which was availed of—William Ernest Robbins was still absent and unable himself to give further evidence. Under these circumstances a further investigation of the capital required for the appellants' calling—if it be a profession—is necessary, and justice would be better served by a remission of the case to me, or some other Justice, for that purpose, than by a determination of the appeal upon the mere question of the burden of proof.

The appeal is dismissed with costs.

H. C. OF A.
1923.

ROBBINS
HERBAL
INSTITUTE
v.
FEDERAL
COMMISSIONER OF
TAXATION.

Starke J.

Appeal dismissed with costs.

Solicitors for the appellants, *McNab, Dowling & Wilson*.
Solicitors for the respondent, *Chambers, McNab & McNab* for *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

J. L. W.

Appl
Robart CC v
Triffert (2001)
10 TasR 471

[HIGH COURT OF AUSTRALIA.]

GORDON & GOTCH (AUSTRALASIA) LIMITED APPELLANT;

AND

COX RESPONDENT.

Practice—High Court—Costs—Taxation—Costs of appeal—Costs of opposing motion for special leave. H. C. OF A.
1923.

Costs of a motion for special leave to appeal to the High Court are costs of the appeal. MELBOURNE,.

Feb. 27;
Mar. 27.

Upon an appeal to the High Court by special leave an order was made that the respondent's costs of the appeal should be taxed, and paid by the appellant. The respondent had voluntarily appeared upon the motion for special leave and unsuccessfully opposed it, but no order had been made as to the costs of the motion. Starke J
(IN CHAMBERS.)

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1923.

GORDON &
GOTCH
(AUSTRAL-
ASIA) LTD.

v.
COX.

Held, that the respondent was entitled to his taxed costs of the motion for special leave if he established that such costs had not been incurred unnecessarily or through over-caution.

REVIEW of taxation.

An appeal had been brought by special leave by Gordon & Gotch (Australasia) Ltd. to the High Court, Frederick John Cox being the respondent. The appeal was dismissed, and the respondent's costs of the appeal were ordered to be taxed and to be paid by the appellant (1). The respondent had appeared on the motion, although no notice of the motion had been served on him, and had opposed the granting of special leave. The respondent brought in his bill of costs for taxation, and included in it (items 1 to 7) were the costs incurred in opposing the granting of special leave. These costs the Registrar disallowed.

The respondent now applied by summons to review the decision of the Registrar, and the summons was heard by *Starke J.*

Other material facts are stated in the judgment hereunder.

Home, for the respondent, in support.

The managing clerk of the appellant's solicitors, for the appellant, to oppose.

Cur. adv. vult.

Mar. 27.

STARKE J. delivered the following written judgment:—

This was a summons to review taxation. An appeal had been brought by Gordon & Gotch Ltd. to this Court pursuant to an order giving special leave to appeal. The appeal was ultimately dismissed, and Cox's "costs of this appeal" were ordered to be taxed, and paid by the appellant. Cox appeared voluntarily on the motion for special leave to appeal, and opposed it. The Court gave leave, but subject to a rather onerous undertaking. Nothing was provided as to costs in the order giving leave to appeal. Now Cox claims that his costs on this motion are part of the costs of appeal to which he is entitled under the order dismissing the appeal.

“Costs of appeal” means “extra expense incurred by reason of the appeal being taken” (see *Kevan’s v. Joyce* (1)). And appellants obtaining orders for “costs of appeal” are allowed, on taxation in this Court, the costs of any motion for special leave to appeal unless the Court has otherwise provided. This, I think, is right, for the order for special leave to appeal is, in these cases, a necessary step in the appeal: it is the first step in the proceedings by way of appeal, and is an extra expense incurred “by reason of the appeal being taken.” The proceedings in appeal do not here start, as in cases where the appeal is of right, by the notice of appeal, but with the application to the Court for leave to appeal.

It is difficult, if the appellant is entitled to his costs of motion for leave to appeal under an order for costs of appeal, to deny that a respondent who opposes the motion on notice is similarly entitled to his costs of so opposing it, in cases in which the “costs of appeal” are awarded to him. The fact that the respondent voluntarily opposes the motion for leave to appeal does not, in my opinion, narrow the meaning of the words “costs of appeal.” But it does, I think, throw upon the party who voluntarily appears the duty of satisfying the taxing officer that the costs were not incurred unnecessarily or through over-caution. The burden is no light one. But as I was a member of the Court which granted the leave to appeal and heard the appeal, I will not remit the matter to the taxing officer to inquire whether the costs in this case were reasonably and properly incurred, for I have no doubt that they were. The circumstances were peculiar and special. Gordon & Gotch Ltd. had reserved to it in the order against which it desired to appeal general liberty to amend its pleadings. The respondent was, I think, well justified in appearing and insisting that supposed matters of law should not be decided on pleadings which might at any time be amended. An undertaking was required from the appellant abandoning this leave to amend so far as any matters were brought to appeal. Ultimately the Court held that the appeal was due to misapprehension of the decision of the Supreme Court, and to faulty pleading, and by consent restored leave to amend. But the intervention of the respondent was clearly justified, and ought perhaps to

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ASIA) LTD.
v.
COX.

Starke J.

(1) (1897) 1 I.R., 1, at p. 5.

H. C. OF A. have induced the Court, in the first instance, to refuse leave to
1923. appeal.

GORDON & GOTCH I allow the summons to review taxation, and direct the Principal
(AUSTRAL- Registrar that the items nos. 1 to 7 mentioned in the bill of costs
ASIA) LTD. ought, in point of principle, to be allowed, and remit to him for the
v. purpose of considering the amount that should be allowed in respect
COX. of each item. Appellant Gordon & Gotch Ltd. to pay £1 ls. costs
Starke J. of this summons.

Order accordingly.

Solicitors for the respondent, *Home & Wilkinson.*

Solicitors for the appellant, *Williams & Matthews.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FLANAGAN AND ANOTHER . . . APPELLANTS;
DEFENDANTS,

AND

THE NATIONAL TRUSTEES, EXECUTORS }
AND AGENCY COMPANY OF AUS- } RESPONDENTS.
TRALASIA LIMITED AND OTHERS }

PLAINTIFF AND DEFENDANTS,

H. C. OF A. ON APPEAL FROM THE SUPREME COURT OF
1923. VICTORIA.

MELBOURNE, Will—Interpretation—"Die without leaving issue"—Death at any time—Gift to
May 15-16. children for life with remainder to their children—Survivorship—Death without
issue—No disposition of accrued shares—Residue—Intestacy—Wills Act 1915
SYDNEY, (Vict.) (No. 2749), sec. 23.
Aug. 9.

Knox C.J., By his will a testator, after disposing of his household effects, gave all the
Isaacs, Higgins, residue of his personal estate and all his real estate to trustees upon trust
Rich and to apply the income to the support and maintenance of his wife and children
Starke J.