Privy Council Appeal No. 52 *of* 1934.

Harold Longworth and others - - - - *Appellants*

v.

William Wells Robinson and others - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES IN ITS EQUITABLE JURISDICTION.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH APRIL 1935.

Present at the Hearing:

LORD BLANESBURGH.
LORD ATKIN.
LORD WRIGHT.
LORD ALNESS.
SIR LANCELOT SANDERSON

[*Delivered by* LORD BLANESBURGH.]

This is an appeal from part of a decretal order dated the 7th December, 1933, made by the Supreme Court of New South Wales in its equitable jurisdiction. The order was made upon an originating summons taken out on the 7th July, 1933, for the determination by the Court of certain questions of construction and administration arising under the will and codicils and in relation to the estate of Mr. William Longworth, a mine proprietor, of Karuah, in New South Wales, who on the 5th December, 1928, had died, domiciled in the State and possessed of an ample fortune.

The summons was heard by Sir John Musgrave Harvey, Chief Judge in Equity, and sundry of the questions then submitted to and decided by him are no longer in debate. The questions to which this appeal is confined arise between the appellants as specific legatees of certain shares of the testator in the Australian Woollen Mills, Limited, and those respondents who were his residuary legatees or their personal representatives. How upon the true construction of the testator's will and the 11th codicil by which these shares are to an extent charged therewith is the burden of State death duty and Federal estate duty to be borne as between the shares on the one hand and the residuary estate on the other?

State probate duty and Federal estate duty are assessed upon values of the estate of a deceased person determined in accordance with the Acts by which the duties are respectively imposed. State probate duty is payable, as is pointed out by the learned Chief Judge, within six months of the death, and, for so long as it remains unpaid, it carries interest from that time at the rate of 10 per cent. per annum. Federal estate duty also carries interest at the same rate from the date on which it becomes due. The raising of these duties with sufficient promptitude to escape penal interest is frequently beset with difficulty inasmuch as probate is not issued to executors until the probate duty is paid, while their title to deal with the testator's assets out of which payment must ultimately come is not complete until probate is granted. Accordingly it is not uncommon, as the learned Judge puts it, for draftsmen who foresee the difficulty to endeavour to meet it, in advance. In the present instance it is by the 11th codicil of the will that this attempt is made. The codicil, however, embodies no detailed scheme; the Court, as the learned Chief Judge indicates, being left to supply all those details which, although not expressed, must be taken from what the testator has said to be within his purpose and intent. And the task has not in this instance been an easy one.

While it is of course upon the effect of the codicil itself properly construed that the questions at issue must ultimately depend still in a measure, the true meaning to be attached to its words, and, to an even greater extent, the proper order of administration resulting therefrom, are disclosed by the terms of the will and the codicil read together, and as these terms must be dealt with at some time it will not be inconvenient to refer to them at once.

The will is copious and elaborate. Its scheme, however, in aspects now relevant is clear enough. It begins with a pecuniary legacy of £500, and the gift of an annuity of £700 to the testator's widow to be paid by equal quarterly instalments. The legacy is to be paid within and the first instalment of the annuity to be paid at the expiration of three calendar months after his death. There follows a large number of pecuniary legacies, many of them to servants and to old friends, obviously complimentary in character, and all to be paid " free from Probate and Estate Duties." These are succeeded by sundry specific " gifts and bequests." Then follow devises of land at Karuah to trustees of the Roman Catholic Church; of specified house property to the testator's sister, the respondent, Alice Longworth; of other specified hereditaments to his sister, Mary Robinson, another respondent; of a cottage and land at Karuah to one James Oliver; of his " Dulwich " property with appurtenances to his nephew, Thomas Hart, in settlement; of his undivided interest as tenant in common with his brother, Thomas

Longworth, in the Ashtonfields Collieries and Woodford and Buttall estates, to the same Thomas Longworth.

Then follows immediately what may be described as the testator's first residuary gift—it is important, as will be seen, to note that in his will there is a first residue; a second or intermediate residue; and a third, or ultimate residue.

The first residuary gift is introduced by these words :—

> " I give devise, appoint and bequeath all the rest and residue of my real and personal estate of whatsoever nature and kind and wheresoever situate unto my trustees upon and subject to the trusts, powers, directions, declarations and provisions hereinafter contained "

The foremost of these is a devise for the benefit of the testator's widow during widowhood of his residence " Glenroy," furnished and equipped with power and authority to his trustees—a power which has in fact been exercised—to purchase for her a suitable house elsewhere should she desire to give up residence in " Glenroy." The follow devises of further specific properties, in settlement to or for the benefit of each of the respondents, who are also, as has been said, the ultimate residuary legatees; and after a further specific bequest and a direction that certain debts due to him at his death are to be released, there follows the constitution of the second or intermediate residue with the trusts of which on this appeal their Lordships are more immediately concerned. The terms employed so far as now material are as follows :—

> " And as to all the rest, residue and remainder of my real and personal estate I direct that my trustees shall as conveniently [as] may be after my decease sell, call in and convert into money the same or such part thereof as shall not consist of money . . . . and shall with and out of the moneys so produced and such part of my estate as shall consist of money pay my funeral and testamentary expenses and debts and all probate and other duties which may be levied on my estate or to which the same may be liable, and " [here is reached the third and ultimate residue] " shall stand possessed of the residue of my said residuary trust estate in trust after making due provision for the payment of the aforesaid annuity to my wife and . . . . for such other contingencies as my trustees may think proper to divide the same equally between and among " [his six sisters and sister-in-law, all of whom or their legal representatives are respondents to this appeal] " for their sole and separate use and benefit."

Later, in a series of supplementary provisions, there is found a declaration that the trustees may " if they think it advisable in the interests of the estate " postpone the sale and conversion of the residuary real and personal estate or any part of it for as long as they shall think fit, and this declaration is followed still later by a direction that the trustees are to have power " to mortgage or charge any part of my residuary real and personal estate as they may consider requisite or necessary to provide for any payment directed to be made under this my will."

To this general statement of the will a reference to three of its specific provisions may here be conveniently added.

First, the testator's house " Glenroy " is included in what their Lordships have called the first residue. Primarily devised for the occupation of his widow during life or widowhood it is the subject of elaborate subsequent limitation. Direction is given for an annual payment for upkeep " to be paid from and out of my residuary estate." There can, their Lordships think, be no doubt that the second residue is here referred to and the payment is to be made subsequent to the charge for duties. Secondly, amongst the trusts of the first residue is one for the executors and trustees, in the event of the widow desiring to relinquish residence at " Glenroy," to purchase for her occupation a residence at Sydney at a cost of from £3,000 to £5,000. This purchase price is, their Lordships think, payable out of the first residue and therefore in priority to the duties although under the succeeding provision, that on the death or re-marriage of the widow the house " shall fall into and form part of my residuary real and personal estate," the second residue is pointed at.

Thirdly, there is an annual sum of £250 to each of the trustees and executors. This is payable out of the second residue subsequent again to the duties.

Summarizing this rough analysis of a very lengthy and somewhat involved document, their Lordships may usefully emphasise features of it which throw a light on questions arising later upon this appeal.

Except in one event which has not arisen and is provided for, the general dispositions of the will are all based on the assumptions that the estate will at the death be sufficient to provide for them all, and that the administration will not be interrupted or disturbed by the intrusion of creditors or other claimants not bound by the provisions of any will.

And these dispositions are in some respects unusual, and one of them at least, the charge of debts and duties, has since the addition of the 11th codicil become significant. Strangely enough the testator charges only on his second residue his funeral and testamentary expenses, debts and duties and, as has been seen, it is after satisfaction of that charge that the annual payments to the executors and trustees are payable out of the same residue. But no fund is anywhere designated as that out of which the other pecuniary legacies are to proceed. The result is that these must come out of the general estate, like the specific bequests and devises, before any residue is constituted, and therefore in priority to any payment charged only on the second residue. The importance of this on the present appeal will be presently manifest.

It is noticeable that there is no direction in the will contemplating postponement beyond the normal in payment of any immediate legacy, and one legacy, namely, that to the testator's widow, is to be paid within three months after his death. It will be noticed also that the sale and realisation of the testator's second residuary real and personal estate, out of the proceeds of which the duties are to be paid, is to be

made as soon as conveniently may be after his death, and that the only postponement authorised is one which his executors and trustees may think advisable in the interests of the estate. So much for the will.

Only two of the eleven codicils call for detailed observation. The series as a whole is indicative of the instability of the testator's testamentary wishes, gifts large in amount made by one codicil being revoked by another. Further pecuniary legacies are bequeathed and specific devises made. These rank with the legacies and devises in the will contained. An annuity given by the 8th codicil is to commence with the testator's death and the first quarterly payment to be made at the expiration of three calendar months therefrom By the 5th codicil the widow's annuity is charged on certain specified real estate. It thereby assumed in effect, the quality of a specific or demonstrative legacy.

The two codicils which are really important are the 10th and 11th.

By the 10th codicil executed on the 29th October, 1927, the testator bequeathed to the present appellants, two of whom it will be seen are executors, in specified proportions the whole of his 75,000 shares in the Australian Woollen Mills, Limited. These shares, which but for this bequest, would have been part of and included in the second residue, were at the death valued at £131,250.

On the 2nd December, 1927, the testator executed the 11th codicil already mentioned.

The codicil is in the following terms:—

> "This is an eleventh codicil to the last will and testament of me William Longworth which will bears date the 12th October, 1912. Whereas by the 10th codicil to my said will I have given and bequeathed my shares in the Australian Woollen Mills, Limited, to the several persons named in such codicil. And whereas it may be found necessary at my decease to raise by way of lien, charge or security over property in my estate the whole or part of the moneys required to satisfy and discharge the State and Probate and Federal Estate Duties attaching to my estate. And whereas I consider it will be most convenient for my trustees and executors to raise the required amount for duties upon the security of my said Australian Woollen Mills shares. Now therefore I declare that the gifts and bequests of the said shares shall be subject to any lien, charge or security which my trustees and executors may have to give for the purpose of raising all moneys which may be required (after taking into consideration and crediting towards such duties the value of the Commonwealth War Loan Bonds held by me) to pay and discharge the said Probate and Estate Duties. And I further direct my trustees and executors to apply the dividends, bonuses and other receipts arising from the said shares in repayment of the moneys due upon any such lien, charge or security and upon full satisfaction and discharge thereof. I direct my trustees and executors to do all things necessary to transfer the said shares to the several persons named in my said 10th codicil. And in all other respects I confirm my said will and codicils."

The remaining relevant facts may be shortly stated. On the 30th January, 1929, probate of the testator's will and codicils was duly granted to his executors, the appellants, Harold Longworth and John William Crane,

and the respondent, William Wells Robinson. A summary of the estate at his death, as then valued, shows a dutiable aggregate of £383,777 6s. 11d. This total includes sums amounting in all to £30,224 4s. 4d., representing gifts made by the testator within three years of his death. These sums, of which account had to be taken for the purpose of State death duty, have been referred to in the proceedings as the notional estate. Amongst the particulars of the actual estate at the death were rents collected and in hand, a sum standing to the credit of the testator's current account with his bankers, Commonwealth Inscribed Stock for £25,000 and Commonwealth Bonds. These items are mentioned in the order of the learned Chief Judge and are conveniently referred to now. With interest accrued at the date when the duties were paid, they or the proceeds of such of them as had then been sold, represented an aggregate sum of £28,839 4s. 5d. The State death duty amounting, as finally adjusted, to £77,977 19s., and the Federal estate duty amounting to £40,748 6s., were both duly satisfied by February, 1930. By purchasing at a discount bonds accepted in payment of duties at their face value, the executors were able to reduce the final estate duties to £117,757 0s. 8d.

The payment of these duties in full was financed by the Commercial Banking Company of Sydney—to be referred to in this judgment as the bank. The difficulty in now adjusting the rights of parties in relation to that finance has been greatly aggravated by the fact that in their arrangement with the bank the executors seem to have had little or no regard to the provisions of the 11th codicil or to the very qualified charge upon the Woollen Mills shares thereby authorised. What happened was this. Payment of the State duty became urgent on the receipt on the 27th September, 1929, of an assessment notice. The executors at once proceeded to arrange with the bank for the closing of their then temporary account, and for the opening of a general estate account with the privilege to overdraw up to £67,000 to meet State death duty. The bank insisting upon security, the formal charge taken, and dated the 25th October, 1929, although confined to the Woollen Mills shares was a charge for all moneys owing by the executors on current account and was in no way limited to advances made to meet death duties with which alone the shares were by the codicil specifically burdened. All advances thus secured were to carry interest at current rates; there was reserved to the bank the power usual in a banker's charge to sell the shares, upon failure to make payment in full on demand of all moneys then due from and unpaid by the executors. The charge was only accepted by the bank on the verbal undertaking by the executors to proceed to raise the moneys necessary to pay it off by sale or realisation or mortgage of specified properties and assets of the testator, and on an

agreement by them not to distribute any portion of the estate without the leave of the bank. In other words the terms of the charge upon the shares actually created in favour of the bank was in no sense the measure of the charge authorised upon them by the 11th codicil.

The overdraft so secured was immediately taken. On the same 25th October, 1929, the executors drew on their general estate account a cheque for £78,717 3s. in payment of State death duty as then adjusted, thereby leaving the account overdrawn to the extent of £63,456. Since then, by crediting against their overdraft as the executors say, " all income received by [them] in the estate and from the realisation of part of the residuary estate " there was owing to the bank at 30th April, 1933, the sum of £25,811 12s. 8d. This statement, however, seems to take no account of the manner in which at a date subsequent to the 25th October, 1929, the Federal duties were paid, nor to the payments on other accounts made out of the estate since that date. It remains in doubt also whether the dividends on the Woollen Company's shares as received were specifically applied in reduction of the overdraft. These dividends seem nowhere to be specifically referred to at any date subsequent to the charge. This sum £25,811 12s. 8d. is, in short, in no way a figure with regard to which the rights of parties can now be adjusted.

It was, however, the request made by the bank for its liquidation which, in regard to the matters now before the Board, led to the issue of the originating summons already referred to by Mr. William Wells Robinson—the one executor with no personal interest in the questions which it raised.

The summons asked in question 3 whether the securities described in the 11th codicil as Commonwealth Bonds included the Commonwealth Government Inscribed Stock held by the testator at the date of his death; it asked further in question 7 whether liability for duty in respect of the notional estate was imposed on the estate passing under the will and codicils of the testator. To each of these questions the answer of the learned Chief Judge was in the affirmative and neither answer was in the end questioned before the Board.

Their Lordships are indeed concerned only with the two remaining questions on this subject. These as originally framed were as follows:—

> " 2. Is liability for payment of (A) State Death Duty and/or (B) Federal Estate Duty on the dutiable estate of the said testator imposed on the residuary estate or on the shares in the Australian Woollen Mills, Limited, mentioned in the 11th codicil or on some other, and what part of the estate and whether exclusively or otherwise?
>
> " 4. Are the [Commonwealth War Loan Bonds] primarily liable for payment of the whole or any part of the said State Death and/or Federal Estate Duties? "

It is clear from his judgment that the learned Chief Judge rightly recognised that the second question on the summons, in view of the action of the executors just detailed had to be subdivided. On subdivision the initial question was for what sum the shares could under the 11th codicil be properly charged to the bank; and the next how that charge validly created was to be liquidated.

On the first of these questions His Honour came to the conclusion that the charge could not exceed the difference between the amount of the duties and the items already referred to and totalling in all £28,839 4s. 5d. In other words, taking the State death duty and the Federal estate duty together, at £117,757 0s. 8d., deducting therefrom the £28,839 4s. 5d., and applying towards payment of the balance the dividends paid on the Woollen company's shares between the testator's death and the date of payment of the duties—£16,875 in all—he held that the charge on the shares authorised by the 11th codicil was on that date—the 7th February, 1930—a charge for £72,042 16s. 3d. On the second of the questions he held that that charge must be paid off by the accruing dividends on the shares exclusively. In a question between their holders and residue, the latter was, he thought, entirely exonerated. His Honour reasoned thus. He saw in the introductory words of the 11th codicil an intimation that the testator was about to outline a scheme under which, for the purpose of meeting the duties in question, the Woollen Mills shares would be brought to the aid of residue still under the will charged with these duties. But he found in the words immediately following a provision so express that it compelled him to hold, in answer to the initial question, that these shares with the other items already referred to were alone charged with the payment of the duties, and, in answer to the second question, that the liquidation of the charge was to come only from the accruing dividends on the shares.

Now, their Lordships have not themselves found anything in the codicil which would prevent a Court of construction from placing upon its provisions read as a whole the meaning which seemed to the learned Chief Judge to be foreshadowed in its introductory words. Rather the contrary. It is for instance very significant that the codicil does not revoke the provision made by the will for the discharge of these duties. The charge of them upon the second residue remains intact and in full force. Again, the occasion chosen in the codicil for the creation of the charge upon the shares is striking—only if at the testator's death it be found " necessary " to raise upon some property in his estate the whole " or part " of the duties in question. And only then are the shares chosen for the service because the testator considers it will be most convenient by their aid to raise the necessary money. It is convenience only that in terms is to be attained by the charge, it being, as their Lordships

think, the implication of the whole that so soon as the requisite moneys for the purpose are forthcoming from residue and the dividends on the shares the charge on the shares themselves, no longer either necessary or convenient, will disappear. And the implication that the shares are only charged in aid their Lordships further find in the concluding provision of the codicil. Thereunder even if the bank—to adopt a generic term indicating the chargee of the shares—enforces its security and obtains repayment of its advance by their sale, the shares must still be finally made available for transfer to the legatees, a result only to be obtained, if at all, at the expense of the general estate. In other words the continuing charge on residue is at no point displaced.

And when the intermediate words of the codicil are examined nothing in conflict with this is found. The reference to the Commonwealth War Loan Bonds points to no necessary conclusion that these bonds are, with the shares, to be the only items of property made applicable to the payment of the duties—even the learned Chief Judge, as his order shows, has not so regarded them. Rather, as it seems to their Lordships, is reference had to the bonds in order to make it plain that, accepted at their face value, as these are for estate duties, such advantage is not to be lost to the testator's estate by anything in his 11th codicil contained.

It is not to be claimed for this codicil that it is well drawn. But its meaning as a whole is not, their Lordships think, obscure. The charge is on the shares, but it is the dividends upon them alone that are finally devoted to its liquidation, and these dividends only for so long as the proceeds of residue duly applied remain with the aid of the dividends insufficient for that purpose. So soon as the moneys from the two sources combined suffice to satisfy the charge, then, as between the shares and residue, the charge, whether actually released by the bank or not, is gone, and it becomes the duty of the executors, if necessary at the expense of residue, to procure a transfer of the shares to the legatees, carrying all subsequently accruing dividends along with them. The whole position may be shortly expressed thus. So soon as the " necessity " for some charge has arisen and the charge upon the shares has been given, residue, aided by the accruing dividends upon the shares, remains applicable to and should be applied in the liquidation of the charge, just as it would have been applied in discharge of the duties themselves had these, and not the charge in their place, still remained payable.

The first question accordingly may now be phrased thus. Was there, in the event, any " necessity " to charge the shares to the bank at all? If so, for what amount was the charge authorised?

Now the accounts of the estate as at the testator's death are very fully set forth in the record, and they point, as their Lordships think, to the " necessity " for some charge if the duties were to be paid in due course, but no necessity for a charge of the amount of £72,042 16s. 3d. as found by the learned Chief Judge. Their Lordships have some difficulty in appreciating how on the construction of the codicil which he adopted, His Honour was able to take into account in reduction of the charge any items of property other than the War Loan Bonds and the then accrued dividends on the shares. On the construction, however, now placed on the codicil by the Board it would appear from the accounts that many items, beyond the others added by the learned Judge, must be included. It follows from what has been already said that these should comprise all moneys then available for payments of duties in accordance with the terms of the second residuary gift which were not at the time required for payment of debts or testamentary expenses. The amount of these, if not ascertainable by agreement, must be ascertained by inquiry.

So much for the first of the two questions. With the second question the learned Chief Judge was not called upon to deal. It is the more difficult of the two.

Accepting as applicable for the purpose of argument the principle just enunciated—a principle which during the hearing was described as the *via media*—counsel, Mr. Simonds and Mr. Maughan, were in difference as to the times at which and the extent to which the contributions from residue towards satisfaction of the charge were to be forthcoming.

Mr. Simonds's contention for the appellant legatees of the shares in substance amounted to a claim that so long as the charge existed the estate should be administered as if it were insolvent. He was willing to concede that debts and funeral and testamentary expenses might be paid before any moneys were treated as applicable to a reduction of the charge. But until the charge was satisfied there could be no payment to any beneficiary; no assent to any devise, no payment of any pecuniary legacy or annuity; no delivery over of any specific bequest.

Their Lordships are unable to accept that view. They were informed, and their judgment now is based upon the statement that the estate is for every purpose and from every point of view solvent—not fully realised but amply solvent. There has been no intrusion by any outside creditor or claimant which would interfere with the order of administration by the will directed. And nothing of the kind is anticipated. The ultimate residue may not be large. But there will be an ultimate residue. The appellants under the 11th codicil, when claiming contribution from the estate towards the extinction of the charge upon their shares are not in the position of outside creditors of

the testator; the residuary legatees and they are alike bound by the will and codicils, and they must each of them take what is provided for them thereunder, no more and no less. And just as it is clear, that the initial charge on the shares was one imposed for convenience of administration only; so the existence of that charge is not to be permitted to interfere with or disturb the testator's prescribed order of administration. It seems to their Lordships, on the footing always that the estate remains solvent, that all payments by the will or any codicil directed, which, on the analysis of the will already made in this judgment, are either outside, or prior to or *pari passu* with the charge for duties therein contained remain punctually payable as if there were no 11th codicil. Equally, on the other hand, must the executors remember that the sale and conversion of the testator's second residue, out of which, *inter alia*, the duties are to be met, is to be made as soon as conveniently may be after the testator's death, and that no postponement of such conversion would, as it must be, in the interests of the testator's estate if its purpose was only in the result to increase the dividends on the Woollen Mills shares made applicable under the 11th codicil for the liquidation of the charge upon the shares.

Their Lordships will now embody their views as above expounded in a form of order which may properly they think be substituted for the order made by the learned Chief Judge in answer to paragraphs 2, 3, 4 and 7 of the originating summons.

The order should, they think, be in the following terms:—

> Order that so much of the decretal order of the 7th December, 1933, as ordered that the State death duty and the Federal estate duty paid in respect of the estate of the testator amounting to £117,757 0s. 8d. was to be paid and satisfied as follows: Firstly by applying for the purpose the rents collected and in hand at the date of the testator's death, namely £768 8s. 8d., the money in the testator's current account at that date, namely £721 16s. 1d., the Commonwealth Inscribed Stock of the face value of £25,000, comprised in the estate the interest thereon to the date of the payment of the estate duty, namely £1,939 19s. 8d., and the proceeds of sale of the Commonwealth Bonds comprised in the estate, namely £409, the total of the said sums amounting to £28,839 4s. 5d., and secondly by raising the balance of the amount by a charge on the shares in the Australian Woollen Mills, Limited, comprised in the estate, and after taking into account dividends paid on the shares between the date of the testator's death and the date of payment of the estate

duty totalling £16,875 the amount of the charge on the shares on the 7th February, 1930, was £72,042 16s. 3d. be discharged.

And declare that the State death duty and the Federal estate duty (including the duties payable on the notional as well as the beneficial estate of the testator) paid in respect of the estate of the testator amounting to £117,757 0s. 8d. are to be treated as payable and debited in account in manner following that is to say :—

(*a*) By treating as applicable towards the payment thereof the rents collected and in hand at the date of the testator's death, namely, £768 8s. 8d., the money in the testator's current account at that date, namely £721 16s. 1d., the Commonwealth Inscribed Stock of the face value of £25,000, comprised in the estate the interest thereon to the date of the payment of the estate duty, namely £1,939 19s. 8d., and the proceeds of sale of the Commonwealth Bonds comprised in the estate, namely, £409, the total of the said sums amounting to £28,839 4s. 5d.

(*b*) By treating as applicable towards the payment thereof all other moneys received by the executors which were or in due course of administration as prescribed by the will of the testator should have been available to the executors for the payment of death duties at the respective dates of payment thereof.

(*c*) As to the balance required for the payment of the duties by treating the same as charged to the Commercial Banking Company of Sydney upon the shares in the Australian Woollen Mills, Limited, specifically bequeathed to the appellants by the 10th codicil to the testator's will.

And declare that there should be treated as applied in the reduction of that charge first all dividends accruing upon the shares during the subsistence of the charge and secondly all moneys which have been or shall be received by the executors since the respective dates of payment of the duties from the residuary estate of the testator or from any realisation thereof applicable in due course of administration as prescribed by the will of the testator to the payment of the State death duty and the Federal estate duty aforesaid.

And declare that for the purpose of ascertaining what moneys were in due course of administration

available to the executors for the payment of duties at the respective dates of payment thereof or have been or shall be from time to time available after those dates for the reduction of the charge on the shares, no moneys actually then expended in the discharge of or due in respect of funeral or testamentary expenses or the debts of the testator are to be treated as so available.

Liberty to apply to the Supreme Court for any inquiries or accounts or orders that may be necessary to give effect to the above declarations and the respective rights of the parties resulting therefrom.

And their Lordships will humbly advise His Majesty accordingly.

The question of the costs of this appeal is not simple. The contest before the Board has been one, in effect, between the residuary legatees and those whom they represent on the one hand, and the Woollen Mills shares legatees on the other. The view taken by their Lordships is not that put forward from either quarter. It seems hardly to be just therefore that all the costs should be borne by one side or by the other, or that in such a contest the whole burden should fall on residue merely because it is residue.

Moreover an order for payment of all costs out of residue might result in this: that at the last these would all be payable out of the dividends on the Woollen Mills shares —a result for which there is no warrant. In order therefore to attain an end which, in every event, will be justifiable, their Lordships think that the appellants and the respondents other than the respondent executor should each pay their own costs of the appeal. The respondent executor will take out of the residue the proper fund for their payment such costs as he has incurred in the appeal, taxed as between solicitor and client. Their Lordships leave any order as to costs made by the learned Chief Judge entirely undisturbed.

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In the Privy Council.

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