[HIGH COURT OF AUSTRALIA.]

GLEN AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED AND OTHERS } RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1935-1936.

MELBOURNE, 1935, *Nov.* 19. 1936, *Feb.* 13.

Rich, Starke, Dixon and McTiernan JJ.

Appeal—High Court—Appeal as to costs only—Special leave—Judiciary Act 1903-1933 (*No.* 6 *of* 1903—*No.* 65 *of* 1933), *sec.* 35.

Costs—Originating summons—Beneficial interest encumbered—Separate representation of assignor and assignee—One set of costs only allowed.

An appeal to the High Court does not lie without special leave from so much of an order of a Supreme Court of a State as deals with the costs of the proceeding.

It is a settled rule of practice that when a beneficial interest has been encumbered not more than one set of costs should be given to the assignor and assignees in respect of that one interest.

Decision of the Supreme Court of Victoria (Full Court) reversed.

APPEAL from the Supreme Court of Victoria.

In the originating summons reported as on appeal to the High Court, *sub nom. Currie* v. *Glen* (1), William Henderson Glen and John Glen, sons of the testator's nephew William Glen, were defendants. Each of these defendants had assigned his interest in

(1) *Ante*, p. 445.

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the testator's estate by way of mortgage. The assignees of the interest of William Henderson Glen were the Australian Mutual Provident Society, Rolfe & Co. Ltd. and the People's Investment Co. Pty. Ltd., and the assignees of the interest of John Glen were the Australian Mutual Provident Society and the Union Bank of Australia Ltd. All these assignees were joined as defendants. They all appeared and were separately represented at the hearing of the originating summons and on the appeal to the Full Court of the Supreme Court of Victoria. The Full Court made an order directing that the costs of all parties, including those of the assignees, occasioned by the originating summons and by the appeals to the Full Court therefrom be taxed as between solicitor and client and when taxed be paid out of the properties in question.

From this decision John Malcolm Glen, David Watson Glen and Alan McDougall Glen, sons of the testator's nephew John Glen, instituted an independent appeal to the High Court. The respondents objected to the competence of the appeal on the ground that sec. 35 (1) (*a*) of the *Judiciary Act* 1903-1933 relates to judgments deciding the cause, matter or proceeding and that an order for costs, although amounting to £300, is not the subject of an appeal as of right.

Clyne, for the appellants. The order for costs is given in respect of a sum or matter at issue amounting to £300. In any case, special leave should be given. The encumbrancers and the assignors should not have been separately represented and should not have been allowed separate sets of costs. Their costs, if they are entitled to any, should have been made payable out of the share which John Glen and William Henderson Glen claimed, and the share to which the appellants are entitled should not have been charged with their costs (*Trustees, Executors and Agency Co. Ltd.* v. *Ramsay* (1); *Read* v. *Chown* (2)).

Herring, for the Union Trustee Co. of Australia Ltd. All the defendants are properly joined as parties. This is the only property not appropriated which is available for the payment of costs.

(1) (1920) 27 C.L.R. 279, at p. 283. (2) (1929) 46 W.N. (N.S.W.) 154.

Wilbur Ham K.C. (with him *T. W. Smith*), for the Australian Mutual Provident Society. The Australian Mutual Provident Society, though an encumbrancer, should receive its costs. This order was made at the discretion of the Full Court. This point was not taken in the Full Court. The question is whether the burden of costs has been unreasonably and unnecessarily increased.

Fullagar K.C. (with him *Moore*), for W. H. Glen, J. Glen and the Union Bank of Australasia Ltd. The Union Bank which is an encumbrancer, is entitled to its costs. The order as to costs of the originating summons was correct so far as the costs of the original hearing was concerned. It was not until the hearing had progressed for some time that the question of costs was raised. So far as the Full Court order is concerned, the expense of the proceedings is a testamentary expense and would ordinarily come out of residue.

Cur. adv. vult.

1936, Feb. 13.

The following written judgments were delivered :—

RICH, DIXON AND MCTIERNAN JJ. We are of opinion that special leave is necessary and that without it this appeal does not lie. But we think the Court should give special leave and then dispose at once of the appeal, which was argued on the merits. We regard the order for costs as a matter of importance because it fails to give effect to what we think is a settled rule of practice. That rule is that, when a beneficial interest has been encumbered, not more than one set of costs should be given to the assignor and assignees in respect of that one interest. Thus, one set of costs should be given to the beneficiary and his encumbrancer (see *Remnant* v. *Hood* [*No.* 2] (1) ; *Greedy* v. *Lavender* (2) ; *Catton* v. *Banks* (3) ; *Re Vase* ; *Langrish* v. *Vase* (4) ; *O'Ferrall* v. *Attorney-General* (5) ; *Stewart* v. *Ferrari* (6)). The method of taxing and allocating the one set of costs of a beneficiary and his encumbrancers is described in the *Annual Practice* under the note to Order 65, rule 27 (8).

(1) (1860) 27 Beav. 613 ; 54 E.R. 243.
(2) (1848) 11 Beav. 417 ; 50 E.R. 878.
(3) (1893) 2 Ch. 221.
(4) (1901) 84 L.T. 761.
(5) (1866) 5 S.C.R. (N.S.W.) Eq. 101.
(6) (1879) 5 V.L.R. (Eq.) 200.

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Rich J. Dixon J. McTiernan J.

The costs of the hearing of the originating summons and of the appeal to the Full Court of Victoria, which succeeded, are governed by the same considerations. We think the costs of each interest under the will which was separately represented should be given out of the estate. The severance to that extent was sufficiently justified by the great importance to each interest of the order which *Irvine* C.J. actually made and by the difficulty of the case.

When parties who have similar interests sever in their appearance the question whether they should receive more than one set of costs is a matter for the discretion of the Court (see *Harbin* v. *Masterman* (1)).

It is open to doubt whether the costs should have been thrown against the moiety of the son who died first, John, as well as against the other, but it appears that before *Irvine* C.J. there was some idea that both moieties were involved and the originating summons was framed on that basis.

We think an order should be made to the effect of that which will be read.

STARKE J. The questions raised in the appeal to this Court, *Currie* v. *Glen* (2), were dealt with by the Supreme Court on originating summons. On that summons the Supreme Court directed that the costs of all parties to the application, up to and including the order of the Full Court, be taxed as between solicitor and client, and that when so taxed those of the plaintiff (the trustee) be retained, and those of the defendants be paid out of the properties in Collins Street and Little Collins Street mentioned in the will. The sons of the nephew William Glen had assigned or encumbered the shares or interests which they took in these properties. The assignees and encumbrancers appeared on the originating summons and became entitled under the order to their costs out of the properties mentioned. The sons of the nephew John Glen appeal to this Court against the order of the Supreme Court as to the costs of the originating summons.

An objection was taken to the competence of the appeal. It was contended that the costs of the originating summons were no part

(1) (1896) 1 Ch. 351, at pp. 362-364. (2) *Ante*, p. 445.

of the matter in issue (*Judiciary Act* 1903-1933, sec. 35; *Doorga Doss Chowdry* v. *Ramanauth Chowdry* (1); *Bank of New South Wales* v. *Owston* (2)), and that the appeal could not be supported as a cross appeal under the Appeal Rules, Part II., sec. 3, rule 16 (*In re Cavander's Trusts* (3)). The contention is well founded, but this Court has power to grant special leave to appeal under the *Judiciary Act*, sec. 35 (1) (*b*), and such leave should be granted in the present case.

The order made by the Supreme Court as to costs is unusual, and casts an undue burden upon the sons of the nephew John Glen, who are the appellants. In administration proceedings, whether by way of suit or upon originating summons, the ordinary rule is that where any person entitled to an interest in any estate the subject matter of the proceedings has assigned or encumbered his share or interest, then the assignor and assignee, or encumbrancer, are only entitled to one set of costs between them, viz., the costs of the assignor, which are directed to be paid to the assignee or encumbrancer towards his costs so far as the same may extend. The assignee or encumbrancer takes any deficiency in his costs from the assignor. If one set of costs is more than sufficient to pay an assignee or encumbrancer, the surplus is applied towards payment of the costs of the subsequent encumbrancers and of the assignor or mortgagor (*Morgan and Wurtzburg* on *Costs*, 2nd ed. (1882), p. 187; *Seton* on *Decrees*, 7th ed. (1912), vol. II., p. 1455, and cases there cited). There are no special circumstances in this case justifying a departure from the ordinary rule, and the order of the Supreme Court should therefore be discharged.

The circumstances of the case, however, require some special order. One suggestion was that the whole costs of the proceedings should be thrown on the undivided moiety of the property mentioned in the will the subject of the gift to the nephew William Glen and his sons. But that, I think, goes somewhat far, for the originating summons raised questions affecting the properties as a whole. An assignment by way of mortgage was made by both the sons of the nephew William to the Australian Mutual Provident Society. And

(1) (1860) 8 Moo. Ind. App. 262; 19 E.R. 530.

(2) (1879) 4 App. Cas. 270.

(3) (1881) 16 Ch. D. 270.

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Starke J.

later, each of these sons gave charges of his several share in the properties to different encumbrancers. The costs of all parties of the originating summons and of the appeal to the Full Court should be taxed as between solicitor and client, but in taxing such costs only one set of costs should be allowed to the defendants John Glen and William Henderson Glen, sons of the testator's nephew William Glen, and their interests, and the taxing officer should not allow any additional costs incurred by reason of the shares or interests of the said defendants having been assigned or encumbered. The amount of the costs so allowed should be paid, in so far as the same extends to the Australian Mutual Provident Society, in or towards the payment of its costs. If such amount be in excess of its costs, the other assignees or encumbrancers should have liberty to apply to the Supreme Court for the purpose of determining their priorities in the excess. The assignees and encumbrancers should have liberty to tax any costs properly incurred by them, including therein any costs, charges and expenses properly payable to such assignees or encumbrancers by virtue of their mortgage securities, and the taxing officer should certify out of whose share such additional costs are payable.

Grant special leave to appeal against so much of the order of the Full Court of the Supreme Court of Victoria as deals with the costs of the originating summons and of the appeal to the Full Court. Order that the notice of appeal and subsequent proceedings in the appeal instituted as of right stand as the notice of appeal and proceedings pursuant to such special leave. The matter having been fully heard, order that the appeal pursuant to leave be disposed of forthwith. Appeal allowed. So much of the order of the Full Court as deals with the costs of the originating summons and of the appeal to the Full Court discharged. In lieu thereof order that the costs of all parties of and incidental to the originating summons and of the appeal to the Full Court be taxed as between solicitor and client and paid out of the properties referred to in the originating summons, but

that in taxing the said costs only one set of costs is to be allowed in respect of the interests of the defendants John Glen and William Henderson Glen. Let the costs allowed in respect of such interests be applied in the first place in or towards payment of the costs of the assignees or mortgagees of such interest according to their priorities, and, if there be any excess, then towards payment of the costs of the said defendants John Glen and William Henderson Glen respectively. And let such costs when taxed be paid to the Australian Mutual Provident Society or its solicitor the first encumbrancer of the said interests. Let such assignees and mortgagees and such defendants be at liberty to apply to the Supreme Court for the purpose of determining their priorities or any other question which may arise in relation to such costs. And let the assignees and mortgagees be at liberty to tax any costs, charges and expenses beyond those already provided for and let the Taxing Officer certify, if so required, out of which interest such additional costs are payable. And let the assignees and mortgagees add such costs to their securities accordingly. Let the appellants and the respondent, the trustee's, costs of this appeal to this Court be taxed, those of the trustee as between solicitor and client, and be paid out of the properties referred to in the originating summons. Let the respondents other than the trustee abide their own costs of this appeal.

Solicitors for the appellants, *E. P. Johnson & Davies.*

Solicitors for the respondents, *Gair & Brahe*; *W. E. C. Treyvaud*; *Nunn, Smith, Crocker & Purves*; *O'Donohue & Brew*; *Arthur Phillips & Just*; *Blake & Riggall*; *William S. Cook & McCallum* and *H. U. Best.*

H. D. W.