1944

Mar. 6.
Apr. 6.

BETWEEN:

HIS MAJESTY THE KING..... PLAINTIFF,

AND

MARION BARROWS FRASER ET AL... DEFENDANTS;

AND

HIS MAJESTY THE KING..... PLAINTIFF,

AND

MARION BARROWS FRASER ET AL... DEFENDANTS;

AND

HIS MAJESTY THE KING..... PLAINTIFF,

AND

MRS. CHARLES (MARION) FRASER
ET AL. ..... DEFENDANTS;

AND

HIS MAJESTY THE KING..... PLAINTIFF,

AND

FLORENCE BARROWS McKELVEY
ET AL. ..... DEFENDANTS.

Practice—Costs—Disallowance of separate bills of costs to defendants—Plaintiff contending for allowance of only one set of costs—Allowance of separate bills of costs to defendants where one defendant added at trial on plaintiff's motion.

Held: That defendants having identical interests who severed in their defence are entitled to only one set of costs.

2. That a defendant added at trial on plaintiff's motion is entitled to a separate bill of costs.

APPEAL from the decision of the Registrar upon the taxation of defendants' bills of costs.

The appeal was heard before the Honourable Mr. Justice Angers, at Ottawa.

C. Stein for plaintiff.

Gordon F. Henderson for defendants.

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Angers J.

ANGERS J. now (April 6, 1944) delivered the following judgment:

These are verbal applications by way of appeal: (*a*) in the first three cases by the defendants from the decision of the Registrar that there should be only one bill of costs taxed in each one; (*b*) in the fourth case by the plaintiff from the decision of the Registrar allowing separate sets of costs to each of the defendants.

The Registrar said that in order to avoid a multiplicity of taxations he had decided not to tax any bill for the present, pending the decision on appeal from him on this question.

The taxation of costs by the Registrar or his deputy and the review thereof by a Judge in Chambers is governed by rule 263 of the General Rules and Orders of the Court, which reads thus:

> All costs between party and party shall be taxed pursuant to Tariff A contained in the Appendix to these Rules. Such costs shall be taxed by the Registrar or by his Deputy, and they shall be the Taxing Officers of the Court, exercising exclusive authority in respect of such taxation; subject, however, to review by a Judge in Chambers.

Counsel for defendants relied on rule 261, being the general rule applying to costs. It enacts (*inter alia*):

> The costs, of and incidental to all proceedings in the Court, shall be in the discretion of the Court or a Judge and shall follow the event unless otherwise ordered . . . .

I do not think that rule 261 offers any assistance in the present case.

The Ottawa agent of counsel for defendants submitted that Martha MacPherson, who lived in Roxbury, Mass., U.S.A., and who is one of the defendants in each of the above cases, was not on friendly terms with the other defendants and that in the circumstances she had an interest in choosing her own counsel. There is no evidence concerning the relations between Martha MacPherson and the other defendants.

In support of his contention that two bills of costs ought to be taxed, counsel cited the following authorities: *Rogers* v. *Davis et al.* (1); *Lamport* v. *Thompson et al.* (2); *Remnant* v. *Hood* (3). Reference was also made to Annual Practice, 1942, p. 1494.

(1) (1932) S.C.R. 546; (1932) 4 D.L.R. 207.
(2) (1942) 2 D.L.R. 65.
(3) (1859) 27 Beavan 613.

In the case of *Rogers* v. *Davis* the matter at issue was an application by way of appeal from the decision of the Registrar of the Supreme Court upon the taxation of the respondents' bills of costs with respect to the allowance by the latter of separate sets of costs to each of three groups of respondents. The action dealt with the validity of a will.

The report shows that before the Registrar the appellant objected to the taxation of a separate bill of costs for each of the three groups of respondents for the following reasons: (1) the interest of all the respondents on the appeal was identical; (2) only one joint factum was filed by the respondents, other than the official guardian; (3) all the respondents were represented by one Ottawa agent, who presented three separate bills for taxation on behalf of the allegedly separate respondents.

Rinfret J., who heard the matter in Chambers, dismissed the appellant's application. In his judgment, he made the following statements (p. 547):

> I know of no law or rule—and none was cited to me—which compels persons who have different shares in an estate to appear by the same solicitor because their interest, as regards their opposition to the claim of the plaintiff, may be identical (See *Remnant* v. *Hood*, 27 Beav. 613, at p. 614, 54 E.R. 243).
>
> In this case there were three separate firms of solicitors representing the three separate groups of respondents, and the rights of these groups to retain the services of the respective firms of solicitors may not be disputed.

Rinfret J. then deals with the fact that only one factum was filed by the respondents and the fact that they were all represented by the same Ottawa agent, stating that he does not think that this can affect their right to separate bills of costs, a question which has no materiality in the present instance. The learned judge thereafter makes the following observations, which are more pertinent (p. 547):

> The judgment of this Court, when dismissing the appeal, was "that the costs of all parties in this Court will be paid out of the said Estate"; and, in my view, the result is that each party separately and properly represented before this Court is entitled to the taxation of his bill of costs. Whether, under the circumstances, there should have been given only one set of costs was a question for the Court, when pronouncing its judgment, and is not a question for the taxing officer, who has only to give effect to the order upon costs, as adjudicated by the Court. The point now raised by the appellant should have been taken, if at all, by speaking to the minutes of judgment.

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This judgment may be of some comfort for the defendants but one must not overlook the fact, as noted by the Registrar, that in the Rogers-Davis action the litigation concerned a dispute about shares in an estate and had to do with the validity of a will and that the costs of all parties were to be paid out of the estate. In the present case the burden of the costs would fall on the Crown alone.

In the case of *Lamport* v. *Thompson et al.*, the matter in question is an appeal by the defendants from an order of Hogg, J. dismissing their motions by way of appeal from the taxing officer's refusal to award two sets of costs. Leave of appeal was granted by Roach, J., who expressed the following opinion (p. 67):

> I do not think these findings alone would be decisive of the question as to whether or not the defendants were entitled to sever in their defences. It is not the ultimate result that governs. If the "foresight" of counsel was always as good as their "hindsight" then defendants taking the advice of counsel would never unnecessarily sever in their defences. The time when the decision has to be made is generally early in the litigation and if at that time having regard to the allegations in the statement of claim and the known facts there is sufficient reasonable grounds for thinking that there would be a substantial difference between the defences at the trial on material points then, I think, that is sufficient justification for severance.

And further on (p. 68):

> Now the plaintiff's position was as follows. She was either bound by the agreement or she would revert to her position and rights under the will. As far as the agreement was concerned it has been appropriately described in the judgments as a "family settlement". In relation to it the position of the trust company as between the members of the family was neutral. If it was set aside the position of the trust company under the will was dominated by the balance of power vested in the brothers. That being the situation at the beginning of the litigation, I should have considered that the trust company was justified in severing its defence from that of the brothers so as not to identify itself with the brothers, who conceivably might through their counsel take positions as to policy in the administration of the estate, particularly under the will if the agreement was set aside, and put forward propositions at the trial as to which the trust company might be indifferent or what is more important, in violent disagreement. In such a contingency one counsel could not represent all defendants; and no one could foresee with certainty that such a contingency would not arise.

As appears from the report, the plaintiff's claim was based on a provision in the will of Alexander M. Thompson which required the executors Harry and Stanley Thompson (both sons of the testator) and Chartered Trust & Executor Company to set aside a trust fund of $100,000 for

the benefit of plaintiff, a sister of Harry and Stanley Thompson. The two brothers were entitled in certain contingencies to the capital of this trust fund on the death of the plaintiff. Shortly after the death of the testator, the trust fund was set up to the extent of $60,000 only, in which was included a mortgage of $30,000. To complete the trust fund it would have been necessary to sell shares to the extent of $40,000 or to the extent of $70,000 if the mortgage of $30,000 was not to be included in the trust fund. The brothers as residuary legatees were interested in the price which might be realized on the sale of those shares and they took the position that, due to the depressed condition of the market, the time was not opportune to sell them. Even at that early date the trust company felt it necessary to seek separate legal advice as to its duties in the circumstances. Then, due largely to the efforts of the trust company, an agreement was made between the plaintiff, her brothers and the trust company in virtue of which the securities allocated to the trust fund totalling $60,000 were approved and regarding the balance of $40,000 the unrealized assets were to be transferred to the trust company as security, but restrictions were imposed on their sale.

In her action the plaintiff sought: 1, judgment setting aside the agreement; 2, judgment directing the executors to set up the $100,000 trust fund in accordance with the provisions of the will; 3, consequential relief on the basis that the $30,000 mortgage was not a proper security to be included in the trust fund; 4, damages for breach of trust; 5, the removal of the trustees from office.

The report shows that there were common defences put up by the trust company and the Thompson brothers, among them being the Statute of Limitations. The trial judge held that any claim which the plaintiff could have had was barred by the statute and that the agreement was binding on the plaintiff.

Henderson, J., delivering the judgment of the Court of Appeal, made the following remarks (p. 69):

> Upon the argument we are of opinion that the matter involves no principle of law which is not well settled by the cases, and that the only matter to be determined is whether the appellant, Chartered Trust & Executor Co., was justified in severing in its defence from its co-defendants, and in retaining solicitors and counsel on its behalf.

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In the light of the allegations and charges made by the plaintiff in her amended statement of claim, and in particular in para. 8 (*b*) and subsequent paragraphs of the same, we think the appellant, Chartered Trust & Executor Co., was fully warranted in severing in its defence. The appellant, Chartered Trust & Executor Co., was entitled to make its election to sever in its defence upon the plaintiff's statement of claim.

In this case of *Lamport* v. *Thompson et al.* it seems evident that separate defences were justified as the trust company had reason to believe that its defence would differ substantially from that of the other trustees. I do not think that the decision in that case can be of much assistance to the defendants.

The facts in the case of *Remnant* v. *Hood* (as reported in 27 Beavan, p. 74) may be summarized briefly as follows:

By his will Sir Nathaniel Thorold directed his trustees to convey his real estates to Samuel Thorold for life, with remainder to his first and other sons successively in tail male, with remainder to his first and other daughters in tail male. He directed that in the settlement should be inserted a power to Samuel Thorold to jointure and a power enabling him to charge the estates with any sum not exceeding £2,000 for the portion of his younger children.

No settlement was made but, on his marriage with Miss Anderson, Samuel Thorold exercised his power of jointuring and charged the estates "with the sum of £2,000, for the portion or portions of the daughter or daughters, younger child or younger children of Samuel Thorold on the body of the said Ann Anderson lawfully to be begotten, to be raised and levied within three calendar months after the decease of Samuel Thorold, by such ways and means as shall be expedient in that behalf, and to be forthwith paid and payable in manner following (that is to say, if there shall be an eldest or only son, and one such daughter or younger child, the same to be raised and paid for the portion of such only daughter or younger child; and if there shall be two or more such daughters or younger children, then the said sum of £2,000 to be equally divided between them, share and share alike, for the portion and portions of all and every such daughters or younger children."

There were seven children of the marriage, consisting of a son and six daughters. The son attained twenty-one and died unmarried. Two of the daughters died infants

in the life of their father; a third, Theodicia, attained twenty-one and married a Mr. Gibbons and died in the same year, in the lifetime of her father. The remaining three daughters survived their father; Ann, as eldest, became entitled to the estates, the other two being Louisa Margaret Moye and Sophia Katherine Whitehouse. After Samuel Thorold's decease, one-half of the £2,000 was paid to Whitehouse and his wife and £50 on account to Mrs. Moye; £950 remained unpaid, which Mrs. Moye had assigned to the plaintiff.

The suit was instituted by the plaintiff to have the remainder of the £2,000 now raised by a sale or mortgage of the estate on which it was charged.

The question argued was whether Theodicia, who had attained twenty-one but had died in her father's life, was entitled to participate in the portion. Pending the suit an offer was made to pay plaintiff one-third of the portion.

The Master of the Rolls in his judgment declared that the question was "whether the sum of £2,000, provided for the portions of younger children, was divisible in thirds or in moieties; in other words, whether, under the terms of the power contained in the will, and of the clause contained in the deed executing the power, the interests of the three younger daughters in this charge vested in them upon their attaining twenty-one and marrying in the lifetime of their father, or whether the vesting was postponed until the death of their father."

The Master of the Rolls concluded that regarding the settlement upon the principles expounded by Sir William Grant in *Howgrave* v. *Cartier* (1) he thought that it was not necessary that the children should survive the father in order to enable them to become entitled to the fund. And he referred again to the words of the settlement which charges the estate "with the sum of £2,000, etc." hereinabove quoted, which it is useless to repeat here.

The Master of the Rolls said that he was of opinion "that the charge vested in the three younger children upon their attaining twenty-one, although it was not payable until within three months after the death of their father."

He held that the plaintiff must have costs down to the date when the tender was made, but that he must pay the costs of all parties from that time. He stated that there

(1) (1814) 3 Ves. & B. 79; 35 E.R. 409.

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must not be two sets of costs in respect of one share. He added that he could not allow trustees to appear separately and that a mortgagor and his mortgagees can only have one set of costs.

After the case had been decided a question arose as to the decision of the Court in regard to the costs and the matter was mentioned to the Master of the Rolls in Chambers by the Registrar. The Master of the Rolls then came to the conclusion that only one set of costs ought to be allowed in respect of the subsequent incumbrancers on the estate. In consequence a notice of motion was given to vary the minutes as handed out by the Registrar accordingly. This point is reported in 27 Beavan, at page 613.

The Master of the Rolls declared that he had carefully gone through this matter again and thought it was clear what the principle was upon which he had decided the question of costs at the hearing. He said that, from the date of the offer to pay plaintiff, the latter was to pay the costs of the suit in the usual manner; that is, the costs of all parties, "but only one set of costs where there were trustees and *cestuis que trust* was given where there was an interest mortgaged and sub-mortgaged". The Master of the Rolls added that any subsequent discussion ought to have been confined to ascertaining what he had then decided and that there would be little difficulty in carrying that into effect. However, he had the question brought before him in Chambers by the Registrar and he had reconsidered the whole matter.

The Master of the Rolls concluded thus (p. 614):

> I think the opinion I expressed at the hearing is the correct one, and that the costs of all parties must be paid, subject to the qualification I have expressed, and which is the usual direction given by the Court in such cases. The only question (if there be any) is the way in which this principle is to be worked out. The Court does not compel persons who have different shares in an estate to appear by the same solicitor because their interests, as regards their opposition to the claim of the Plaintiff, are identical. I think that I have no right to make the Defendants suffer by reason of their not having adopted that course, the more so, when I am informed that the Plaintiff exhibited interrogatories to each of the Defendants, and required and obtained separate answers from each of them.

A note at the foot of page 614 indicates that this decision was affirmed by the Lords Justices in November, 1860.

Counsel for defendants referred to decisions and comments thereon contained in The Annual Practice, 1942, p. 1494. I have before me The Annual Practice of 1943, which contains at least the same references and annotations. The decisions cited are all founded on regulation (8) of rule 27 of Order 65 of the Rules of the Supreme Court, 1883; it reads thus:

> Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for two or more such defendants separately, the taxing officer shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

It appears from the cases noted that the question of whether one or more sets of costs are to be allowed depends largely on the nature of the action. The question is also, to a large extent, subject to the identity or the conflict of interest of the parties.

The Annual Practice, 1943 (p. 1508), cites and comments upon various cases in most of which it was held that defendants having identical interests who severed in their defence were entitled to only one set of costs. An enumeration of these cases, with a brief notation of their respective subject and the judgment referring thereto, seems to me convenient:

Farr v. *Sheriffe* (1) where it was held that trustees and their *cestui que trusts*, and next of kin in the same interest, severing in their defences, were entitled only to one set of costs, although stated (at the bar, but not by the answers) to reside in parts of the country remote from each other.

Greedy v. *Lavender* (2) where it was held that in a simple administration suit the costs of all necessary parties are payable out of the estate, but that where some of the residuary legatees have assigned or incumbered their share they and their assignees are entitled to one set of costs only, namely, the costs of the assignors.

Remnant v. *Hood* (3), previously referred to.

Bull v. *West London School Board* (4). The head-note states that A. and B., two surveyors in partnership, who

(1) (1845) 4 Hare's Rep. 512, at 528.
(2) (1848) 11 Beavan 417.
(3) (1860) 27 Beavan 613.
(4) (1876) 34 L.T. 674.

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were employed as a firm with respect to the matters in question in the suit, were made defendants for the purpose of discovery only. The bill also prayed that "the defendants might pay the costs of the suit".

A. and B. put in separate answers and appeared by separate counsel at the hearing. Prior to the hearing they had dissolved partnership.

It was held that A. and B. were only entitled to one set of costs between them, as they were not justified in severing in their defence.

Bellew v. *Bellew* (1). This was a suit for the administration of the personal estate of an intestate. The plaintiffs were the children of a deceased brother and were entitled to one-fourth of the estate among them. The administrators were a brother and sister of the intestate and entitled to one-fourth each. The remaining fourth belonged to the two children of a deceased sister; on being served with notice of the decree, they obtained separate orders for leave to attend proceedings.

It was submitted by counsel for one of the administrators that the two children ought to have only one set of costs. It was then proposed by one of the other parties that this should be waived and that the costs of both should be allowed. The Vice-Chancellor declined to sanction this proposal and said that, as the authorities had established the rule, it ought to be enforced, in order to put a check upon the unnecessarily obtaining leave to attend proceedings.

Day v. *Batty* (2). Upon further consideration of an administration action in which judgment had been given in the ordinary form, it was held that "mere liberty to attend the proceedings under a judgment does not entitle the parties obtaining the liberty to the costs of their attendance in Chambers as a matter of course, but the Court still has a discretion as to allowing their costs. To entitle them thereto the order giving the liberty to attend should expressly provide that they are to be entitled to their costs of such attendance".

Catton v. *Banks* (3). Real estate divisible under a settlement in three equal shares, of which two were

(1) (1868) W.N. 253. (2) (1882) 21 C.D. 830.
(3) (1893) 2 Ch. 221.

incumbered and the third unincumbered, was sold in a partition action and the proceeds were paid into Court:

It was held that only one set of costs in respect of each share should be allowed out of the fund in Court (*Belcher* v. *Williams* (1) not followed).

Ancell v. *Rolfe* (2). In a partition action the chief clerk had certified that the property was divisible into six shares, two of which only were incumbered:

It was held that "only one set of costs in respect of each share ought to be allowed. *Catton* v. *Banks* (*ubi supra*) followed on this point . . . . The Court has a general discretion as to the costs, and as a rule will not allow parties representing an incumbered share any additional costs incurred by reason of such incumbrance . . . ."

Re Vase (3). An action for the sale and distribution of the proceeds in lieu of partition. It appeared from the chief clerk's certificate that six persons were interested in the property and that some had mortgaged their shares. The property was sold and the proceeds paid into Court. The question was raised whether each mortgagee who had been served with a notice of the proceedings and had attended ought to be allowed a separate set of costs or whether only one set of costs should be allowed in respect of each share.

Cozens-Hardy, J., said:

> I shall follow the decision of Chitty, J., in *Ancell* v. *Rolfe* (*ubi sup.*), who followed the decision of Kekewich, J., in *Catton* v. *Banks* (*ubi sup.*), and allow only one set of costs in respect of each share of the property. I have no doubt I have a discretion as to what costs to allow, but in this and in other cases, unless there are special circumstances necessitating a different rule, I shall follow *Ancell* v. *Rolfe* (*ubi sup.*).

Carroll v. *Harrison* (4). This was a partition action. Some of the shares were incumbered. The question arose whether in taxing the costs only one set of costs should be allowed in respect of each of the incumbered shares or whether separate sets of costs should be allowed for each beneficiary and each incumbrancer.

Joyce, J., following *Catton* v. *Banks* in preference to *Belcher* v. *Williams* (5), held that only one set of costs should be allowed in respect of each share. He said that

(1) (1890) 45 C.D. 510.
(2) (1896) W.N. 9.
(3) (1901) 84 L.T. 761.
(4) (1910) W.N. 104.
(5) (1890) 45 C.D. 510.

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it would only create confusion if, after the decision in *Catton* v. *Banks*, *Ancell* v. *Rolfe* and *In re Vase*, he were to go back to what was held by North, J., in *Belcher* v. *Williams*, a case which had never been followed.

In re Catling's Estate (1). By his will John Catling devised to his wife, whose maiden name was Leach, certain copyholds so long as she lived, then at the death of his wife to her brother George Leach, then at the latter's death all his estate "to go to the next heir in the name of Leach as long as the world stands". After the testator's death a burial board took a portion of the copyholds under their statutory powers and paid the purchase money into Court. George Leach survived the testator and died without issue, having devised all the real estate vested in him under the testator's will to Thomas Leach, who, after the death of the testator's widow, petitioned to have the fund in Court paid out to him. There were four claimants to the fund: (1) the petitioner who contended that George Leach was absolutely entitled; (2) Frederick J. Leach who was the heir neither of George Leach nor of the testator; (3) a Mrs. Rowe who was the heiress of George Leach but whose name was not Leach at the time of the testator's death; and (4) the representative of the heir-at-law of the testator. The question was also raised whether the burial board were bound to pay the costs of all parties, the board contending that this was adverse litigation within section 80 of the Lands Clauses Consolidation Act, 1845, and that they ought to pay one set of costs only.

Stirling, J., held (*inter alia*) that the board was only bound to pay one set of costs and that the rest of the costs must be paid out of the fund.

Gaunt v. *Taylor* (2). The testator by his will had given his widow an income of £370 out of his estate and had appointed her his executrix, together with Shaw and Tottie as co-executors. This was a creditor's bill filed against the executors, executrix and heir-at-law of the testator for the administration of his estate. The executrix and executors appeared jointly, but the widow, having an interest different from that of her co-executors, severed in her defence and throughout the proceedings appeared by a different solicitor. By orders made on former occasions two sets of

(1) (1890) W.N. 75.

(2) (1840) 2 Beavan 346.

costs had been allowed them, and the cause coming on for further directions it appeared that the personal estate was insolvent and that the testator was not a trader.

The Master of the Rolls held (p. 347):

> Where several persons are made defendants in respect of a joint fiduciary character only, or if the beneficial interest which any of them may have in the matters of the suit is in no way conflicting with their other duty, they certainly ought to answer and defend together; if they do not, and there are no special circumstances, then, according to the settled rule of the Court, they will be allowed one set of costs only. On the other hand, if one has a personal interest which conflicts with his duty as trustee, or if one of several trustees can admit facts which the others believe not to be true, it then becomes impossible for them with prudence to answer together. Whether they are entitled to two sets of costs depends on the circumstances of each particular case. If a party creates unnecessary expense it is just that he should be deprived of his costs; and if several trustees unnecessarily sever their defences, it is right that one set of costs only should be allowed; the question always is, whether there was reasonable ground for them to sever.
>
> The previous orders made in this case allowing two sets of costs have, I think, considerable bearing on the present question; and under all the circumstances I think two sets of costs must in this case be allowed.

Garey v. *Whittingham* (1). A testator gave his residuary estate to his wife for life and then to be divided into three shares; he gave one-third between the children of his brother, Thomas Baker, living at the death of his wife; one-third to his niece Frances Garey, and one-third to his nephew and niece, Thomas Baker and Sarah Baker; in case such, any, or either of them should die, having left a child or children surviving them, he declared that the expectant's share should go between his or her children. Thomas Baker's children all died in the lifetime of the widow, but some left children. Held that the latter were entitled to the first-mentioned one-third.

Husband and wife, entitled in the wife's right to a share of residue, were living apart and defended separately. Held, entitled to only one set of costs.

A party entitled to a share of the residue became bankrupt. Held that he and his assignees were entitled to one set of costs between them.

Harbin v. *Masterman* (2). By his will John F. Duncan gave the residue of his personal estate to trustees upon trust to permit the same to remain in its actual state of

(1) (1842) 5 Beavan 268. (2) (1896) 1 Ch. 351.

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investment at the time of his death or, if necessary, to alter the same and, out of the annual income, to pay several annuities to certain persons ten of whom were still living. He then provided that in case at any time the annual income of the trust funds should not be sufficient for the payment of the whole amount of the annuities, then the trustees should apportion the deficiency between the annuitants according to the amount of their respective annuities.

It was held that where an annuity is payable out of the clear residuary estate of a testator the Court has jurisdiction to set apart a sufficient sum to answer the annuity and to pay the remainder of the residue to the residuary legatees.

Delivering the judgment of the Court of Appeal, Lindley, L.J., when dealing with the question of costs, stated (p. 364):

> In these cases there is always a discretion in the Court of Appeal as to the orders it ought to make with reference to the question of costs; and the Court is bound to see that its orders are not necessarily oppressive. It appears to me that in this case there really was no sensible reason for all parties appearing by separate solicitors. It is well known that only two counsel in the same interest can be heard here. I think it would be oppressive to allow more than one set of costs. What we are prepared to do is to exercise our discretion on this occasion, and give the costs to the party who has the conduct of the cause. There will be one set of costs to be paid by the appellant, and the others must pay their own costs. They are perfectly justified in employing their own solicitors if they like; but this is not a case where it was necessary for four sets of counsel to be instructed in order to protect the rights of the residuary legatees.

In the matter of Hopkinson's Patent (1). This was a petition for the prolongation of a patent by the patentee and a company to whom he had sold the whole beneficial interest in the patent. It appeared that the patentee had received a total amount of £19,750 in shares and cash for this patent and a German patent for the same invention, but that the company's expenditure had exceeded their receipts. The petition was opposed by the Crown on the ground that the inventor had been adequately remunerated; it was also resisted by seven sets of opponents. The petition was dismissed and the petitioners were ordered to pay one set of costs to the opponents.

(1) (1896) 14 R.P.C. 5.

Lord Hobhouse said (p. 10):

The petitioners must pay the costs. There are as many as seven sets of opponents, and in this case there ought not to be more than one set of costs allowed. The matter stood over to give the parties an opportunity of agreeing as to the amount. It was intimated that, in case of non-agreement, their Lordships would themselves name a sum, as has sometimes been done. As no agreement has been come to, the sum they name is £400.

See also *In re Henderson's Patent* (1).

Reade v. *Sparkes* (2). The bill was filed by a friend on behalf of plaintiff, then a minor, for the purpose of having the charge of £1,500 affecting the defendant's estate raised by sale of a term. The sum of £300, part of this charge, was claimed by the plaintiff in right of his mother, upon whose marriage it was vested in trustees, of whom Catherine Swan, the representative of the survivor, was made a defendant; all the other persons interested in the residue of the charge were made defendants. The plaintiff, having become of age, entered the usual rule and proceeded in his own name. The plaintiff's right to the sum of £300, with arrears of interest, was reported by the Master. The only question raised for the opinion of the Court was the right of the defendant Swan to her costs and by whom they were to be paid.

The Lord Chancellor, in the judgment, made the following observations (p. 12):

The infancy of the plaintiff at the institution of the suit, makes no difference. Having attained his age and adopted the suit instituted during his minority, he has rendered himself liable to the costs as any ordinary adult. The law has provided for his protection. He had the power, when he attained his age of twenty-one years, of repudiating the suit, and have left his next friend to try the question; but if he thinks proper to proceed, he adopts the suit with all its faults. I am of opinion that defendants, whose rights and titles are identical, having a common interest and defence, as trustee and *cestui qui trust*, should not split such defence, and file separate answers. The cause must be very short and very plain, when they may split and burden the opposite party with a double set of costs; and in general where *cestui qui trust* and trustee have an identity of interest relative to a demand, they should be co-plaintiffs.

Hubbard v. *Latham* (3). This was a suit for the administration of an estate.

(1) (1901) A.C. 616, 621. (2) (1827) 1 Molloy's Reports, 8.
(3) (1866) 35 L.J. Ch. 402.

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By the deaths of legatees during the testator's life, two-thirds of the personal estate comprised in the will lapsed and became divisible between his widow and next of kin. The Court having directed the usual inquiries, leave was granted to several parties claiming as next of kin to attend the taking of accounts and other proceedings.

The cause coming to be heard on further consideration, a question was raised as to the costs of the various parties (other than the plaintiff and the defendants) who, being in the same interest with the plaintiff, appeared nevertheless in separate classes by several solicitors. The plaintiff and defendants also appeared by separate solicitors.

Kindersley, V.C. said:

> I think that the rule laid down by the Master of the Rolls is so simple and wholesome in its application to cases like the present, where the same interests and position in respect of the suit are represented by a numerous class of persons, that I have no hesitation in following the authority of his decision in *Daubney* v. *Leake* (1 L.R. Eq. 495; 1866, 35 L.J. Ch. 347). Moreover, it seems to me that such a course is quite in accordance with the principle of those rules of the 35th Order which have been referred to, their object clearly being to save the expense of unnecessarily numerous appearances.
>
> I shall therefore allow no separate costs to the next-of-kin beyond the costs of proving their respective titles.

Twist and others v. *Tye* (1). The headnote states that "executors, who are also residuary legatees, are in the same position, as to costs, as any other party who unsuccessfully propounds a will".

It further says that, where executors, also named as residuary legatees, had ample opportunities of forming an opinion as to the testamentary capacity of the deceased and, acting upon their opinion, propounded wills, which were pronounced against, on the ground of testamentary incapacity and want of knowledge and approval of the contents, it was held (Gorell Barnes, J.) that "not only was this a case in which their costs should not be allowed out of the estate, but that, following the general rule that costs follow the event, they should pay the costs of the defendant; but not of any of the parties cited, whose interests were practically identical with those of the defendant".

Hodson v. *Cash* (2). Motion for decree. The only point of interest was as to the costs of the defendant Rushbrooke who had severed in his defence from the defendant

(1) (1902) P. 92.

(2) (1855) 1 Jurist 864.

Cash, his co-trustee. Rushbrooke was authorized by power of attorney from Jemima Hull, the tenant for life, to take proceedings to obtain the annual interest to which she was entitled. Rushbrooke had never acted, except by signing documents for the sake of conformity.

Sir W. P. Wood, V.C., in his judgment, said in substance that Cash was a trustee and as such had but one duty to fulfil, viz., to hand over the money to the party entitled. Rushbrooke, the other trustee, severed in his defence on two grounds: first, because he did not know what the accounts were or what Cash had done, which is not a sufficient reason as he ought to have inquired of Cash and, had he then found something wrong, that might have given him good ground for severing; second, because he holds the power of attorney and is private solicitor of Jemima Hull, the tenant for life, a position which he ought not to have accepted. The Vice-Chancellor concluded: "A person who is a trustee for several *cestuis que trust* acts improperly in taking a power of attorney from one *cestui qui trust* only. He ought to have given up that position. Nor had he any right to instruct any person to appear for him separately, for one solicitor might have appeared for himself and Cash as joint trustees, offering jointly to pay over what was due whenever the Court should have determined who was entitled to receive it". Only one set of costs allowed.

Webb v. *Webb* (1). Two trustees, Webb and Yates, had employed separate solicitors and put in separate answers. Webb had misapplied the trust funds, but no imputation was cast upon Yates.

The Vice-Chancellor said that Yates was justified in severing in defence from Webb and that there must be only one set of costs and the whole of them paid to Yates' solicitor.

Smith v. *Dale* (2). Two executors, defendants in an administration action, were represented by the same solicitor, to whom they had given a joint retainer. One of them was a debtor to the estate and became bankrupt. It was held that the costs incurred by them prior to the bankruptcy be distinguished; that the solvent executor should be allowed only his own proportion out of the fund, the

(1) (1847) 16 Simons Reports, 55. (2) (1880) 18 Ch. 516.

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defaulter's proportion being set off against the debt due from him; but that the costs incurred by both subsequently to the bankruptcy should be allowed in full.

In re Isaac (1). A trustee ought not to be deprived of his costs out of the trust's estate merely on the ground that he has severed from his co-trustee in his defence to an action to administer the estate. He ought to have an opportunity of explaining the reasons for his severance, so that the Court may be able to decide whether the severance was improper.

As the following four decisions were rendered under the Rules of Practice of the Supreme Court of Ontario, it is apposite to quote rule 669 (rule 1162 before the revision and amendment of 1928), which reads as follows:

669. Where two or more defendants defend by different solicitors under circumstances entitling them to but one set of costs, the Taxing Officer shall allow but one set of costs; and if two or more defendants defending by the same solicitor separate unnecessarily in their defences, or otherwise, the Taxing Officer shall allow but one defence and set of costs.

This rule differs materially from the English rule.

I think it is expedient to review briefly the judgments rendered under the scope of this rule, giving in each case a short résumé of the facts and a concise summary of the decisions.

In the case of *Gorham* v. *Gorham* (2), which was a suit by a residuary legatee for the administration of an estate, it was held that the plaintiff represents all the residuary legatees, that the other legatees are not entitled, as of course, to charge the estate with the cost of appearing by another solicitor and, to entitle them to such costs, some sufficient reason must be shown for their being represented by a separate solicitor.

Crawford v. *Lundy* (3). The bill in this case was filed by the executors of Francis Lundy for the construction of his will. Proudfoot, V.C., in his judgment, said (p. 251):

While I cannot say the construction of the will is so obvious that there was no need of asking the opinion of the Court, I do not think there was a necessity for the appearance of so many counsel. One counsel appeared for the plaintiffs; three for the heirs-at-law; some for one, some for others, and two for the grandchildren and the assignee of

(1) (1897) 1 Ch. 251. (2) (1870) 17 Gr. 386.
(3) (1876) 23 Gr. 244.

one of them. I see no reason for the same classes of parties severing in instructing counsel, and direct the attention of the Master to the subject on taxation. With that direction the costs of all parties will come out of the estate.

Re Shields, Shields v. *London and Western Trust Company* (1). This was an appeal by plaintiff from the judgment of Middleton, J. on an appeal from the taxation by the taxing officer of the costs of the defendants under several orders made in a matter originated by an application for an order for administration of the estate of James Shields. The judgment was affirmed. Middleton, J. in his judgment expressed the following opinion (p. 617):

> In cases of this kind, each defendant having a separate interest is justified in severing, if he sees fit; and, unless the Court at the hearing, in awarding costs, sees fit, in the exercise of its discretion, to provide that there shall be but one set of costs, each is entitled to his separate bill. The only exception to this general statement, at all relevant to this case, is that those who in truth represent the same estate and interest are not entitled to sever: mortgagors and mortgagees, execution creditors and their debtors, are not entitled to separate. This has been recognized as an established principle of equity for many years: for example, see the cases collected in Morgan on Costs, 2nd ed., p. 125.

The report notes that the Appellate Division affirmed the decision of Middleton, J. agreeing with the reason given by him for his order.

Re Murphy and Lindsay, Bobcaygeon and Pontypool Railway Company (2). In an action for compensation for lands taken for railway purposes, the claimants severed in their defence. Meredith, C.J. referred the case to the senior taxing officer to report whether the parties interested in the lands should be allowed two sets of costs. The taxing officer, after hearing counsel for all parties, made a report in which he said (p. 363):

> I should hold that all parties interested in a piece of land under the Railway Act, 1903, must appear together by one solicitor. The persons who on the arbitration herein appeared in opposition to the company were the life tenant, those who would take in succession on his death, or as beneficiaries on a forfeiture of his life estate, those who then became trustees for such beneficiaries, and the life tenant's mother, who was entitled to a yearly payment charged on the whole farm. Before the arbitration proceedings, one solicitor acted for all in negotiations with the company, which resulted in possession being given it. No reason appears for the employment of an additional solicitor on the arbitration * * * *

(1) (1920) 52 D.L.R. 615. (2) (1905) 6 O.W.R. 361.

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The proportions of their several interests could not be considered on the arbitration, but only the magnitude of one lump sum, during the ascertainment of which they could not be considered as having distinct shares * * * *

But the persons interested in the land are not defendants but plaintiffs. The nature of the case makes them such. Such is the actual procedure. And the Land Clauses Consolidation Act, 1845, on which the Railway Act is based (sec. 43), expressly makes them plaintiffs. As plaintiffs they would, of course, have only one solicitor.

No authority has been cited to me for allowing the claimants costs of severing as to solicitors upon the arbitration. I know of none. The cases cited to me are decisions under sec. 80 of the Land Clauses Consolidation Act (to which sec. 174 of our Railway Act is equivalent), and costs thereunder are in the discretion of the Court; and Judges have differed much as to giving costs to the several interests there separated or created.

This is the first such arbitration on which, to my knowledge, parties interested in a piece of land have asked for several bills of costs.

The report (p. 365) states that Anglin, J. adopted the senior taxing officer's report and requested him to tax the two bills of costs as one bill and to apportion the amount between the solicitors for the two sets of parties as he thought proper in the circumstances.

See also *Rex* v. *Commissioners of Taxes for St. Giles and St. George, Bloomsbury* (1), (also reported in (1915) 3 K.B., 768, under the heading of *The King* v. *Bloomsbury Income Tax Commissioners*).

There are a few cases in which two or more sets of costs were allowed. It seems appropriate to at least review briefly the most important.

Aldridge v. *Westbrook* (2). By certain marriage articles the husband covenanted with trustees to convey and settle certain real estates on the trusts mentioned therein. The articles not having been performed, a bill was filed for that object, to which the co-heiresses of the surviving covenantee were made parties. The bill prayed a specific performance, the appointment of new trustees and a conveyance to the co-heiresses or such new trustees. The co-heiresses lived at a distance from each other they were defended by separate solicitors. One of them put in a full answer to all the allegations in the bill, stating that, if she were a trustee, she submitted to act as the Court might direct on being paid her costs. The other put in a short

(1) (1915) 7 Rep. of Tax Cases, p. 59, at 73. (2) (1841) 4 Beavan 212.

answer, saying that she was a stranger to the matters, but that, if a trustee, she wished to relinquish the trust; and she submitted to act under the Court.

It was held by the Master of the Rolls (p. 213):

According to the facts as now represented, these two ladies are the co-heiresses of the surviving trustee. They never acted in common in the performance of the trusts, nor did they ever undertake to perform the duty which belonged to their ancestor: they appear also to have been living at a distance from each other, and therefore I do not think that they come within that very salutary rule, which prevents trustees from separating in their defences, and putting money into the pockets of third parties at the expense of the persons beneficially entitled. They are both, therefore, entitled to their costs as between party and party.

Boswell v. *Coaks* (1). An action to set aside the sale of a life interest to C. and B., on behalf of themselves and four other defendants, was dismissed by the House of Lords with costs. It was orderd that in taxing the costs the taxing master should consider whether any of the defendants who appeared separately had good reason for severing and if it should appear that they had not then the taxing master should allow only one set of costs or only as many as he thought right. He allowed the six defendants costs of separately defending.

It was held by North, J. that there was no appeal from the discretion of the taxing master. On appeal it was held that, as the House of Lords had delegated to the taxing master the decision of the question as to how many sets of costs should be allowed, no appeal would lie from his decision unless he altogether omitted to exercise his discretion.

In *Belchar* v. *Williams* (2), which was a partition action, it was held that the costs of all parties, including those of the mortgagees, must be paid first out of the proceeds of sale; that there is no fixed rule in partition actions, as there is in administration actions, that only one set of costs will be allowed in respect of each share of the property.

North, J. expressed the following opinion (p. 518):

I think, therefore, that in the present case the incumbrancers must be treated as if they were owners of a share, and must have their costs out of the fund. I am not, however, attempting to lay down any absolutely fixed general rule. It is quite clear, as I have already said, that the Court has a discretion as to costs, which it will exercise differently under different circumstances. In the present case, I think, the incumbrancers must be treated as owners of shares, and have their costs accordingly.

(1) (1887) 36 Ch. 444.

(2) (1890) 45 Ch. 510.

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Such a rule might, no doubt, work rather hardly in some cases; but the Court is strong enough to exercise its discretion so as that the costs shall be borne in the fairest way possible, having regard to the circumstances of each particular case.

Blakey v. *Latham* (1), a patent action which had been dismissed with costs. In delivering judgment Kay, J. held, as a matter of law, that the plaintiffs' patent was invalid, but expressed the opinion that "if the patent was valid" there had been an infringement. The defendants were partners, but after the action had been commenced and before trial the partnership was dissolved. The defendants severed and appeared by separate solicitors, though only one appeared at the trial by counsel, the other appearing in person and availing himself of the defence of his co-defendant. Questions having arisen before the Registrar as to the form of the judgment, the plaintiffs moved to vary the minutes by inserting a declaration that the defendants had infringed the plaintiffs' patent and by directing that the defendants should have only one set of costs.

Kay, J. said "he intended to give the defendants all their costs, and that whatever expense had been occasioned to them by the action the plaintiffs should pay".

Bagshaw v. *Pimm* (2) was an action to establish the third and, alternatively, the second will of a testator. It was separately defended by the executors of the first will and by two legatees thereunder. The legatees were interested in upsetting both the second and third wills, but the executors were only substantially interested in upsetting the third. The jury found that the execution of the two last wills was obtained by undue influence and the judge pronounced against them and for the first will. It was held by the Court of Appeal, reversing the judgment of Gorell Barnes, J. "that there was a sufficient divergence of interest between the defendants to justify the legatees in appearing by separate counsel and that, consequently, there was no good cause for depriving them of the costs of their separate appearance".

Petrie v. *Guelph Lumber Co. et al.*, *Stewart* v. *Guelph Lumber Co. et al.*, *Inglis* v. *Guelph Lumber Co. et al.* (3).

(1) (1888) W.N. 126. (2) (1900) P. 148.
(3) (1885) 10 O.P.R. 600.

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The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrong-doers. They were sued for conspiracy to defraud, which it was alleged they carried into effect by defrauding the plaintiffs respectively. The defendant McLean defended, meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McLean and believed that the statement by them and McLean, which was the foundation of the actions, was true. It was held that the taxing officer was right in allowing two bills of costs, one to the defendant McLean and one to the other defendants.

In appeal, Burton, J.A. made an order that only one appeal book should be printed and the three cases were argued together. Held that the taxing officer was right in allowing separate counsel fees in each case.

Melbourne v. *City of Toronto* (1). This was an action for damages for injuries caused to a drain, in which two contractors who had constructed the drain and the assignee of one of them were added defendants. The two contractors were partners when the drain was constructed, but had dissolved partnership before the action was begun. One contractor defended by one solicitor and the other and his assignee by another solicitor. The judgment dismissed the claim against the added defendants with costs. It was held by Armour, C.J. that there was no "law of the Court" which, under the circumstances of the case, justified the taxing officer in refusing to allow more than one set of costs to the added defendants.

Rose & Laflamme Ltd. v. *Campbell, Wilson & Strathdee Ltd.* and *Grand Trunk Pacific Railway Co.* (2). This case, relied upon by plaintiff, dealt with an appeal from a decision of the judge in Chambers disallowing certain items in the railway company's bill of costs allowed by the taxing officer and affirmed by the Master. As stated by Lamont, J.A., who delivered the judgment of the Court of Appeal of the province of Saskatchewan, "the items are limited to costs incurred by the railway company in examining for discovery an officer of their co-defendant, obtaining dis-

(1) (1890) 13 P.R. 346.

(2) (1923) 4 D.L.R. 92.

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covery and inspection of their co-defendant's documents and attending on the examination for discovery of one of the Railway Company's officers at the instance of their co-defendant, and the attendance on the production and inspection of their own documents. With the incurring of these costs the plaintiffs had nothing to do. The plaintiffs, however, have to pay the Railway Company's costs, and are therefore liable for such costs as were necessarily incurred by the company".

The learned judge referred to rules 252, 256 and 265 of the Rules of Practice and Procedure of the Court of King's Bench of the province of Saskatchewan, the first one referring to the notice requiring discovery of documents, the second one to the inspection of documents referred to in the pleadings or affidavits and the third one to the examination of parties before trial. I do not think that it would serve any useful purpose to reproduce these rules here.

Lamont, J., in his judgment, made the following observations (p. 97):

> Where a plaintiff brings two defendants into Court who have adverse interests, and he is called upon to pay the costs, he is liable for such costs as are necessarily incurred by them in ascertaining the facts upon matters in reference to which their interests are adverse; but he cannot be held liable for the costs incurred in inquiring into matters not directly concerned with the point of conflict between the defendants.

Mitchell v. *Martin and Rose* (1). This was an appeal by the defendants, who had severed in their defences from the refusal of a taxing officer to allow them separate costs. It was held by Dysart, J., of the Court of King's Bench of the province of Manitoba, as follows (p. 264):

> Where the interest of two or more defendants is diverse in any material respect, the defendants are entitled to sever their defences. They are not bound to link themselves up to each other's fortunes: *McDonald* v. *Cunningham* (1885, 3 Man. L.R. 39). And the consequence that the severed statements of defence incidentally include much matter that is common to both is immaterial. Being practically unavoidable, it is all taxable.
>
> But where the interests, though diverse, are not conflicting, there is no good reason why the defendants may not employ the same solicitor—at least up to the trial. And conversely, it is quite proper for a solicitor to act for them. But in such a case he is limited to one bill of costs, in which there should be but one set of items to cover all the common matters, and separate sets of items for separate matters. That is the course followed by Deacon in this case, and is the correct one: *McDonald* v. *Cunningham, supra.*

(1) (1925) 1 D.L.R. 260.

See also *Cameron, The Principles of the Law of Costs,* p. 76 *Widdifield, The Law of Costs in Canada,* 2nd edition, p. 110.

The law pertaining to costs in the province of Quebec differs from that of this Court and of the other provinces. However it may be convenient to make a brief reference to it in order to exhaust the subject. Costs under the Code of Civil Procedure of Quebec are not payable to the parties but to their solicitors. Article 553 enacts:

> Every condemnation to costs involves, by the operation of law, distraction in favour of the attorney of the party to whom they are awarded.

The only article of the Tariff of Advocates' Fees before the Superior Court referring to defendants severing in their defences is article 14, which reads thus:

> Whenever there are several defendants who sever in their defence, the plaintiff's attorney receives, on each additional contestation, one half of the fee allowed by article 25, plus one half of the enquête and hearing fees (art. 45-46), with also one half of the additional fee mentioned in article 5, if there be reason; the same rule applies equally to interventions and to all the other proceedings enumerated in article 48 of this tariff.

As may be seen, this article merely provides for the case where the action is maintained. It says nothing of the costs of defendants, who have severed in their defences, which may be taxable against the plaintiff. One has to make his own deductions. The jurisprudence has almost always been constant in allowing to each defendant pleading separately a complete set of costs: *Frothingham and Workman Ltd.* v. *Shean et al.* (1); *Brown et vir* v. *Winterbottom et al.* (2) *Tassé et vir* v. *Tassé et al.* (3); *Renaud et vir* v. *Chartier et al.* (4); *Lavergne dit Renaud* v. *Larivière et al.* (5); *Barclay's Bank* v. *Paton et al.* (6); *Protestant Board of School Commissioners of Outremont* v. *Cooke et al.* (7); *Claude* v. *Bélisle et al.* (8); *Dion* v. *Gagnon et al. et Vanier et al., mis-en-cause* (9); *Cimon et al.* v. *Fortin et al.* (10).

Contra: *Wallace* v. *Languedoc et al.* (11).

(1) 17 Q.P.R. 159.
(2) (1917) 19 Q.P.R. 162.
(3) (1917) 18 Q.P.R. 340.
(4) (1923) 25 Q.P.R. 242.
(5) (1910) 12 Q.P.R. 149.
(6) (1933) 38 Q.P.R. 72.
(7) (1899) 2 Q.P.R. 251.
(8) (1938) 41 Q.P.R. 274.
(9) (1924) 27 Q.P.R. 93.
(10) (1930) 34 Q.P.R. 127.
(11) (1902) Q.R. 21 S.C. 298.

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Of the decisions reviewed that *in re Murphy and Lindsay, Bobcaygeon and Pontypool Railway Company* is the most pertinent and I feel disposed to accept the principles therein laid down. I may add that the case of *Farr* v. *Sheriffe,* wherein it was held that trustees and *cestui que trusts* and next of kin of the same interest, although residing in parts of the country remote from each other, were entitled to only one set of costs, offers, on the point of residence, some relevance. The decisions in *Catton* v. *Banks, Ancell* v. *Rolfe, Re Vase, Carroll* v. *Harrison* and *Harbin* v. *Masterman,* though not so directly in point, uphold my view.

As stated by the Registrar all the defendants in the four cases had a common interest, namely to get the most for the properties expropriated. The cases offered no unusual difficulty. They were ordinary expropriation cases concerning properties of comparatively little value. I do not think that the matters at issue nor the amounts involved justified the retaining of the services of two solicitors.

The statements of defence filed on behalf of Martha MacPherson are in one case identical and in the other cases substantially similar to those produced on behalf of the other defendants. Moreover her statements of defence in the first, second and third cases are dated and were filed a day or two only after those of the other defendants. In the fourth case, her statement of defence was filed at the trial only, viz., on June 25, 1943, practically one month after the statement of defence of the defendant Florence Barrows McKelvey, because she was only added as defendant, at plaintiff's request, on that date.

True it is that the defendant Martha MacPherson was at the time of the expropriation, and had been for a certain time previous thereto, living in the United States. According to a statement by her counsel, she was not on friendly terms with the other defendants. Of this fact there is unfortunately no proof whatever.

When did Martha MacPherson become aware of the proceedings in expropriation and when did she instruct her counsel to look after her interests? We do not know; there is no indication in the record in this connection, except that her statements of defence followed very closely those of her co-defendants. However that may be, I do

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not think that there was any necessity to put in a separate defence nor that the attendance of two solicitors at the trials was required.

After listening attentively to counsel's arguments and taking notes thereof, perusing the decision of the Registrar and examining carefully the judgments relied upon by counsel and by the Registrar and a number of others, I have reached the conclusion to dismiss the appeals of the plaintiff and of the defendants. One bill of costs should be taxed in the first three cases, the costs so taxed to be paid to the parties in the ratio of their proportionate interest in the compensation money. Two bills of costs should be allowed in the fourth case, in which Martha MacPherson was added as defendant at the trial on plaintiff's motion. I do not feel inclined to interfere with the discretion of the taxing officer.

As both plaintiff and defendants are partly successful there will be no costs to either party on these appeals.

Judgment accordingly.