In re BEDDOE.

DOWNES v COTTAM.

[1892 B. 596.]

[COURT OF APPEAL]

[1893] 1 Ch 547

HEARING-DATES: 28, October 2 December 1892

2 December 1892

CATCHWORDS:

Practice - Appeal for Costs - Trustee - Rules of Supreme Court, 1883, Order LXV., r. 1 - Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49 [Revised Ed. Statutes, vol. xvii., p. 86].

HEADNOTE:

Costs incurred by a trustee in an action respecting the trust estate are not costs in the discretion of a Judge who did not try the action, within Order LXV., rule 1, but are charges and expense incurred in the execution of the trusts; and if such a Judge acting in the administration of the estate makes an order as to such costs, his decision is subject to appeal.

Real estates were devised to trustees in trust for S. during her life, in such terms as gave her the legal estate, and after her death in trust to sell. S. desired to sell the estates under the Settled Land Act, and applied to the surviving trustee for the title-deeds. The trustee, acting under the advice of his solicitor, refused to give them up, and S. brought an action of detinue in the Queen's Bench Division, and recovered judgment against him with costs. The trustee took out an originating summons in the Chancery Division, and obtained an order for payment of the costs incurred in the action out of the trust estate:-

Held, that the costs of the action of detinue were not costs in the discretion of the Judge of the Chancery Division within Order LXV., rule 1, and that his decision was subject to appeal:

Held, also, reversing the decision of Kekewich, J., that the trustee, not having shewn reasonable cause for defending the action, was not entitled to retain out of the trust estate the costs of the action beyond the amount which he would have incurred by applying for leave to defend it.

Charles v. Jones n(1) explained.

INTRODUCTION:

THIS was an appeal from an order of Mr. Justice Kekewich. The proceedings were commenced by an originating summons for the decision of a question which had arisen in the administration of the estate of Sarah Beddoe, deceased. The Plaintiff was T. P. Downes, the surviving executor and trustee of her will; and the Defendant was C. B. Cottam, a solicitor, one of the persons beneficially interested under the will. The question on which the opinion of the Court was required was whether the Plaintiff was entitled to retain and be paid out of the trust estate the costs of and relating to an action brought against him in the

n(1) 33 Ch. D. 80.

Queen's Bench Division by Mary Ann Savage, the tenant for life under the will, including in such costs all charges and expenses properly incurred by him as trustee in relation to such action.

Sarah Beddoe, by her will, dated the 29th of August, 1876, devised her real estate to T. P. Downes and another trustee, who was dead, in trust to permit and suffer Mary Ann Savage to receive the rents and profits during her life, and after her death in trust to sell the same and divide the proceeds among certain persons, of whom C. B. Cottam was one. The testatrix died in February, 1885. In 1889, Mary Ann Savage, being desirous of selling the estates under the Settled Land Act, claimed the deeds from Downes; but Downes, acting under the advice of his solicitor, refused to give them up. On the 1st of March, 1889, Mrs. Savagecommenced an action of detinue in the Queen's Bench Division against Downes. On the 7th of March, 1889, Downes, through his solicitor, Mr. Trow, consulted counsel, who stated that he had come to the conclusion with some hesitation that Mrs. Savagewas legal tenant for life under the will, and as such was entitled to the custody of the deeds. On the 25th of March, Downesobtained a further opinion, in which counsel suggested that a summons should be taken out in the action to stay it, for the purpose of an originating summons being taken out in the Chancery Division to determine the right to the custody of the deeds; and in the event of the summons in the action being unsuccessful, he recommended that an allegation should be inserted in the statement of defence that the Defendant had been advised that the point was doubtful, but submitted to act as the Court might direct. The summons was taken out to stay proceedings in the action, but was unsuccessful, and Downes then put in a defence containing the submission as suggested.

The action was tried before Mr. Commissioner Philbrick, at Birmingham, and judgment was given for the Plaintiff, with costs to be paid by the Defendant Downes.

The correspondence which passed between the solicitors for the parties is specially referred to in the judgment of Lord Justice Lindley.

The present summons was taken out against Cottam, who was appointed to represent the other persons interested in the

proceeds of the residuary real estate of the testatrix. Mr. Justice Kekewich, who heard the summons, made the following order: "The Court, being of opinion that the amount of the taxed costs paid by T. P. Downes to the Plaintiff in the action in the Queen's Bench Division - Savage v. Downes - and also the costs of the said T. P. Downes in the same action as between solicitor and client, ought to be allowed to the said T. P. Downes as costs, charges, and expenses properly incurred, doth order that it be referred to the Taxing Master to tax the costs, &c., including in such taxation any charges and expenses properly incurred by him in relation to the trusts of the real estate devised by the will." Cottam appealed from this order.

The case was argued first on the 28th of October, and was re-argued on the 2nd of December on the question whether an appeal could be brought.

COUNSEL:

Cottam, in person, in support of the appeal:-

The Plaintiff was not justified in refusing to give up the deeds to Mrs. Savage and in defending the action which was brought against him on that account. If he thought there was any doubt as to right to the custody of the deeds he ought to have applied to the Court for its direction. The Plaintiff contends that this Court has no jurisdiction to entertain an appeal from the order of Mr. Justice Kekewich so far as the costs of the action are concerned, inasmuch as the costs were costs within the discretion of the Judge within Order LXV., rule 1 n(1) . But these costs were not costs in proceedings before Mr. Justice Kekewich,and, therefore, not within his discretion. They were costs

n(1) Order LXV., rule 1, is as follows: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

incurred in another Court, and were simply charges and expenses which the trustee might or might not be entitled to retain out of the estate. They were, therefore, the subject of appeal: In re Chennell n(1) .

Renshaw, Q.C., and Lake, for the Plaintiff:-

The costs properly incurred by a trustee in the execution of his trusts are within Order LXV., rule 1: Charles v. Jones n(2) . In that case the costs properly incurred by the mortgagee as mortgagee were clearly different from the costs of the action, and it was there held that as they had been allowed by the Judge there was no appeal from his decision. In the present case, if the trustee had been refused leave to retain his costs paid in Savage v. Downes out of the estate, he might have appealed; but the cestui que trust cannot appeal against the permission to retain them. If an appeal is allowed, we contend that the trustee was justified in defending the action. He acted bona fide and under legal advice. The learned Commissioner who tried the action expressed his opinion that his conduct was reasonable, and that his costs ought to be allowed out of the trust fund.

PANEL: LINDLEY, BOWEN and A. L. SMITH, L.JJ

JUDGMENTBY-1: LINDLEY, L.J

JUDGMENT-1:

LINDLEY, L.J: :-

This is an appeal from an order of Mr. Justice Kekewich allowing the Plaintiff, a trustee, certain costs, charges, and expenses out of the estate. The Plaintiff was trustee of the will of a Miss Beddoe.She devised her real property to the Plaintiff Downes in trust to permit and suffer Mrs. Savage to receive the rents and profits during her life, and after her death upon trust to sell and divide the proceeds amongst various persons, of whom the Defendant Cottam is one. He is a solicitor; he was a nephew of Mrs. Savage,and was her solicitor. Miss Beddoe died in February, 1885, and, shortly after her death, Mr. Trow, as solicitor for the Plaintiff, applied to Mrs. Savage for the deeds of the trust property and received them from her. The rents were received by or were paid to Mrs. Savage for some years, and all went smoothly until February, 1889, when Mrs. Savage, or Mr. Cottam for her, thought it would be desirable that she as tenant for life should sell the

n(1) 8 Ch. D. 492.

n(2) 33 Ch. D. 80.

trust property under the Settled Land Act. In order to sell the property Cottam wanted the deeds, and, on the 21st of February, 1889, he asked Downes, the trustee, for them. Downes applied to his solicitor, Trow, for advice. He told Cottam verbally on the 23rd of February, 1889, that he should advise his client not to give them up. On the 25th of February Trow asked Cottam for the authorities on which he said he relied in support of his client's claim to the deeds. On the 1st day of March, 1889, Cottam, issued a writ in the name of Mrs. Savage against Downesin the Queen's Bench Division to obtain the deeds. On the 7th or 8th of March, 1889, Trow obtained counsel's opinion on the course to be pursued. His advice is partly contained in an opinion dated the 7th of March, 1889, and partly in a verbal communication made to Trow's London, agents, and the effect of which is given in their letter to Trow of the 8th of March, 1889. on the 9th of March Trow wrote to Cottam as follows: "I beg to inform you as solicitor to the Plaintiff that Mr. Downes has been advised by counsel that the point as to the custody of the deeds is extremely doubtful, and that until it is decided who is the proper custodian of them I feel bound to advise him, as the surviving trustee, to retain them, and that they can be produced to your client for inspection at any time, or, if required for any definite purpose by her, they can be handed over to you as her solicitor on a proper undertaking being given for their return." On the 25th of March, Trow obtained another opinion from counsel, who advised a summons to stay the action on the Defendant's undertaking to obtain direction from a Judge in the Chancery Division. Counsel also advised on the kind of defence to be put in by Downes if the application to stay should be unsuccessful. Before the step thus advised could be taken, Cottam,on the 28th of March, 1889, wrote to Trow as follows: "At the interview I had with you this morning, in which I complained that you should have applied for a month's time

to deliver your statement of defence with the object presumably of embarrassing the Plaintiff in the proposed sale of the property of which she is legal tenant for life under the will of Miss S. Beddoe, you stated that the words 'on a proper undertaking being given for their return,' in your letter to me of the 9th of

March, 1889, were intended by you to convey that in case of the sale of the property you would not have required the title deeds to be returned. I then told you that that was not the inference to be drawn from that letter, and that if you so intended and had so stated in plain words I should on my client's side have accepted the deeds, and the action could have been then stopped on payment of the very small costs then incurred. This I now repeat and say, that if you will pay the costs of the action to this time, I will accept the deeds in order to enable me properly to prepare for the sale, and to hand over the deeds to any purchaser or purchasers, though, in my opinion, my client's right to them is absolute without condition. You stated this morning you were going to take other proceedings as to the deeds, and that I should hear in a few days what they were. I deprecate the incurring of useless costs, and shall object to them being paid out of the estate. I have instructions to proceed with the sale without delay, and, if this offer be not accepted, must hold you responsible and your client for any damages caused by your non-acceptance, and I shall be glad of a reply by 11 to-morrow to this letter." Pausing here for a moment, it is, in my opinion, much to be regretted that Mr. Downes was not advised to hand over the deeds and put an end to the action by paying the costs of it up to that date. Had he done so, I do not believe that any Judge would have disallowed them out of the estate. Unfortunately, Downes's solicitor did not consult counsel again as to what ought to be done after the receipt of this letter, but acted on the advice he had previously received. On the 30th of March, he took out a summons to stay the action as advised. The summons was dismissed, and the costs were made costs in the action. This experiment therefore, failed, and the costs were increased by it. On the 9th of April, a defence such as had been advised by counsel was put in. This defence submitted the rights of the parties to the decision of the Court. Such a defence is common enough, and not without use in the Chancery Division in actions for the administration of trusts; but a submission by a defendant to act as the Court may direct is of no use in an action by a legal owner to enforce his legal rights adversely to a person who,

although he is trustee for others, is not a trustee for the plaintiff in that action.

On the 24th of April, after some correspondence, in the course of which Cottam more than once urged Trow to hand over the deeds and pay the costs of the action, the deeds were handed over to Cottam on an undertaking to return them if the property should not be sold. On the 13th of August, judgment in the action was given for the Plaintiff with costs; but the learned Commissioner who tried the case said that he saw no reason why the costs should not ultimately come out of the trust estate. Although the Commissioner had read the correspondence, he had not read the opinion of counsel; but if he had, I do not think his view would have been different. The costs of this action were taxed at £116 2s. 4d., viz., £64 19s. 10d. Plaintiff's costs, and £51 2s. 6d. Defendant's costs. In August, 1891, Mrs. Savage died. Some of the property was sold in her lifetime and some not. On the 9th of February, 1892, Downestook out an originating summons for an order authorizing him to retain the above costs out of the trust estate. Mr. Cottam, as a residuary devisee, was made a Defendant to this summons, and he was appointed to represent the other residuary devisees, who were numerous. He opposed the summons, the costs of which have amounted to a considerable sum. The summons was heard by Mr. Justice Kekewich, and he authorized the payment of the costs of the action and of the summons out of the trust estate. From this order Mr. Cottam has appealed.

The first question which arises is whether any appeal lies from that order, and for reasons which I will give presently I am of opinion that an appeal does lie. The important sections and rules which we have to consider are the 49th section of the Judicature Act, 1873, and the Order LXV., rule 1. The 49th section of the Act of 1873 runs thus: "No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order." Therefore, we have to ascertain what costs only are by law left to the discretion of the Court. That is found by turning to Order LXV., rule 1.

[His Lordship read the rule and proceeded:-] Now, in the first place, it will be observed that neither in the Act nor in the rule is there a word said about charges and expenses, either of mortgagees or trustees. The 49th section relates to "costs only" which by law are left to the discretion of the Judge. Order LXV., rule 1, relates to costs only, but says that, "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge." The object of introducing those words, "including the administration

of estates and trusts," which are not found in the preceding order made under the Judicature Act, was really to emphasize the first part of the rule, and to check, and I think it has had the effect of checking, the old Chancery practice of giving costs out of the estate, almost as a matter of course, without the Judge exercising any discretion in each particular case, which he ought to do. Then what costs are there referred to? "Subject to the provisions of the Act and these rules, costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge." What Court or Judge? I apprehend the meaning of the rule is quite obvious, that in every proceeding in the Court the costs of that proceeding are in the discretion of the Judge who has to deal with it - who has to try it. He knows the facts of the case, he knows the conduct of the parties and the nature of the controversy, and the costs of every proceeding are, therefore, placed in the discretion of the Judge who tries the proceeding. It does not mean that the costs in a proceeding are to be in the discretion of the Court or Judge before whom these costs may incidentally come, upon an application to have them borne by some fund or some person not before the Court in the proceedings in which they have been incurred - that is not the meaning of the rule. Although costs are costs when they are incurred, the moment you come to ask that they shall be borne as expenses by a particular fund, or by persons not parties to the proceedings in which they were incurred, they become, not costs, but charges and expenses, and when once you get them into the category of charges and

expenses this rule and this enactment do not apply to them. For example, the costs of the action of Savage v. Downes were in the discretion of the learned Commissioner who tried that case; they were discretionary with him, and in the exercise of his discretion he gave the successful party the costs, which of course he would do unless there was some reason for the contrary - still they were in his discretion. But when you ask a Judge in the Chancery Division to allow those costs to the Defendant who has been unsuccessful, those costs immediately assume the character of charges and expenses; they are not costs of the preceeding before the Chancery Judge who was asked to allow them. They are no more costs in that sense, no more costs in his discretion, than any other charges and expenses would be - such, for example, as charges and expenses incurred by trustees in taking advice, or in sales, or any abortive proceeding - all of which may be perfectly proper. I should have thought that on principle this was tolerably plain, had it not been for the case, which has been so much discussed in this argument, of Charles v. Jones n(1) . The view I am taking of the distinction between costs and charges and expenses was taken in the case of In re Chennell n(2) - a decision, it is true, on the old rules, but which appears to me as applicable to the new rules as to the old. But Charles v. Jones certainly looked like a decision the other way, and it was not until we sent for the Registrar's book that the obscurity which arose from the report was cleared up. Order LXV., rule 1, makes all costs discretionary with the Judge who tries the proceedings in which the costs have been incurred; but then there is this proviso in favour of trustees and mortgagees, that they are not to be deprived in the discretion of the Judge of those costs to which they are entitled according to the settled rule which has prevailed. It is right, of course, that they should be allowed costs, charges, and expenses properly incurred against a mortgagor or mortgagee, and, therefore, if they are deprived of their costs, charges, and expenses properly incurred they can appeal. That was settled in the case of Turner v. Hancock n(3) , which was referred to in this argument.

n(1) 33 Ch. D. 80.

n(2) 8 Ch. D. 492.

n(3) 20 Ch. D. 303.

Then comes the converse case of Charles v. Jones n(1) , in which a mortgagee who has been guilty of some misconduct was nevertheless allowed his costs against the mortgagor. The mortgagor appealed, and the Court of Appeal held, on the true construction of Order LXV., rule 1, that the mortgagor could not appeal because, although there was misconduct, the costs became costs within the discretion of the Judge who had ordered them to be paid by the mortgagor, or added to the security of the mortgagee, which is the same thing, and they were not within the proviso. There was in the judgment of Lord Justice Cotton a passage which looked as if some question had arisen about charges and expenses as distinguished from the costs, and that was the doubt which induced us to have the case put in the paper again in order that it might be investigated; but when you come to look at that case, I do not think the point before us was before the Court in Charles v. Jones, nor was it involved in the decision. The controversy was whether the mortgagor could

appeal against costs allowed to the mortgagee who had misconducted himself. Then we found in Vice-Chancellor Bacon's order, which was under appeal, a direction that the costs of the mortgagee properly incurred should also be allowed. There was no controversy there, as there is here, as to the propriety of any costs or expenses or charges - that was not the point at all, but the suggestion was that the Judge had gone too far. The answer of the Court of Appeal was, No. Therefore, notwithstanding there was an ambiguity, which is removed when you look at Vice-Chancellor Bacon'sorder, it appears to me that Charles v. Jones is not an authority against the appeal in this case, and on principle, on the true construction of the Acts and rules, it appears to me that the appeal lies.

Having arrived at this conclusion on the right of appeal, we must proceed to consider what ought to be done and whether the order appealed from is right or wrong. The order appealed from is this: "The Court doth order that it be referred to the Taxing Master to tax the costs of the Plaintiff Downes of the said action" - that is the action at law unsuccessfully defended

n(1) 33 Ch. D. 80.

by him against Mrs. Savage - "and also his costs of this application" - that is the summons to have those costs out of the estate - "including the costs of the application for the cross-examination of the Plaintiff as between solicitor and client"; and then there is this addition, "Including in such taxation any charges or expenses properly incurred by him in relation to the execution of the trusts." There is no appeal against that - that is right enough, of course; but the appeal is against that part of the order of Mr. Justice Kekewich which allows the trustee the costs of the unsuccessful action at law, and as a consequence against that part of the order which directs the costs of the application to come out of the estate.

Notwithstanding the terms of the devise, Mrs. Savage was legal tenant for life and was entitled to the deeds, and no doubt ought to be thrown by the Court on this point. It is perfectly clear when the authorities are looked into. But no trustee could be reasonably expected to know this; and no solicitor can be blamed for not seeing at a glance what the rights of the parties were. Trow himself thought Cottam was right; but Trow did not act unreasonably in taking time to consider, nor in consulting counsel, nor in being guided by him rather than by his opponent Cottam. But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his cestui que trust unless under very exceptional circumstances. If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any Judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate.

I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred: such an indemnity is the price paid by cestuis que trust for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred." This view of a right of a trustee to indemnity is in conformity with the settled practice in Chancery and with Turner v. Hancock n(1) , the latest decision on the subject.

But, considering the case and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to shew that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the Court in favour of the trustee; but counsel's opinion is no indemnity to him even on a question of costs. This was decided in Stott v. Milne n(2) . In this case, I am compelled to say that counsel made a mistake in advising that there was any

doubt about Mrs. Savage's right to the deeds; and Trowmade a mistake in acting on a doubtful opinion and in not applying by an originating summons for leave to defend the action, as he was advised that he had a doubtful case. Under these circumstances, it appears to me that the order of Mr. Justice Kekewich allowing the whole costs of that unsuccessfully defended action out of the estate ought to be discharged, and that an order ought to be made more in accordance with what is just to the parties on both sides. The order which we think it right to make is this: Vary that order. As to the costs of Savage v. Downes, Downes ought only to have such costs as he would have incurred had be applied for leave to defend at the expense of the estate, and as we do not intend to have a further taxation or to have any further costs incurred about this

n(1) 20 Ch. D. 303.

n(2) 25 Ch. D. 710.

unfortunate matter, we shall fix them at £35. As to Downes' costs of his summons to get his costs out of the estate, he ought to be allowed a reasonable sum, say £20; but no more. As to Cottam'scosts of this summons, he was right in appearing and in opposing the claim of Downes, and he has saved the estate thereby a considerable sum; but he has unnecessarily incurred expense. He ought to be allowed £20 for his costs of this summons out of the estate, and no more. As to the costs of the appeal, Cottamsucceeds in part, and the estate has benefited by this. On the other hand, he asked for too much, and we propose to give him £10 as the costs of this appeal out of the estate; and there will be no other order as to the costs of the appeal.

JUDGMENTBY-2: BOWEN, L.J

JUDGMENT-2:

BOWEN, L.J: :-

I also am of opinion that an appeal lies. The costs of the collateral action in the Queen's Bench become, in my opinion, charges and expenses when the trustee seeks to recoup himself for them in the administration of the trust. They were costs in their origin, but cease to be costs which are purely within the unappealable discretion of a Court when an attempt is made to fix them on the trust fund. Order LXV. rule. 1, directs that subject to the provisions of the Acts and the rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court. In order to understand the scope of this general rule which deals with the general subject of costs, and in order to see whether there is or is not an appeal as regards the subject-matter of his summons, one must look back to sect. 49 of the Act of 1873, which enacts that no order made by the High Court as "to costs only, which by law are left to the discretion of the Court" is to be subject to an appeal, except by leave. Unless an appeal in the present case is taken away by sect. 49, an appeal necessarily still lies. Were, then, these costs of the Queen's Bench action costs within the discretion of Mr. Justice Kekewich? They were costs as between the parties to the Queen's Bench action, and as between these parties were rightly dealt with by the Queen's Bench Judge. But when one of the parties to the Queen's Bench action endeavours to recoup himself for

them out of a trust fund, can they be said to be still costs within the meaning of sect. 49, and within the absolute discretion of the Judge who hears the application? So to hold would be to deprive cestuis que trust of an appeal upon the question whether the trustee was justified in defending a collateral action. In In re Chennell n(1) the Master of the Rolls and the Court of Appeal pointed out that "charges and expenses" are not "costs" within sect. 49; and the present rule, Order LXV., rule 1, which is subsequent to In re Chennell, in still adhering, after that decision, to the former word, "costs," cannot be taken to include "charges and expenses" under it. Is it reasonable to sweep within the scope of a section dealing with general costs of actions the costs of an independent and collateral proceeding between third persons tried before a different Judge? If this were a question between principal and agent, can it be said that under this rule the costs incurred by an agent in an action brought or defended by him were as between himself and his principal to be within the absolute discretion of some other Judge who had not heard the case? The liability of the principal would depend on questions of pure fact. Why should the discretion of a Judge of the High Court

conclude the matter? Why should the law be otherwise in the case of a trust fund? All matters in con nection with trust funds are not made the subject of pure discretion of a Judge. They depend on questions of gravity involving controversies as to facts, and possibly legal questions of right. The fallacy of the Respondent's argument lies in supposing that because a trustee has to pay costs in a collateral suit, it is as costs that he inflicts them on his own trust fund. It is only as "charges and expenses" that he can recover them, and charges and expenses are not matters as to which an appeal is taken away, either under sect. 49 of the Act of 1873, or under Order LXV., rule 1. But it is said that the case of Charles v. Jones n(2) decides that, although in such a case the trustee may appeal, the cestuis que trust may not. That case (rightly decided, no doubt, on the rules) nevertheless is one which inflicts some hardship on trust funds. If a trustee may appeal against an order finding that he has been guilty of misconduct, justice

n(1) 8 Ch. D. 492.

n(2) 33 Ch. D. 80.

would seem to indicate that an appeal ought conversely to lie in the interest of infants and cestuis que trust where the decision is the other way. However, under Order LXV., rule 1, it is not so, and we ought not to stretch the words of the rule in order to apply such a hard doctrine to "charges and expenses" when the clear words seem in their ordinary sense to exclude them. But in truth, in Charles v. Jones n(1) , the point raised in the present case as to the lawfulness of an appeal did not really arise. The appeal prosecuted there was as to the misconduct of a mortgagee in the suit; and the Lord Justice Cotton, while holding that no appeal lay on behalf of the fund, intimated that that part of the order of Vice-Chancellor Bacon which directed that costs (in the sense of charges and expenses) properly incurred were to come out of the fund was regular; but he does not say that on the propriety of incurring such charges and expenses no appeal would lie. This case, therefore, is not in point. In my opinion, an appeal here lies, and I proceed to consider the present case on its merits.

If the present appeal fails what, we are told, amounts to nearly a quarter of a tiny trust fund will have been wasted with impunity in an unsuccessful litigation of no profit whatever to the trust; and the legal profession will have devoured, without any corresponding advantage to anybody, a considerable portion of a very small oyster. The Respondent was trustee of an estate such as I have described, and entitled in that capacity to a remainder in fee in trust for sale subject always to the previous life interest of a tenant for life. The tenant for life, who was herself meditating a sale of the property under the Settled Land Act,demanded - as she was entitled to do - possession of the title deeds. On the true construction of the will the trustee had no answer in law to the demand. But his solicitor entertained at the outset some doubt as to the law of the case - doubts which the result shewed to be unfounded. He did not take out any summons for directions from the Court, as he might have done, and thereby have avoided litigation; but on his own responsibility he defended the action down to the trial at the assizes, and was there defeated in the end. The vanquished trustee now

n(1) 33 Ch. D. 80.

seeks to impose the costs of this idle and fruitless litigation on the estate under circumstances which I shall presently examine.

The principle of law to be applied appears unmistakeably clear. A trustee can only be indemnified out of the pockets of his cestuis que trust against costs, charges, and expenses properly incurred for the benefit of the trust - a proposition in which the word "properly" means reasonably as well as honestly incurred. While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness, it is on the other hand essential to recollect that mere bona fides is not the test, and that it is no answer in the mouth of a trustee who has embarked in idle litigation to say that he honestly believed what his solicitor told him, if his solicitor has been wrong-headed and perverse. Costs, charges, and expenses which in fact have been unreasonably incurred, do not assume in the eye of the law the character of reasonableness simply because the solicitor is the person who was in fault. No more disastrous or delusive doctrine could be invented in a Court of Equity than the dangerous idea that a trustee

himself might recover over from his own cestuis que trustcosts which his own solicitor has unreasonably and perversely incurred merely because he had acted as his solicitor told him.

If there be one consideration again more than another which ought to be present to the mind of a trustee, especially the trustee of a small and easily dissipated fund, it is that all litigation should be avoided, unless there is such a chance of success as to render it desirable in the interests of the estate that the necessary risk should be incurred. If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutory precaution might often be to speculate in law with money that belongs to other people. With these preliminary observations, I proceed to narrate succinctly the story of this wasteful litigation.

The Respondent, Downes, was created trustee under a will which devised the estate of the testatrix to himself and others in trust, to permit Mrs. Savage to receive the rents and profits during her life, and after her decease to sell and divide the proceeds amongst several persons, of whom the Appellant Cottam,himself a solicitor, was one. Mrs. Savage, who in 1889 was an old lady, and whose solicitor Cottam was, desired as life tenant to sell the trust property under the Settled Land Act, and for this purpose applied, in February, 1889, through Cottam, to Downes, the Respondent, for the deeds. Mr. Trow, the Respondent's solicitor, advised him not to comply with this request; and on the 1st of March Cottam, on behalf of the life tenant, issued a writ in detinue against the Respondent. With the tone and temper of Cottam, who acted for Mrs. Savage, I have no sort of sympathy. He was availing himself of her legal rights to deprive a brother solicitor of the conduct of sales which the trustee in the end would be bound to make as soon as Mrs. Savage died, and his language towards the Respondent's solicitor appears to have been overbearing, irritating, and offensive. But I cannot agree with the Respondent's counsel that the issue of the writ was premature. No such point was ever taken before the learned Commissioner in the action of detinue, and the judgment of the learned Commissioner states "that it must be taken as not denied upon the pleadings that there was a demand and a refusal to hand over the deeds." Indeed, in the letter of the 5th of March, written immediately after, the Respondent's lawyer admits the refusal to deliver up the deeds. That Mrs. Savagewas entitled, as against the Respondent, to possession of the deeds, was in my opinion open to no doubt whatsoever. That a layman wholly unacquainted with the law might not be aware whether, on the true construction of the will, Mrs. Savage was so entitled is very possible. That even an experienced lawyer might wish to examine the authorities in order to instruct himself upon the point is also quite likely. The authorities however, when examined, are perfectly clear on the subject, and there is not a solicitor in the profession who, after consulting such authorities, might not have known that for the Respondent to defend the threatened action was, to say the least of it, a

dangerous thing, and calculated gravely to imperil the small trust fund. Mr. Trow, the Respondent's solicitor, appears on the issue of the writ to have become himself alarmed, and on the 5th of March wrote a letter with the view of obtaining counsel's opinion. He states in his letter that, according to the cases he has examined, the words of the will "appear to vest the legal estate in the tenant for life, which," he fears, "Mrs. Savageclearly is, within the meaning of the Settled Land Act," and he asks his London agents to say what they think is the best course for him to adopt. Counsel's opinion in reply states that "on the whole, though with much hesitation, I think that the latter view is correct, and that Mrs. Savage is legal tenant for life, and therefore entitled to the custody of the deeds." Counsel added that, as regards costs, if the question had been raised in the Chancery Division, the trustee would have had his costs out of the estate, and recommended an allegation to be added in the statement of defence in the action of detinue that Defendant had been advised the point was doubtful. Counsel did not, however, advise the action to be defended, or state that it could be defended with a fair prospect of success: nothing to that effect is to be found in the opinion.

Pausing here to review the situation, the following facts are clear. The Respondent, through his solicitor, now knew, on the 7th of March, that his counsel feared, as he himself did, that he was in the wrong. His counsel had not even advised him that the action might be defended with any reasonable prospect of success. What was the duty of any trustee of a tiny trust fund? What was the only reasonable course that could thereupon be pursued for the benefit of a fund of this description? Obviously, either to abandon the defence if he could not compromise, or take out an originating summons asking the direction of the Court.

The smallness of the estate out of which costs if ordered would have to come, the character of the question at issue, the adverse impression of counsel, the sense that the authorities on the point were unfavourable: all these things, to my mind, made it absolutely and utterly unreasonable without further advice to risk the money of the cestuis que trust in a common law action about the custody of these deeds. And I see no possible

reason why the trustee did not accept the terms proposed to him in Cottam's letter of the 28th of March, even if he had not abandoned his defence before. The litigation pursued its course. A futile attempt was made to stay the common law action on the terms of taking out an originating summons in Chancery to have the question decided there, where the counsel believed the trustee would get his costs allowed out of the fund. A useless profession was made in the statement of defence of a willingness as soon as the Court of the Queen's Bench Division should pronounce judgment to submit to it - a pious expression of resignation to the will of the Court borrowed from Chancery, but wholly thrown away upon a common law action of detinue. And on the 13th of August at the assizes the learned Commissioner who sat as Judge decided the action against the Respondent, not expressing any doubt upon it. There was no appeal against his decision.

Reliance has been placed by the Respondent's counsel in this Court on the fact that in delivering judgment the learned Commissioner stated that if he had to deal with the matter on the materials before him he saw nothing unreasonable in the Respondent's conduct. The language of the learned Commissioner is as follows: "I have not to deal with the question, which will arise hereafter, whether the trustee is entitled to retain or charge these costs against his trust estate when that estate comes into his possession; but perhaps it is right that I should say that if I had to deal with the matter now I see nothing unreasonable in his conduct which ought to deprive him of them on the ground that he has acted in an unfair or improper manner, or done that which as trustee he was not warranted in doing. But that matter must be disposed of when it arises by the proper tribunal." The learned Commissioner had not before him the materials now before this Court, and the matter is at large for us. The view of Mr. Justice Kekewich in the Respondent's favour is a matter that has much impressed me. The note furnished to us of his judgment is imperfect; but I think Mr. Justice Kekewich has been influenced by the view that the solicitor of the Respondent had acted either under or not contrary to the opinion of counsel. He also expresses the opinion that the point of law was one of

difficulty. I am sensible of the experience of Mr. Justice Kekewichin these matters; but I am bound, when I have a clear view, to adhere to it, however I may differ from those of my Brethren whom I respect. As I have above stated, I myself do not agree that the point of law was difficult. It is a point with which a solicitor might well be unfamiliar. That I freely admit; but as soon as the authorities are examined the difficulty vanishes. Even if the point of law was difficult this does not, to my mind, justify, in the affairs of a small trust, defending an action of detinue in which the Respondent's solicitor and his counsel were both unable to bring themselves to believe that the Respondent would succeed without making some effort to obtain directions from the Court or to make terms with the Plaintiff. Any other view appears to me fraught with the utmost danger both to trust estates and to the practice of this Court. I think that up to the 9th of March the trustee was not acting unreasonably, although he was acting under a mistaken impression of his rights. From and after the 9th of March he was acting, in my opinion, most rashly and very unreasonably. He ought, I think, to be allowed out of the trust fund the costs directed by Lord Justice Lindley,but no more. This will relieve the trust fund of the burden placed on it by the order of the Court below, and I agree that the varied order which my Brother Lindley has stated is the correct one.

JUDGMENTBY-3: A. L. SMITH, L.J

JUDGMENT-3:

A. L. SMITH, L.J: , concurred.

SOLICITORS:

Solicitors: Tucker, Lake, & Lyon, agents for A. P. Trow, Cleobury Mortimer; Cottam.

M. W.