[HIGH COURT OF AUSTRALIA.]

NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED AND ANOTHER . . . } APPELLANTS;
PLAINTIFFS,

AND

BARNES AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1941.

MELBOURNE, *Feb.* 18, 19; *March* 12.

Rich A.C.J., Starke and Williams JJ.

Executors and Administrators—Trusts—Action by dissatisfied beneficiaries—Allegations of breaches of trust—Successful defence by executors—Executors unable to recover costs from beneficiaries—Whether costs properly incurred in administration—Whether executors entitled to indemnity by estate therefor—Trustee Companies Act 1928 (*Vict.*) (*No.* 3793), *sec.* 17—*Trustee Act* 1928 (*Vict.*) (*No.* 3792), *sec.* 30 (2)*.

Certain members of a class of residuary beneficiaries sued executors of an estate, alleging breaches of trust and claiming repayment of moneys lost, administration of the estate and removal of the executors. The executors successfully defended the action but were unable to recover the costs which were ordered to be paid to them by the plaintiffs. The executors then sought by originating summons to have it determined whether they were entitled to be indemnified out of the estate in respect of their costs.

Held that, the costs having been properly incurred as an incident of the administration, the executors were entitled to the indemnity, but that the shares of the beneficiaries who brought the action should first be used to satisfy the same.

*Sec. 30 (2) of the *Trustee Act* 1928 (Vict.) provides: "A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers." In sec. 3 of the Act "trustee" is defined, for the purposes of the Act, where the context admits, to include a personal representative.

The executors were refused an order for their costs of the originating summons, inasmuch as they could have obtained an order for costs out of the estate on the hearing of the original action if they had joined all the residuary beneficiaries, as they should have done.

Decision of the Supreme Court of Victoria (*Mann* C.J.): *In re Dunn; National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Barnes*, (1941) V.L.R. 25, varied.

APPEAL from the Supreme Court of Victoria.

The National Trustees Executors and Agency Co. of Australasia Ltd. and James Edward Hogan were the executors of the will of Winifred Dunn, deceased, and they were sued in the Supreme Court of Victoria by nine out of thirty-seven residuary beneficiaries for failing to call in a balance of purchase money on a contract of sale of land or to enforce their rights thereunder on default by the purchaser. The beneficiaries alleged other breaches of trust and claimed declarations that such breaches had been committed, accounts on the basis of wilful default, administration of the estate and removal of the executors from their office. The action was heard by *Mann* C.J., who upheld the beneficiaries' allegations and gave judgment against the executors (*Dwyer* v. *National Trustees Executors and Agency Co. of Australasia Ltd.* (1)). The executors then appealed to the High Court, which reversed the decision in the court below and entered judgment for the executors, with costs of the action and the appeal against the unsuccessful plaintiff beneficiaries (2). The executors did not during the proceedings seek to join the remainder of the residuary beneficiaries in the action, and, at the conclusion of the proceedings, they did not apply for any order that the costs be paid out of the estate. The costs were not paid by the beneficiaries pursuant to the order, and the executors sought to be indemnified therefor out of the estate. The costs were taxed as between solicitor and client at £2,006 7s. 5d. The executors in the course of the action were ordered to pay £20 17s., the costs of an interlocutory application made by the beneficiaries for an order for further particulars of the defence; these had also been paid by the executors, and they sought an indemnity for this amount. Further, in the course of the action, the executors had to pay £3 3s. for the fares and expenses of one Cassidy, a solicitor, of Cobram, who came to Melbourne to be consulted by them, whilst two other small sums were expended by officers of the trustee company in preparing for the defence. The executors also sought an indemnity for these small sums.

(1) (1939) V.L.R. 417.

(2) (1940) 63 C.L.R. 1.

H. C. OF A. 1941. NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. BARNES.

As in the passing of the executors' accounts the beneficiaries objected to their indemnity on all the items, the executors obtained leave to withdraw these contested items from their account and issued an originating summons out of the Supreme Court of Victoria for the determination of questions relating to their rights of indemnity. They joined Anastasia Myrtle Barnes as a defendant, representing herself and all beneficiaries who were not parties to the original action, and Walter Kemp and William Charles Lynott Townsend, as defendants representing, firstly, themselves as assignees of the interests of the plaintiffs to the original action, and, secondly, such plaintiffs.

The questions asked in the summons were substantially as follows :—

1. Are the plaintiffs (that is, the executors) entitled to be reimbursed out of the estate of the testatrix their costs as between solicitor and client of the above-mentioned action in the Supreme Court and of the appeal from the judgment therein to the High Court of Australia ?

2. Are the plaintiffs entitled to be reimbursed out of the estate of the testatrix the sum of £20 17s. ordered to be paid by them to the plaintiffs in the said action as costs of and incidental to interlocutory applications therein and paid by them on or about 8th February 1939 ?

3. Are the plaintiffs entitled to be reimbursed out of the estate of the testatrix—(*a*) the sum of £3 3s. paid to Cassidy, and (*b*) and (*c*) the other small amounts expended by the officers as referred to above ?

The summons came on for hearing before *Mann* C.J. on 24th and 25th September 1940, and in a reserved judgment, on 14th October 1940, he answered the questions : (1) No ; (2) No ; (3) No, and ordered that the costs of the defendants to the summons be taxed as between solicitor and client and paid out of the estate and that the plaintiffs bear their own costs of the summons : *In re Dunn* ; *National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Barnes* (1).

The executors appealed to the High Court.

Ham K.C. (with him *Mulvany*), for the appellants. The trustees were entitled to be recouped the costs of defending the action brought by the dissentient beneficiaries. What the trustees did was quite reasonable, and they are entitled to an indemnity. They had acted properly in the administration of the estate (*Turner* v. *Hancock* (2) ;

(1) (1941) V.L.R. 25.

(2) (1882) 20 Ch. D. 303, at p. 305

Rules of the Supreme Court of Victoria, Order LXV., rule 1). They were acting for the benefit of the estate, although they were defending themselves. The benefit need not be pecuniary (*Walters* v. *Woodbridge*; *Ex parte Teesdale* (1)). *In re Dunn*; *Brinklow* v. *Singleton* (2) is distinguishable, as it contained charges of gross personal fraud.

[STARKE J. referred to *Courtney* v. *Rumley* (3).]

The authorities show that trustees who have even been guilty of minor breaches of trust of no great impropriety have been allowed their costs as between solicitor and client out of the estate (*In re Maddock*; *Butt* v. *Wright* (4); *Taylor* v. *Tabrum* (5); *Bailey* v. *Gould* (6)). In *Nissen* v. *Grunden* (7) the trustees were allowed the costs of defending themselves: See also *Noble* v. *Meymott* (8); *Royds* v. *Royds* (9); *Cotton* v. *Clark* (10).

[STARKE J. referred to *In re Jones*; *Christmas* v. *Jones* (11).]

Trustees are entitled to their costs, and it is not a matter of discretion for the court (*In re Love*; *Hill* v. *Spurgeon* (12)).

Lewis, for the respondents Kemp and Townsend. Order LXV., rule 1, of the *Rules of the Supreme Court* has nothing to do with this proceeding. The proper time for the trustees to apply for costs in an administration action was at the conclusion of the proceedings, not afterwards. If they apply later, then the sole consideration is whether the costs claimed were proper charges and expenses incurred by the trustee in the administration of the estate (*In re Beddoe*; *Downes* v. *Cottam* (13)). The right of indemnity is common to all trustees, but the test here is whether the costs were incurred in and about the execution of the trust (*Hood and Challis, Conveyancing, Settled Land and Trustee Acts*, 7th ed. (1909), p. 408). These costs were not so incurred; the defence was solely for the benefit of the executor (*Worrall* v. *Harford* (14); *Attorney-General* v. *Mayor of Norwich* (15); *In re German Mining Co.* (16)). The principle that a trustee is entitled to his costs rests on an implied contract (*Darke* v. *Williamson* (17)). *Lord St. Leonards' Act* (22 & 23 Vict. c. 35), passed in 1859, declared the law as set out in

(1) (1872) 20 W.R. 520; (1878) 7 Ch. D. 504, at p. 510.
(2) (1904) 1 Ch. 648.
(3) (1871) 6 I.R. Eq. 99, at p. 106.
(4) (1899) 2 Ch. 588.
(5) (1833) 6 Sim. 281 [58 E.R. 599].
(6) (1840) 4 Y. & C. 221 [160 E.R. 987].
(7) (1912) 14 C.L.R. 297, at pp. 309-311.
(8) (1851) 14 Beav. 471, at p. 480 [51 E.R. 367, at p. 371].
(9) (1851) 14 Beav. 54 [51 E.R. 207].
(10) (1852) 16 Beav. 134 [51 E.R. 728].
(11) (1897) 2 Ch. 190, at p. 197.
(12) (1885) 29 Ch. D. 348.
(13) (1893) 1 Ch. 547, at p. 554.
(14) (1802) 8 Ves. 4, at p. 8 [32 E.R. 250, at pp. 251, 252].
(15) (1837) 2 My. & Cr. 406, at p. 424 [40 E.R. 695, at pp. 701, 702].
(16) (1853) 22 L.J. Ch. 926.
(17) (1858) 25 Beav. 622, at p 626 [53 E.R. 774, at p. 776].

H. C. OF A. 1941. NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. BARNES.

the above cases. This was copied in Victoria by the *Statute of Trusts* 1864, sec. 78 (now *Trustee Act* 1928, sec. 30 (2)). The question is whether the costs were properly employed in execution of a trust.

[WILLIAMS J. referred to *Halsbury's Laws of England*, 2nd ed., vol. 33, p. 275.]

The costs here were subject to an order, and the taxing master, disallowed one counsel, showing that that was an expense improperly incurred (*Hosegood* v. *Pedler* (1) ; *In re Maddock* ; *Butt* v. *Wright* (2)). Order LXV., rule 1, applied only in the original action. Once an order for costs is made, they are no longer costs within the rules but become charges and expenses of the trustees (*Bruty* v. *Edmundson* (3) ; *In re England's Settlement Trusts* ; *Dobb* v. *England* (4) ; *Walters* v. *Woodbridge* ; *Ex parte Teesdale* (5) ; *Turner* v. *Hancock* (6) ; *In re Dunn* ; *Brinklow* v. *Singleton* (7)). As to the costs of the unsuccessful summonses for particulars, those are not proper expenses.

[RICH A.C.J. Do you press for those, Mr. *Ham* ?

[*Ham* K.C. The answer to that question may affect the question of issue-estoppel on the taking of accounts before the Chief Clerk.]

Lewis. As to the costs of these proceedings, if the trustees had obtained the proper order for the joinder of all beneficiaries on the original proceedings, this originating summons would have been unnecessary. If they had followed the ordinary course of litigation, then questions 2 and 3 would have been unnecessary. The originating summons is for the benefit of the trustees personally.

Gowans, for the respondent Barnes. There are two general questions :—(1) What is the proper measure of the trustees' indemnity ? (2) Do the expenses incurred here fall within that indemnity ? As to the first question, the principle is now stated in the statute and is the same as has always been stated by the Chancery courts. All the cases quoted to show that a trustee was entitled to be indemnified were cases in which application for costs was made in the administration proceedings and not in subsequent proceedings. The proceedings were proper administration suits or claims for accounts, or claims by beneficiaries to have the estate handed over. Different considerations apply, however, when, subsequently, the trustees apply after the original proceedings have been completed. In the first class of cases, the trustee, prima facie, is entitled to recoup

(1) (1896) 66 L.J. Q.B. 18.
(2) (1899) 2 Ch. 588.
(3) (1917) 2 Ch. 285, at pp. 293, 294.
(4) (1918) 1 Ch. 24, at p. 28.
(5) (1872) 20 W.R. 520 ; (1878) 7 Ch. D. 504.
(6) (1882) 20 Ch. D. 303.
(7) (1904) 1 Ch. 648.

himself from the estate if an order is made on the original proceedings; but in the second class of cases, if the trustee does not ask for the order on the original proceedings, then the trustee loses his prima-facie right and must show that the costs and expenses were incurred in the proper administration of the estate. The statement of the principles is found in *In re Love*; *Hill* v. *Spurgeon* (1). The rule of practice there set out was applied in an administration suit, but not in subsequent proceedings. The test in the subsequent proceedings is whether the costs were properly incurred in the due execution of the trusts. In other words, was it for the benefit of the estate? The distinction between an administration action and a hostile action is shown in *Williams* v. *Jones* (2). In that case the trustee was not allowed costs but was left to the same remedies as an ordinary litigant in a hostile action (*In re Davis*; *Muckalt* v. *Davis* (3)). If the defence by the trustee in the action is not for the benefit of the estate but for the benefit of the trustee, to protect his own pocket, then the costs are not expended in or about the execution of the trust. It is in the nature of a hostile action. If the trustees are entitled to be recouped out of the estate, then (*a*) the plaintiff's right to be recouped should be conditional on exhausting its remedies under the High-Court order, and (*b*) should be primarily against the unsuccessful beneficiaries' shares (*In re Allen*; *Wheeler* v. *Foster* (4)).

Mulvany, in reply. It was unnecessary to join representatives of all beneficiaries in the original action (*Williams* on *Executors*, 12th ed. (1930), vol. II., p. 1266; *Rules of the Supreme Court*, Order XVI., rules 8, 33; Order LV., rule 10). The trustees cannot execute the original order of the High Court (*Farmers Protection Act* 1940 (Vict.)). The effect of that Act is retroactive to 7th August 1940. The court should not go past the questions asked by the originating summons. It should not lay down any conditions of the indemnity but should rely on the undertaking of the trustees to protect the interests of the beneficiaries who did not sue.

Cur. adv. vult.

March 12.

The following written judgments were delivered:—

RICH A.C.J. I have had the advantage of reading the judgment of my brother *Williams*. As I agree with his reasons and the order proposed by him, I cannot usefully add anything to what he has said.

(1) (1885) 29 Ch. D., at p. 350.
(2) (1886) 34 Ch. D. 120, at p. 126.
(3) (1887) 57 L.J. Ch. 3.
(4) (1889) W.N. 132.

H. C. OF A. 1941.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. BARNES.

STARKE J. "A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers" (*Trustee Act* 1928 of Victoria, sec. 30 (2)). And this provision applies to executors: See Act, sec. 3. But this enactment is but statutory recognition of the rule acted upon by the Court of Chancery that an executor or trustee is entitled as of right to be recouped everything that he has expended properly in his character as executor or trustee (*In re Jones*; *In re Christmas* v. *Jones* (1)). My brother *Dudley Williams* has collected many cases to the same effect, and I would add another which illustrates the application of the rule—*In re Whiteley*; *Whiteley* v. *Learoyd* (2). There the trustees were charged with making unauthorized or improper investments, and the claim was that the trusts of the will relating to the sums invested should be carried into execution under the direction of the court and that the trustees might be ordered to invest the sums or so much thereof as were not properly invested upon the securities mentioned in the will. The imprudent investment of one sum of £3,000 was established, but as to another of £2,000 no want of prudence or of diligence was established. There was no order as to costs so far as the £3,000 was concerned, but as to the £2,000 the trustees were given their costs out of the trust estate or out of the £3,000, for which they were liable to account (*In re Whiteley*; *Whiteley* v. *Learoyd* (3)).

In the present case, executors were charged with a breach of their duty in not getting in certain purchase money when it fell due, forgoing interest, and with some subsidiary acts and defaults connected with the main charge. The plaintiffs, who were nine out of some thirty-seven residuary legatees, claimed, *inter alia*, a declaration that the executors had been guilty of breaches of their duties as such executors, and administration of the estate of the testator with all necessary or incidental inquiries and accounts, including accounts upon the footing of wilful default, and an order for removal of the defendants as executors and the appointment of new executors, which last-mentioned claim was based apparently upon the *Administration and Probate Act* 1928, sec. 29. When the case was before this court on appeal (4), attention was called to the fact that only nine out of thirty-seven residuary legatees had been made parties to the action, but the litigants were content so to proceed and relied apparently upon rules of the Supreme Court corresponding with Order 16, rules 33 and 40, of the English Judicature Rules. A

(1) (1897) 2 Ch., at p 197.
(2) (1886) 32 Ch. D. 196; 33 Ch. D. 347 (C.A.); (1887) 12 App. Cas. 727.
(3) (1886) 32 Ch. D., at p. 206.
(4) (1940) 63 C.L.R. 1

majority of this court held that the executors had not been guilty of any breach of duty and dismissed the action with costs "to be paid by the said respondents" (the plaintiffs in the action) "to the appellants" (the executors). The executors did not apply for their costs out of the estate, and the court did not so order, but there is no order depriving or purporting to deprive them of such costs: See *In re Hodgkinson*; *Hodgkinson* v. *Hodgkinson* (1).

The costs awarded to the executors under the judgment already mentioned are not, it seems, likely to be paid in full owing to the want of means of the plaintiffs in the action. So the executors sought by originating summons issued out of the Supreme Court the determination of the questions whether they were entitled to be reimbursed out of the estate of the testatrix their costs as between solicitor and client of the action already mentioned and of the appeal upon which they were successful, and whether they were entitled to certain other small sums which need not be detailed. All the questions were determined in the negative, upon the ground that the executors' defence of the action could and did not result in any benefit to the estate of the testatrix and that the executors were not therefore entitled to their costs out of the estate.

Benefit to the estate, however, does not, I apprehend, mean pecuniary benefit, for it is a commonplace that costs out of the estate are given in cases relating to the construction of wills and the administration of trust estates. Some cases, however, were referred to in support of the decision already mentioned, the strongest of which is *In re Dunn*; *Brinklow* v. *Singleton* (2). But that case lays down no general rule; the ground of the decision was "that a receiver cannot be entitled to indemnity in respect of the costs of an action brought against him, if it is a purely personal action against him and not having relation to the estate, except so far as the acts complained of were acts done by him while acting as an officer of the court" (3). In that case, the receiver had been discharged, his accounts passed, and his remuneration and costs paid. The matters charged against him were conspiring to bring about unnecessary litigation and personal fraud and negligence in the management of an estate both as an administrator *pendente lite* and as a receiver, and damages were claimed. The case bears but little resemblance to the present case, in which an administration order was claimed, and it was sought to make the executors accountable for a breach of their duty in administering the estate of the testatrix and to remove them from office. No doubt a successful defence of the

(1) (1895) 2 Ch. 190, at pp. 194-196. (2) (1904) 1 Ch. 648.
(3) (1904) 1 Ch., at p. 657.

H. C. OF A. 1941. NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. BARNES. Starke J.

action would relieve the executors of any personal liability, but, as was said in *Walters* v. *Woodbridge* (1), that would be "merely an incident" of the successful defence. The action related and related only to the administration of the estate of the testatrix and was defended and successfully defended upon the ground that it had been properly and prudently administered. In my opinion, costs thus incurred were incurred in or about the execution of the trusts or powers of the will of the testatrix. *In re Whiteley*; *Whiteley* v. *Learoyd* (2) clearly supports the view, but other cases to the same effect might be cited: See *Morgan and Wurtzburg* on *Costs*, 2nd ed., pp. 180, 181. But the executors should exhaust their remedies against the plaintiffs already mentioned before resorting to the estate of the testatrix: Cf. *Williams* v. *Jones* (3).

The executors' right to retain their costs out of the estate will take priority over the claims of any assignee from a beneficiary in the estate of the testatrix (*In re Knapman*; *Knapman* v. *Wreford* (4)).

The questions in the originating summons directed to the small sums already mentioned should be answered, as to number 2, in the negative. The question relates to some costs in interlocutory matters in the action brought against the executors, which they were ordered to pay, but there is nothing before the court which warrants the conclusion that they were reasonably and properly incurred. The third question of the originating summons should be answered in the affirmative. It relates to sums expended in and about the executors' defence of the action. The fourth question of the originating summons seeks a direction how the costs of all parties to the summons should be borne. Shortly, I agree with the order proposed as to these costs and also as to the costs of this appeal.

The appeal should be allowed.

WILLIAMS J. The appellants are the executors and trustees of the will of Winifred Dunn, deceased. She died on 13th October 1926. One of the assets in her estate was the balance of purchase money, namely, £4,380 owing by one J. K. Walsh under a contract of sale of land which became payable on 1st May 1930. He was unable to meet this debt on the due date, and the appellants gave him certain extensions of time to pay.

Under the trusts of the will thirty-seven nephews and nieces were entitled to the estate. Nine of these beneficiaries became

(1) (1878) 7 Ch. D., at p. 509.
(2) (1886) 32 Ch. D. 196; 33 Ch. D. 347; (1887) 12 App. Cas. 727.
(3) (1886) 34 Ch. D., at p. 123.
(4) (1881) 18 Ch. D. 300.

dissatisfied with the trustees' administration of this asset and commenced a suit in the Supreme Court of Victoria which came on appeal to this court. The result of the appeal was that the suit was dismissed and the plaintiffs were ordered to pay the defendants' costs. The material facts will be found set out in the report of *National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Dwyer* (1).

The statement of claim charged the defendants with breaches of trust and prayed, *inter alia*, for an order for administration and the removal of the trustees. The foundation of the suit was a charge that the trustees had committed a breach of duty in failing to get in the balance of purchase money on its due date. The court held that the charge was not sustained and that the trustees had administered this asset properly. No attack was made against the honesty or integrity of the individual trustee or against any officer of the trustee company.

A trustee is entitled to be indemnified out of the trust estate against all his proper costs, charges and expenses incident to the execution of the trust: See *Selby* v. *Bowie* (2); *Cotterell* v. *Stratton* (3); *Turner* v. *Hancock* (4); *In re Love* (5); *In re Beddoe*; *Downes* v. *Cottam* (6); *In re Maddock*; *Butt* v. *Wright* (7). In *Dawson* v. *Clarke* (8) Lord *Eldon* L.C. said: "This court infuses such a clause into every will though not directed." This right received statutory recognition in England when the *Law of Property and Trustees Relief Amendment Act* 1859, sec. 31, provided that every trust instrument should be deemed to contain a clause to the effect that it should be lawful for the trustees to reimburse themselves or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the deed, will or other instrument. This provision, omitting any reference to the trust instrument, was included in the Victorian *Statute of Trusts* 1864 and repeated in the *Trusts Act* 1890, sec. 76, the *Trusts Act* 1915, sec. 36, and the *Trustee Act* 1928, sec. 30 (2). The authorities already cited show that this right of indemnification includes costs, charges and expenses properly incurred in litigation relating to the trust estate.

Where trustees are charged with breach of trust all the beneficiaries should be made parties to the suit. In the present case the suit was heard and determined without twenty-eight of the residuary

(1) (1940) 63 C.L.R. 1.
(2) (1863) 4 Giff. 300 [66 E.R. 720].
(3) (1872) 8 Ch. App. 295, at p. 302.
(4) (1882) 20 Ch. D. 303, at p. 305.
(5) (1885) 29 Ch. D., at p. 350.
(6) (1893) 1 Ch. 547.
(7) (1899) 2 Ch. 588.
(8) (1811) 18 Ves. 247, at p. 254 [34 E.R. 311, at p. 313].

H. C. OF A. 1941.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. BARNES.

Williams J.

beneficiaries being joined. If the suit had been properly constituted, it would have been possible for the trustees to have asked at the hearing that their costs as between solicitor and client, so far as not recoverable from the plaintiffs, should be paid out of the estate. The absence of the twenty-eight beneficiaries made it impossible to ask for such an order in the suit. If an application to add these beneficiaries as parties would have put an end to the suit, the failure of the trustees to insist on their being joined might have amounted to improper conduct on their part which would have disentitled them to the indemnity. It appears, however, that the suit would have gone on in any event, so that the only result of the failure to join the absent beneficiaries has been that the appellants have been forced to incur the extra expense of taking out the present originating summons in order to ask for their costs out of the estate.

The main contention has been whether these costs are recoverable under the indemnity. The learned Chief Justice of the Supreme Court of Victoria decided that they were not because they were incurred by the trustees in defending themselves against a personal liability and therefore on their own behalf and not for the benefit of the trust. He considered the principle to be that the costs of trustees of defending such a suit are chargeable against the estate in all cases in which the defence is for the benefit of the estate. He referred to *Walters* v. *Woodbridge* (1). In that case the court had approved of a certain compromise by the trustees. Subsequently, infant beneficiaries by their next friend commenced a suit to have the compromise set aside on the ground that the court had been misled into giving its approval by the fraud of Teesdale, one of the trustees. In view of this charge his co-trustees insisted on severing their defence. He applied to the court for leave to defend the suit and for an order that his costs of so doing might be allowed out of the estate. The Master of the Rolls held that, as the bill contained charges of misconduct against him, no order could be made until the result of the cause was known, and he accordingly directed the summons to stand over in the meantime. The other trustees do not appear to have actively defended the suit, but Teesdale did so, and it was dismissed with costs. The next friend of the plaintiff was unable to pay the costs, so Teesdale renewed his application for the payment of his costs as between solicitor and client out of the estate, and the Court of Appeal held that he was entitled to the order. It was pointed out in the judgments that, while he had incidentally succeeded in clearing his own reputation, he had also shown that the making of the compromise was proper

(1) (1878) 7 Ch. D. 504.

and an act of administration which was beneficial to the estate. His defence had therefore been for the benefit of the estate, and so he was entitled to have his costs paid thereout. The present case is a stronger one in favour of the trustees than *Walters* v. *Woodbridge* (1), as there was no severance by the trustees, no attack was made on their probity, and the only question was whether they had acted properly or improperly in their administration of an asset in the estate. It is to be noted that, in the judgments in *Walters* v. *Woodbridge* (1), and in the subsequent case of *In re Dunn*; *Brinklow* v. *Singleton* (2), where the personal integrity of the receiver was attacked and he was charged with gross personal fraud, there are suggestions that it may be necessary for the trustees to show some benefit to the trust estate before they are to be reimbursed for their costs thereout, although in the latter case *Byrne* J. was careful to point out that he was not attempting to lay down any such general rule. If it is necessary to show such a benefit, then the fact the trustees establish that they have administered properly would be sufficient, but I am satisfied that it is not necessary to do so. Such expressions as acting "for the benefit of" "with reference to" or "on behalf of" the trust estate or in the discharge of his duty as a trustee are used indiscriminately in the judgments, but they all mean the same thing, namely, that the question is whether the costs, charges and expenses are properly incurred by the trustee as an incident of his administration of the estate. If a trustee is sued by beneficiaries who complain of some act or omission by the trustee, he is entitled to defend his conduct as an incident of such administration (*In re Llewellin*; *Llewellin* v. *Williams* (3)). Even if he fails in the suit, he may be allowed his costs out of the estate, but, if he succeeds, as in this case, he is clearly entitled thereto. At the same time the indemnity must be given effect to in such a way as to make the burden fall upon the beneficiaries equitably having regard to the circumstances under which the costs, charges and expenses were incurred. Here they were incurred as a result of the action of nine out of the thirty-seven beneficiaries, so that the shares of these beneficiaries should be exhausted before any part of the burden is placed on the shares of the twenty-eight. It was stated during the argument that one of the nine is a farmer and that by reason of the *Farmers Protection Act* 1940 the trustee cannot issue execution against him or the other eight who are jointly and

(1) (1878) 7 Ch. D. 504. (2) (1904) 1 Ch. 648.
(3) (1887) 37 Ch. D. 317, at p. 327.

H. C. OF A. 1941.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. BARNES.

Williams J.

severally liable with him under the existing order for costs. Assuming that this is so, the protection of the Act will presumably not continue indefinitely and the order will become enforceable some day. The order should therefore provide that the trustees should recover as much as their costs as possible under this order in the first instance, and that, in so far as they are not recovered thereunder, the trustees should be authorized to retain them as between solicitor and client, first out of the shares of the nine beneficiaries and, after these shares have been exhausted, out of those of the twenty-eight. If authority is needed to show that the court can adjust the burden of the costs in this way between the beneficiaries, it will be found in the cases referred to in *Halsbury*, 2nd ed., vol. 33, p. 275, notes *h* and *i*, and *In re Allen* (1).

There are three different amounts of costs, charges and expenses referred to in the three questions asked in the summons. On the hearing of the appeal Mr. *Ham* did not press for the second of these amounts, while the respondents did not deny that the appellants were entitled to the third amount if they succeeded with respect to the first. The order which I have already mentioned will therefore cover the first and third amounts.

After the suit had been commenced the nine plaintiffs assigned their shares by way of mortgage to the respondents Walter Kemp and William Charles Linott Townsend, but the right of these assignees is subject to the trustees' rights under their indemnity (*In re Knapman* ; *Knapman* v. *Wreford* (2) ; *In re Jones* ; *Christmas* v. *Jones* (3) ; *In re Pain* ; *Gustavson* v. *Haviland* (4) ; *Cock* v. *Aitken* (5) ; *Halsbury*, 2nd ed., vol. 33, p. 270). The full amount, therefore, of these nine shares, and not merely the equity of redemption therein, will be available to satisfy the appellants' indemnity.

The appellants' costs of the summons in the court below should not be thrown on the estate, because, if the suit had been properly constituted, the order now asked for could have been obtained at the hearing thereof. It is plain that any costs of the summons or of this appeal that are allowed out of the estate will have to be paid out of the shares of the twenty-eight beneficiaries. The costs of the respondents Kemp and Townsend of the hearing in the court below or this appeal should not be thrown on these shares.

Appeal allowed. Order of the Supreme Court discharged. In lieu thereof order that the costs, charges and expenses

(1) (1889) W.N. 132.
(2) (1881) 18 Ch. D. 300.
(3) (1897) 2 Ch. 190.
(4) (1919) 1 Ch. 38.
(5) (1912) 15 C.L.R. 373, at p. 384.

referred to in questions 1 *and* 3 *of the summons so far as they are not recoverable from the plaintiffs in suit No.* 258 *of* 1938 *under the order for costs made therein may be retained out of the estate of the testatrix Winifred Dunn in the following manner :—First out of the shares therein of the said plaintiffs and when these shares have been exhausted out of the balance of the estate. The costs as between solicitor and client of the appellants and of the respondent A. M. Barnes of this appeal and the costs as between solicitor and client of the said respondent of this summons to be paid out of the said estate.*

Solicitors for the appellants, *Gillott, Moir & Ahern.*

Solicitor for the respondent Barnes, *J. F. Carroll.*

Solicitors for the respondents Kemp and Townsend, *Kemp & Townsend.*

O. J. G.