

of the defendants, for which she is in no way responsible. And why should the "estate" pay? It is easy to speak of "costs out of the estate;" but that means that the innocent beneficiaries under the will have to pay for the mistakes of the executors, a result which I shall not bring about if it is my power legally to prevent it. There are two innocent sets of persons (in the assumption that the executors have acted upon the advice of the solicitor said to have been first consulted), namely, the beneficiaries and the executors themselves; on one of these must fall a loss; it is clear equity that the loss should fall upon those whose mistakes occasioned it. The Rules leave the costs in my discretion, subject to the provision, Rule 1130 (2), that "nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules acted upon before the Ontario Judicature Act, 1881, in courts of equity."

There can be no doubt that the usual rule was and is that if litigation is occasioned by difficulty in the will, the act of the testator himself, the costs should be borne by the estate of the testator, in some cases the particular fund; but I do not find any such rule laid down where there is no difficulty at all in the will, and the litigation is occasioned by the wrongful though honest act of the executors. And the fact of legal advice being taken does not take the case any further; that simply establishes good faith, and has no further effect. Amongst many cases I find *Talbot v. Marshfield*, 2 Dr. & Sm. 285, L. R. 4 Eq. 661, L. R. 3 Ch. 622. There the trustees had acted in good faith (see L. R. 3 Ch. at p. 625), and the Vice-Chancellor had, in fixing the costs up to the hearing of the plaintiffs in litigation, occasioned by the wrongful though honest acts of the trustees, at the sum of £200, directed that the defendants should pay that sum out of the estate. The Court on appeal, however, held that the defendants should themselves pay these costs, the result being (p. 633) "to leave the hostile parties to pay their own costs of the proceedings, and exonerate the general estate of the testator." Even in England it will be seen that there was no rule requiring the payment of costs of executors or trustees out of the estate or fund. And the cases in the English Courts as to the protection to be given to executors should, in my humble judgment, be read with caution as applicable to cases in Ontario. There the executor has no right to compensa-