REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1912-1913.

[HIGH COURT OF AUSTRALIA.]

RAMSAY AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

LOWTHER AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1912.

SYDNEY, *Aug.* 7, 8, 9, 13, 21, 22; *Oct.* 9, 21.

Barton and Isaacs JJ.

Will—Construction—Gift of "moneys"—Specific gift—Direction to pay legacies out of rents and profits—Charge on corpus—Gift of policy moneys charged by testator in his lifetime—Exoneration by specific devisees of real estate—Contribution—Marshalling—Payment of mortgages.

A gift by will of "all moneys stock and funds which I shall die possessed of" is specific in the absence of anything in the context showing that "money" is intended to mean "personal estate."

A direction to a life tenant to pay certain legacies out of the rents and profits of the estate of which he was made life tenant was held not to charge the legacies on the corpus of the estate.

Where there is in a will a general direction to pay debts, and the general personal estate of the testator not specifically bequeathed is insufficient for

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

payment of his debts, a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money is entitled to exoneration by the specific devisees of real estate in respect of payment of the incumbrance.

In re Butler; *Le Bas* v. *Herbert*, (1894) 3 Ch., 250, not followed.

A testator by his will after directing payment of his debts and funeral and testamentary expenses as soon as could conveniently be done, and giving certain household property to his wife absolutely, gave and bequeathed "all moneys stock and funds which I shall die possessed of" and all moneys payable under two policies of assurance on his life "and all benefit derivable therefrom" to his wife "upon trust to pay and apply the same as in manner provided." He then gave certain house property to his wife for life "subject always that she remains single not otherwise as hereinafter is provided and also subject to the payment out of the rent and income thereof of all interest moneys costs and charges, taxes &c. which shall be or become due by virtue of" two mortgages existing over different portions of the house property, and also subject to his wife keeping all the house property in repair. He also declared that this devise was subject to, and he directed his wife to pay, certain legacies out of the rents and profits of the house property, or out of the moneys he should die possessed of or the policy moneys. He further declared that the devise should be subject to his wife giving up all her right to certain allotments of land which he had transferred to her, and that she should sell those allotments as soon as convenient upon trust to pay and apply the proceeds "together with the balance of moneys remaining after payment" of the legacies in paying off the mortgage debt on the house property; "any money remaining thereafter" he gave absolutely to his wife. On the death or re-marriage of his wife he gave and devised all the before mentioned real estate and other land to his children. The life policies were mortgaged by the testator during his lifetime. The testator's widow gave up her right to the allotments of land.

Held, (1) that the gift of "all moneys stock and funds which I shall die possessed of" was specific and not residuary; (2) that the devise to the widow of the house property was not subject to her paying out of the rent and income thereof the principal of the mortgage debts upon it as well as the interest; (3) that the legacies were not charged on the corpus of the estate; (4) that the testator's widow was bound to apply the rents and profits of the house property in the first instance to payment of legacies so as to leave as much as possible of the moneys the testator died possessed of and of the policy moneys for payment of the mortgage on the house property; (5) that the income received by the widow from the allotments which had been transferred to her should be applied in reduction of the principal of the mortgages, leaving the interest thereon to be paid out of the rent and income of the house property; and (6) that the widow was entitled to be exonerated out of the real estate devised by the will in respect of the mortgage debt on the life policies.

The mortgagees pressing for payment of their mortgage debts, an arrangement was made to borrow the money from a new mortgagee, to whom the old

mortgages were to be assigned. For that purpose, and in order to correct an error of boundaries caused by an encroachment of one of the houses on an adjoining block of land, an indenture was entered into between the widow, the remaindermen and the new mortgagee, whereby the widow charged her interest in the mortgaged property with repayment of the principal and interest of the mortgage debts, and covenanted for herself her heirs, executors and administrators to pay on demand the moneys advanced by the new mortgagee. The widow also agreed in writing with the new mortgagee that all the properties directed by the will to be sold, or which she was thereby empowered to sell (which included other lands than those in which the widow had a life interest), should be so disposed of, and that the proceeds should be appropriated in reduction of the mortgage debt, and that the title deeds of those properties should be held to further secure the mortgage debt.

Held, that the widow did not thereby, as between herself and the other beneficiaries, assume the burden of paying off the principal of the mortgage debt.

Decision of the Supreme Court of New South Wales (*Rich* A.-J.) varied.

APPEAL from the Supreme Court of New South Wales.

Edward Lowther, who died on 13th June 1892, left a will, dated 18th April 1892, which, so far as is material, was as follows :—

" This is the last will and testament of me Edward Lowther of Woollahra near Sydney in the Colony of New South Wales master mariner First I direct the payment of my just debts funeral and testamentary expenses as soon as can conveniently be done after my decease I give and bequeath unto my dear wife Fanny or Frances Lowther all my household furniture plate linen and effects with the exception of the furniture and things in the room at my residence now occupied by my son Frederick Edward Lowther to whom I bequeath the same together with the large oil painting of myself absolutely I give and bequeath all moneys stock and funds which I shall die possessed of also all moneys which shall arise or become payable on my death by virtue of two policies of assurance effected by me upon my life in the office of the Australian Mutual Provident Society numbered respectively — for the several sums of three hundred and seven hundred pounds and all benefit derivable therefrom to my said wife Fanny Upon trust to pay and apply the same as in manner hereinafter provided I give and devise all those nine houses and

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

land now known as Lonsdale Terrace situate and being in John Street Woollahra aforesaid Also the house in which I now reside called 'Wellington House' and the adjoining house called 'Nelson House' and grounds both situate in Wallis Street Woollahra aforesaid to my said wife Fanny Lowther for the term of her natural life subject always that she remains single not otherwise as hereinafter is provided and also subject to the payment out of the rent and income thereof of all interest moneys costs and charges taxes &c. which shall be or become due and owing by virtue of the existing mortgages over the said several properties and also to my said wife at all times keeping the same properties during her life in thorough and perfect repair and good condition And this devise is also subject to And I direct my said wife to pay the following legacies out of the rents and profits of the said premises as soon as she can conveniently do so after my decease or out of the moneys I shall die possessed of or the moneys which shall come to her out of the aforementioned life policies that is to say to pay thereout to my sister-in-law Jane Taylor of Moore Park Road widow the sum of one hundred pounds for her own sole and absolute use and benefit free from the debts or control of any husband her receipt alone to be a good and sufficient discharge therefor And also to pay into the Sydney Savings Bank or Government Savings Bank to the credit of each and every of my grandchildren who shall survive me a sum of twenty-five pounds each to be invested therein for their sole and individual benefit till they shall attain the age of twenty-one years And I direct that in the event of the death of either of my said grandchildren (unless married in which case his issue shall take his parents' share) before he or she shall attain their majority then the share of such of my grandchildren so dying (save as beforementioned) shall go and be equally and evenly divided amongst those who shall survive and in case only one of my said grandchildren (save as aforesaid) shall live to attain their majority then the whole of the moneys so invested shall together with all interest go absolutely to such one child And I declare the aforesaid devise to be further subject to her giving up all right title and interest in and to the allotments of land fronting Waverley Road and Wallis Streets which I transferred to her my said wife

which allotments I hereby direct shall be sold by her as soon as convenient may be after my decease most advantageous so to do thereafter in my said wife's discretion upon trust to pay and apply the proceeds arising out of the sale of the allotments together with the balance of moneys remaining after payment of before-named legacies in paying off the mortgage debt and interest over the aforesaid Lonsdale Terrace any money remaining thereafter I give absolutely to my said wife and from and after the decease of my said wife or immediately upon her marrying whichever shall first happen I give and devise the whole of my said before-named real estate together with the land (or proceeds thereof which my wife is hereby empowered in her discretion to sell) situate at Balaclava and Mount Druitt unto my son Frederick Edward Lowther and to my daughter Lilly Aitken Lowther now the wife of Alfred Ramsay and to their heirs absolutely as tenants in common the share of my said daughter to be held by her free and absolutely clear and independent of her present or any future husband as if she were a feme sole and in no way liable to his debts or engagements her receipt alone to be valid and effectual But I declare that neither of my said children shall in any way mortgage or anticipate his or her share and in the event of either of them so doing or becoming bankrupt the share of such child son or daughter as the case may be shall be forfeited and I direct that such share shall thereupon become vested in my trustees hereinafter named upon trust to collect get in and pay the rent interest or income arising from such forfeited share being that of my son to his wife from time to time as the same shall be available for the benefit maintenance and support of herself and her infant children till they shall become of age upon which event the share so forfeited shall be divided evenly and equally between all of them and in the event of my said son leaving no such issue then I devise that his share so forfeited shall be held by my said trustees for my daughter Lilly Aitken Lowther and her heirs free and clear from any right title or interest whatsoever of any husband as aforesaid And in the event of my said daughter anticipating her share under this my will the share of my said daughter shall immediately thereupon become vested in my said

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

trustees (in like manner as I have provided in the case of forfeiture of my said son) for the sole benefit of her issue and if no such issue remaining then the share or interest of my said daughter shall go absolutely to my said son unless he shall have also anticipated or forfeited his share by the means aforesaid when I direct my trustees to take hold and possess such share or shares for the sole benefit of my said son and daughter for their several and respective lives with remainder to their respective legal descendants."

The testator appointed his wife, Frances Lowther, John Booth and John Davies to be executrix and executors and trustees of the will, and to them probate was granted on 13th July 1892. John Davies subsequently died.

Lilly Aitken Ramsay, mentioned in the will, died on 5th May 1909, without having ever mortgaged or anticipated her share under the will and without ever having been bankrupt. She made a will dated 12th March 1909 of which probate was granted on 27th October 1909 to Alfred Ramsay and James Wailes.

At the time of his death the estate of the testator was of the total gross value of £11,688 19s. 8d., and of the net value of £6,988 8s. 2d. The real estate left by the testator comprised Lonsdale Terrace, consisting of nine houses, Wellington House and Nelson House, and two pieces of land at Mittagong and Mount Druitt, all of which are mentioned in the will. Six of the houses in Lonsdale Terrace and Wellington House and Nelson House were then subject to two mortgages made by the testator, one to William Macquarie Molle for £2,100 and interest thereon, and the other to Joseph Thompson for £2,000 and interest thereon. Both these mortgages were overdue at the date of the testator's death. The testator's personal estate consisted of money in the bank, debts due to him, certain furniture, &c., and the two policies of insurance mentioned in the will on which the testator had borrowed £515 17s. 4d. from the Australian Mutual Provident Society, which at his death was still owing.

On 5th June 1894 an indenture (Exhibit 8) was entered into between Frances Lowther of the first part, Frederick Edward Lowther (the testator's son mentioned in the will) and Lilly Aitken Ramsay of the second part, and Cecil Bedford Stephen

(thereinafter called "the said mortgagee") of the third part: After reciting that the premises erected on one of the blocks of land (lot 9) comprised in Molle's mortgage encroached upon one of the blocks (lot 8) comprised in Thompson's mortgage; that Molle and Thompson had applied for payment of the moneys owing on their mortgages, amounting to £3,666, that Frances Lowther, F. E. Lowther and L. A. Ramsay had requested Stephen to pay the money due, and to take transfers of such mortgages to secure the sum to be so paid by him, and £39 1s. 9d. for incidental expenses, together with interest thereon, and that Stephen had agreed to do so; and that Frances Lowther, F. E. Lowther and L. A. Ramsay had "agreed at the request of the said mortgagee to execute these presents for the purpose of rectifying the error made by" the testator "in causing such encroachment as aforesaid by defining and extending the boundaries and alignment of the premises intended to be mortgaged by" Molle's mortgage "to the land actually occupied by the messuages"; the indenture continued:—"Now this indenture witnesseth that in pursuance and in consideration of the premises she the said Frances Lowther doth hereby charge all her estate right title and interest in and to the lands hereditaments and premises hereinafter described in the schedule hereto with the repayment on demand to the said mortgagee his executors administrators or assigns of the said sum of £3,700 so paid by him as aforesaid and interest thereon in the meantime at the rate at the times and in manner in the said memorandum and indenture of mortgage respectively provided and also all other moneys now due or henceforth to become due under or by virtue of the same respectively And the said Frances Lowther doth hereby for herself her heirs executors and administrators covenant with the said mortgagee his executors administrators or assigns that she or they will on demand pay to the said mortgagee his executors administrators or assigns the moneys so advanced by him as aforesaid And each of them the said Frances Lowther and the said Frederick Edward Lowther doth hereby for herself and himself respectively her and his heirs executors and administrators further covenant with the said mortgagee his executors administrators and assigns that they she or he will pay interest on the

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

said sum in the meantime at the respective rates at the times and in manner in the said memorandum and indenture of mortgage respectively provided and also all other moneys intended to be thereby secured And the said Frances Lowther doth hereby further covenant as aforesaid that she will when required by him or them execute at her own expense a legal mortgage over the said lands and hereditaments hereinafter described in favour of the said mortgagee his executors administrators or assigns to be prepared by and to the satisfaction of his or their solicitors to secure such moneys And the said Frances Lowther Frederick Edward Lowther and Lilly Aitken Ramsay do and each of them doth hereby covenant and agree with the said mortgagee his executors administrators and assigns that the boundary of the said messuages in lot 8 shall be defined and presumed to be the boundary of the premises intended to be included in the said memorandum of mortgage and that they or their representatives will execute and do all things necessary for giving valid and legal effect to this arrangement and rectifying the error so made as aforesaid And it is hereby further agreed that the said mortgagee his executors administrators or assigns shall be entitled to retain possession of the deeds and titles relating to the said lot 8 until all moneys so advanced by him have been fully paid and satisfied . . . ."

Indorsed on this indenture was an indenture of the same date whereby Thompson transferred his mortgage to Stephen.

On the same day Frances Lowther wrote the following letter (Exhibit 10) to Stephen :—

"Sir,—Referring to a memorandum and indenture of transfer of mortgage respectively bearing the respective dates of 1st June instant and the 5th June inst. made respectively by William Macquarie Molle and Joseph Thompson in your favour to secure the repayment to you of the principal sum of £3,700 being the amount advanced by you on taking over the memorandum and indenture of mortgage so transferred and which were executed by my late husband Edward Lowther deceased who died on the 13th June 1892. In pursuance of the agreement made by me with you on your taking over the securities above referred to I hereby promise and undertake that all properties directed by the

will bearing date the 18th April 1892 of my said husband to be sold, or which I am thereby empowered to sell shall as opportunity arises be so disposed of and the proceeds appropriated in reduction of the above mortgages until the sum due to you and secured by the same shall be £3,000 only and I also agree that all deeds and titles relating to the properties to be sold as above-mentioned shall in the meantime until such sales be effected and completed or the amount secured by the above mortgages be entirely liquidated be retained and held by you or your solicitors to guarantee the due performance by me and my co-executors of this undertaking and to further secure the amount advanced by you at my request on taking such transfers of mortgages."

A suit was brought by the executors of L. A. Ramsay against Frances Lowther, John Booth, and F. E. Lowther and his wife and infant children, alleging certain breaches of trust by Frances Lowther and John Booth, as trustees of the testator's estate, and claiming (*inter alia*) administration by the Court; the removal of Frances Lowther and John Booth from their position as trustees and the appointment of new trustees; a declaration that Frances Lowther had elected to take the benefit of the transfer to her of the land fronting Waverley Road and Wallis Street against the provisions of the will of the testator, and that she should be decreed to make compensation accordingly; alternatively, a decree that Frances Lowther was bound to elect between the benefits of such transfer and the benefits given to her by the will, and that she should be ordered to elect accordingly; accounts and inquiries.

The suit was heard by *Rich* A.-J. who made a decree which, after ordering certain accounts on the footing of wilful default, and certain inquiries, proceeded:—

"And this Court doth declare that on the true construction of the said will the annual rents profits and income of the real estate devised by the testator to the defendant Frances Lowther for her life are not charged with the payment of the principal sums of the mortgage debts mentioned in the testator's will or either of them nor with the payment of the pecuniary legacies in the will mentioned and that the defendants Frances Lowther and John Booth were not bound by the terms of the said will to

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

apply the said annual rents profits and income towards the payment of the said moneys or any of them And this Court doth further declare that the rights and liabilities of the parties *inter se* under the said will as hereinbefore declared were not altered by the execution of the document dated the fifth day of June One thousand eight hundred and ninety four and marked Exhibit 8 so as to render Frances Lowther primarily liable for the payment of the mortgage debts therein mentioned in exoneration of the beneficial interest of Lilly Aitken Ramsay in the mortgaged lands And this Court doth further declare that the defendant Frances Lowther was by the terms of the said will entitled to apply the annual rents and profits of the allotments of land fronting Waverley Road and Wallis Street in the said will referred to in payment of the interest on the mortgage debt over Lonsdale Terrace in the said will mentioned And this Court doth further declare that the defendant Frances Lowther is under the provisions of the said will entitled to be recouped out of the general assets of the estate of the said testator the amount of the mortgage debts secured on the policy moneys bequeathed to her by the said will and that the amount of the said mortgage debts so secured ought to be raised and paid out of the real estate devised by the said will in exoneration of the said policy moneys."

The decree then reserved further consideration and liberty to apply.

From this decision the plaintiffs now appealed to the High Court.

Loxton K.C. (with him *Clive Teece*), for the appellants. Neither the mortgages on the house property nor the legacies are charged on the corpus of the estate, but they are charged solely on the rents and profits. The words " interest moneys " must be read as applying only to interest on the mortgages. There is no charge on the corpus by implication from the direction to pay out of rent and profits because the widow who is directed to pay is only given an estate for life: *Metcalfe* v. *Hutchinson* (1); *In re*

(1) 1 Ch. D., 591.

Green; *Baldock* v. *Green* (1); *Heneage* v. *Lord Andover* (2). The bequest of "all moneys, stock and funds which I shall die possessed of" is a residuary, and not a specific, bequest, as the word "moneys" must be taken to mean personal estate: *In re Cadogan*; *Cadogan* v. *Palagi* (3); *Fielding* v. *Preston* (4); *In re Green*; *Baldock* v. *Green* (1); *Williams on Executors*, 10th ed., p. 1195.

[ISAACS J. referred to *Byrom* v. *Brandreth* (5).]

Whether that bequest is residuary or specific, the testator has charged his real and personal estate with the payment of debts, and therefore the bequest has to bear its share of those debts including the mortgage debts: *Jarman on Wills*, 6th ed., pp. 2025, 2026. The widow was bound to apply the rents and profits of the property of which she was life tenant, in the first instance to payment of the legacies so as to leave as much as possible of the moneys left by the testator and the policy moneys for payment of the mortgages on the house property: *Scales* v. *Collins* (6). The widow should also have applied the income from the property which had been transferred to her and which she was directed to bring into the estate, towards payment of the principal of the mortgage debts, and the interest on those mortgage debts should have been paid out of the rents and profits of the house property. The mortgage debt on the policy moneys must be borne by the legatee of those policy moneys, and the devisees of the land should not have been directed to exonerate her in respect of that debt. The fact that there is a general direction for payment of debts does not alter that duty: *In re Butler*; *Le Bas* v. *Herbert* (7); *Halliwell* v. *Tanner* (8); *Oneal* v. *Mead* (9); *Jarman on Wills*, 6th ed., p. 2035. The indenture of 5th June 1894 is binding on the widow and under it she, in her personal capacity, assumed the burden, if she did not already bear it, of paying off the principal of the mortgage debts. The agreement by the widow in the letter of 5th June 1894 to deposit the deeds of the Balaclava and Mount Druitt lands as security for the

(1) 40 Ch. D., 610.
(2) 3 Y. & J., 360, at p. 370.
(3) 25 Ch. D., 154.
(4) 1 De G. & J., 438.
(5) L.R. 16 Eq., 475.
(6) 9 Ha., 656.
(7) (1894) 3 Ch., 250, at p. 255.
(8) 1 Russ. & M., 633.
(9) 1 P. Wms., 693.

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

mortgage was a breach of trust, and she should be compelled to get the deeds back. There is no implication of a life estate in those lands to the widow.

Breckenridge, for the infant respondents, submitted to such order as might be made.

Innes (with him *Milner Stephen*), for the respondent trustees. The mortgage debts are charged on the corpus: *Metcalfe* v. *Hutchinson* (1). The wife as executrix has the fee of the land in her. The general rule is that where a limited sum is directed to be raised out of rents and profits a charge on the corpus is created, and there is nothing to take this case out of the rule. [He referred to *Heneage* v. *Lord Andover* (2); *Lord Londesborough* v. *Somerville* (3); *Wills, Probate and Administration Act* 1898; *Jarman on Wills*, 6th ed., p. 2005; *In re Marquess of Bute* (4); *Gibson v. Lord Montfort* (5); *Allan* v. *Backhouse* (6); *Tewart v. Lawson* (7).] The bequest of "all moneys, stock and funds which I shall die possessed of" was specific: *Bothamley* v. *Sherson* (8); *Byrom* v. *Brandreth* (9); *Cowling* v. *Cowling* (10); *Jarman on Wills*, 6th ed., p. 1041; *Theobald on Wills*, 7th ed., p. 199; *Berry* v. *Askham* (11); *Warburton* v. *Warburton* (12); *Trafford* v. *Ashton* (13); *Ivy* v. *Gilbert* (14). The widow, being a trustee of the mortgaged land with power to convert in her discretion and to apply the proceeds in reduction of the interest and principal of the mortgages, is entitled to set off against the money received for the land when sold the amount of interest paid to the mortgagees of which she would have been relieved had the land been sold and the proceeds paid in reduction of the mortgages within a year of the testator's death. The gift of the policy moneys being specific, the widow was entitled to contribution in respect of the mortgage debt on the policies from the real estate specifically devised. The general rule is that specific legatees

(1) 1 Ch. D., 591.
(2) 3 Y. & J., 360.
(3) 19 Beav., 295.
(4) 27 Ch. D., 196.
(5) 1 Ves. Sen., 485.
(6) 2 V. & B., 65.
(7) L.R. 18 Eq., 490, at p. 494.
(8) L.R. 20 Eq., 304, at p. 308.
(9) L.R. 16 Eq., 475.
(10) 26 Beav., 449.
(11) 2 Vern., 26.
(12) 2 Vern., 420.
(13) 1 P. Wms., 415.
(14) 2 P. Wms., 13.

contribute rateably with specific devisees for the general debts of testator, if in the ordinary course of administration that class is reached: *Gervis* v. *Gervis* (1). The same rule applies where the debts are charged on members of both classes: *Jarman on Wills*, 6th ed. p. 2031; *Irvin* v. *Ironmonger* (2) *Middleton* v. *Middleton* (3). *In re Butler*; *Le Bas* v. *Herbert* (4) was wrongly decided. Whether there should be contribution was not brought before the Court in that case. [He also referred to *Halliwell* v. *Tanner* (5) *Oneall* v. *Mead* (6); *In re Chantrell* (7); *Re Stokes* (8); *In re Roberts*; *Roberts* v. *Roberts* (9); *In re Kempster*; *Kempster* v. *Kempster* (10); *In re Balls* (11); *Theobald on Wills*, 8th ed., pp. 832, 840.]

Under the deed of 5th June 1894 the new mortgagee merely acquired new rights. There was no novation, and there was no consideration between the widow and the remaindermen.

Loxton K.C., in reply, referred to *Lewin on Trusts*, 11th ed., pp. 1224, 1247.

Cur. adv. vult.

Oct. 9.

BARTON J. I agree in the judgment which will be read by my brother *Isaacs*, and which, in my view, covers the case.

ISAACS J. read the following judgment:—The first question to which I shall address myself is, as to whether the bequest of "all moneys, stock and funds which I shall die possessed of," is specific or residuary. In my opinion it is specific.

In *Robertson* v. *Broadbent* (12) Lord *Selborne* L.C., in speaking of the exemption of personal estate specifically bequeathed for the payment of legacies and debts, instances the bequest of a particular chattel, in which case it passes in *statu quo*, and then he adds:—"As against creditors the testator cannot wholly release it from liability for his debts; but as against all persons taking benefits under his will he may. The same principle applies to everything

(1) 14 Sim., 654.
(2) 2 Russ. & M., 531.
(3) 15 Beav., 450.
(4) (1894) 3 Ch., 250.
(5) 1 Russ. & M., 633.
(6) 1 P. Wms., 193.
(7) (1907) W.N., 213.
(8) 67 L.T., 223.
(9) (1902) 2 Ch., 834.
(10) (1906) 1 Ch., 446.
(11) (1909) 1 Ch., 791.
(12) 8 App. Cas., 812, at p. 815.

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

Isaacs J.

which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate, the fund out of which pecuniary legacies are in the ordinary course payable."

"This reasoning," says the learned Lord Chancellor, "does not apply to a gift in general terms of the whole personal estate to which a testator may be entitled at the time of his death."

See also *per* the same learned Lord in *Giles* v. *Melsom* (1) and *per Jessel* M.R. in *Bothamley* v. *Sherson* (2), as explained by that learned Judge in *In re Ovey*; *Broadbent* v. *Barrow* (3), affirmed as *Robertson* v. *Broadbent* (4).

Applying the statement of the law so laid down to the present case, I am of opinion the bequest referred to is specific. The contrary position really rests on an enlarged meaning sought to be given to the word "money." It regards that word as equivalent to "personal estate," and then treats the subsequent reference to particular portions of the testator's property, as a cautious enumeration to ensure their inclusion. *In re Cadogan*; *Cadogan* v. *Palagi* (5) and *In re Green*; *Baldock* v. *Green* (6) were relied on. But of those and all other cases, I would say that they are useless as guides except for the principles they contain or exemplify. Rules of law or construction are to be observed, and may govern the interpretation, as pointed out by Lord *Wensleydale* in *Greville* v. *Browne* (7), but apart from them, each will must stand alone for the purpose of ascertaining the intention of its maker. As *Wilmot* L.C.J. said as far back as 1768, in delivering the opinion of the Judges to the House of Lords in the case of *Keiley* v. *Fowler* (8):—"In questions of intention, cases, unless they coincide in words, and every other circumstance, never assist, but perplex the exposition. A will is the picture of a man's mind; and one may as well look at the picture of one man to know the person of another, as look at the will of one mind to know the mind of another."

(1) L.R. 6 H.L., 24, at p. 29.
(2) L.R. 20 Eq., 304, at p. 309.
(3) 20 Ch. D., 676, at pp. 681, 682.
(4) 8 App. Cas., 812.
(5) 25 Ch. D., 154.
(6) 40 Ch. D., 610, at p. 618.
(7) 7 H.L.C., 689, at p. 703.
(8) Wilm., 298, at p. 319.

But when examining the will of an individual testator to ascertain his intention, one rule of common sense asserts itself. I have stated it in an earlier case, *Knight* v. *Knight* (1), in terms which are equally suitable to the present, and I will repeat a few words of what was then said :—" Undoubtedly, a testator has the right to choose his own vocabulary, and the right to use words in any sense he pleases, however arbitrary. But, as he is announcing his desires to persons who he knows are accustomed to understand language in its ordinary sense, unless some special meaning is intimated, it is obvious he expects them not to depart, either by enlargement or restriction, from the ordinary signification of his words without a distinct indication to do so. If there be such indication it must, of course, be followed."

Then I take the ordinary signification of the phrase " money of which I am possessed," which is shewn by Lord *Selborne* in *Byrom* v. *Brandreth* (2) to be cash in personal possession or in the house or at the bank or otherwise in such situation that it is ready money at call at the time of death. Context may extend it, or the necessary implication arising, for instance, from some direction given, which would be wholly or partially unfulfilled unless the word was extended, may suffice as an indication of enlarged signification.

And to that extent it is lawful to attribute the larger meaning.

The provision which says that the proceeds of the Waverley Road and Wallis Street allotments are, together with the balance of moneys remaining after the payment of legacies, to be applied in payment of the mortgage debt and interest over Lonsdale Terrace, is followed by a declaration that " any money remaining thereafter I give absolutely to my said wife." Now, unless that includes the produce of the " stock and funds," or the stock and funds themselves, previously given in trust, there is no beneficial gift of that property. Then, turning back to the gift itself, we find that the money, stock and funds he is possessed of and the policy moneys are given " and all benefit derivable therefrom to my said wife Fanny Lowther upon trust to pay and apply the same as in manner hereinafter provided." One, therefore, expects to see a direction as to the application of the stock and funds or

(1) 14 C.L.R., 86, at p. 107. (2) L.R. 16 Eq., 475 ; 42 L.J. Ch., 824.

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

Isaacs J.

"the benefit derivable therefrom," which means money, as well as of the ready money; and so it is not difficult, connecting first the terms of the gift, next the direction to apply the moneys both those he was possessed of and the policy moneys, and lastly the beneficial gift of the balance of money absolutely, to see that he must have considered stock and funds to be really equivalent to or synonymous with "money."

But this still leaves the nature of the bequest specific, and if we search for any further expansion of the expression "money" no such indication is found. I am, therefore, of opinion that the contention as to this bequest being residuary fails.

Next, it was urged that the devise of the realty was subject to her paying out of the rent and income thereof, the principal of the mortgage debts as well as interest. In support of this the words "interest moneys costs and charges taxes &c." were read as if the words "interest" and "moneys" were independent and severally complete. It was suggested that to speak of "interest moneys" was so improbable and indeed inartistic as to invite rejection. But that is not so; Molle's mortgage of 20th April 1883 contains in the fourth covenant the phrase "the principal and interest moneys" and this was one of the mortgages referred to by the testator. Again in sec. 62 of the *Real Property Act* we find the expression "interest moneys." It cannot therefore be regarded as inherently objectionable. Then we have to remember the devisee is a life tenant at most—properly speaking the estate is during widowhood,—and it is not to be presumed that the ordinary obligation of keeping down interest is increased so as to relieve the remaindermen with respect to the principal, without most distinct language. This consideration is assisted by the following circumstances:—The widow is compelled to keep the premises in repair; she is compelled to elect as to surrendering the allotments previously given to her, or abandoning her gifts under the will; and there is the explicit language "mortgage debt and interest" in connection with the proceeds of the surrendered allotments. This contention, then, I resolve in favour of the appellants, as did the learned primary Judge.

Then it is claimed that when the testator speaks of "the rents and profits of the said premises," he includes the corpus of the

realty. So the learned Judge has held on the authority of *Metcalfe* v. *Hutchinson* (1); *Lord Londesborough* v. *Somerville* (2); and *Heneage* v. *Lord Andover* (3). No doubt, where an estate is given to any person for the purpose of raising out of the rents and profits a gross sum, it has often been considered the declared purpose dominated the power, and entitled the donor to sell or mortgage the property itself to effectuate the donor's intention. The argument addressed to us has, however, gone to this length. It is contended that by virtue of the principle just adverted to, no matter how limited the estate may be in respect of which the rents and profits are appropriated to the purpose of raising a gross sum, the law presumes that the fee is to be charged. In other words, it is said that the fee is the *corpus* in every case, notwithstanding the definite limitation of estate, unless some other context exists to cut it down. That is rested largely on the generality of the language in some of the cases.

Jessel M.R. says in *Metcalfe* v. *Hutchinson* (4) that, where there is a trust to pay or raise and pay debts out of rents and profits, "that, *without more*, means that you may raise them by sale or mortgage." He adds:—"I say 'without more,' because you may find in the instrument a context which will overrule that construction, but the great point to bear in mind is that you must find a context to get rid of that construction. It is not that there is a *primâ facie* construction that rents and profits mean annual rents and profits, but in the case I have put the *primâ facie* construction is that it means to pay out of corpus."

That is a plain distinct enunciation of the law, it lays down a general rule, which is the same as Sir *Thomas Plumer* V.C. called in *Allan* v. *Backhouse* (5) "a technical rule of construction, not permitting the Court to exercise any judgment." Both those learned Judges, however, go on to show that this general *primâ facie* rule, which is really artificial, may be modified by the context. The question is: Does it apply to such a case as the present? In the present instance all that the wife gets is an estate during life conditional on widowhood, and this devise is made subject to

(1) 1 Ch. D., 591, at p. 594.
(2) 19 Beav., 295.
(3) 3 Y. & J., 360, at p. 370.
(4) 1 Ch. D., 591, at p. 595.
(5) 2 V. & B., 65, at p. 77.

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

Isaacs J.

the direction to pay legacies out of "the rents and profits of the said premises." It is obvious that she cannot pay more than she receives, and the receipts are not indefinite; they cannot be more than co-extensive with the estate she gets in the premises. Nevertheless, say the respondents, the fee is charged. No case has been cited in which it was held that any estate in the land larger than that of which the rents and profits were devoted could be disposed of for the declared purpose.

All the cases cited were, to say the least, consistent with the position urged by Mr. *Loxton*, that in these circumstances the authorities referred to by the learned primary Judge were inapplicable. This is a fundamental distinction which appeals to me as correct on the face of it. There is, apparently, no judicial utterance opposed to it, and, on the other hand, it is supported by several cases of great authority. The first is *Foster* v. *Smith* (1), a decision of Lord *Lyndhurst*. As that case was afterwards approved by the House of Lords in *Torre* v. *Browne* (2), I quote from the latter case. At the page mentioned, Lord *Cranworth* L.C. said that in *Foster* v. *Smith* (1) "a testator devised his estates to trustees, on trust to receive the rents, and thereout to pay to his wife an annuity of £200 for her life, and after her decease, to convey the estates to his three sisters in fee. Lord *Lyndhurst* held, that after the death of the wife, the sisters were entitled to a conveyance of the property free from any claim on the part of the wife's executors for arrears of her annuity. But," said Lord *Cranworth*, "the ground on which that decision rested, was that nothing was made liable to the annuity, except the rents which accrued during her life, and so that the estate of the sisters could not be touched."

And then the Lord Chancellor added: that Lord *Lyndhurst* had in his judgment said expressly, that if the trust had simply been to receive the rents, and thereout pay to the wife an annuity of £200 for her life, this would have been a charge on the rents until the whole amount of the annuity with the arrears had been paid. In that case the rents referred to would have been co-extensive with the fee instead of being, as in the will there dealt with, commensurate only with the life of the widow. In

(1) 1 Ph., 629.

(2) 5 H.L.C., 555, at p. 577.

Phillips v. *Gutteridge* (1) Lord *Westbury* L.C. was most precise. The Lord Chancellor said:—"An unlimited indefinite charge upon rents and profits is a charge upon the corpus, just as an unlimited indefinite gift of rents and profits is a gift of the corpus." Then he says:—"The trust in this case is in effect out of the rents and profits to pay the testator's daughter £60 a year during her life, not out of the rents and profits during the life of the daughter to pay her the annuity. The right of the trustee to receive the rents and profits is general and indefinite; there is no limitation of time. The charge, therefore, upon the rents and profits is unlimited and continues until the annuity is satisfied." In other words, the annuity was a charge on the corpus—and so the Lord Chancellor said. See also *In re Moore's Estate* (2).

For these reasons I am compelled to take a different view from that in the judgment appealed from, and to hold that the legacies are not a charge upon the corpus.

The next point raised by the appellants was one argued before the learned primary Judge, but which, in the view he took of the matter just dealt with, it was unnecessary to decide. It now becomes requisite to deal with that point, which is whether the life tenant is bound to apply the rents and profits in the first instance to payment of legacies, so as to leave as much as possible of the "possessed" and "policy" moneys for the liquidation of the mortgage on Lonsdale Terrace. On the principle of the case cited, *Scales* v. *Collins* (3), which is one of many, this is correct.

Then the appellant claimed that the income actually received by the widow from the Waverley Road and Wallis Street allotments and applied by her in payment of interest on the Lonsdale Terrace mortgage, ought to have been paid in reduction of principal, leaving the interest to be paid by means of the rent and income of the devised land. As a legal proposition, that appears to be well founded, because it was clearly intended that the rent and income of the devised land, and the money representing the surrendered allotments, should both be applied in reduction of the mortgage debt, the first as to interest only, the second as to interest so far as required and otherwise as to principal. How

(1) 3 D. J. & S., 332, at p. 336. (2) 19 L.R. Ir., 365, at p. 367.
(3) 9 Ha., 656.

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

Isaacs J.

that legal proposition, or the previous one as to marshalling, may affect the parties practically, we are not in a position to judge—they are matters which may have to be worked out on the accounts. We can do no more now than state the principle to be applied in each case so far as it may prove material.

With regard to Exhibit 8, the indenture of 5th June 1894, an independent argument is raised:—It is said whatever were the rights, or the doubts as to the rights of the parties previously, that document amounted to a definite adjustment of those rights on the basis that the life tenant should assume the burden of paying off the principal mortgage debt as well as interest. I find it impossible so to read the document. A new mortgagee took over the old mortgages, which, except for the substitution of a new creditor, and the correction of an error as to parcels by the later indenture, still stand in full force and effect; the debt and the debtors remain the same. The old contract not being discharged, there is no novation. But the new contract is something additional to the old, and not only consistent with it except, perhaps, as regards the correction referred to; and not only so, the new contract is for the very purpose of securing the rights of the new mortgagee in respect of the moneys owing to him under the transferred original mortgage. The transaction was simple as appears on the face of the documents. The one mortgage had been overdue, and was extended, the other was overdue and was not extended, and payment was pressed for. The property values had fallen in 1894, as is commonly known; and so the proposed new mortgagee stipulated, before agreeing to the transfer and advancing some further small amounts incidental to the transaction, that an error in dimensions should be corrected, with the consent of all parties interested, that the further sums should be secured on the widow's interest on devised lands not already included with the mortgages, and that the widow and her son should enter into a personal covenant securing the payment of the moneys secured by the mortgage, and in view of the diminution in value of the lands, the new mortgagee also stipulated with the trustees that the mortgage debt should, until reduction to £3,000, be further secured by deposit of the deeds of the Balaclava and Mount Drewitt lands This was done by

Exhibit No. 10. The technical objection that only one executor, instead of two, signed that document was not pressed, and is immaterial. The only possible ground for questioning the transaction is the fact of the extension of Molle's mortgage to April 1896, and it was suggested that no reason for giving Exhibit No. 10 in June 1894 was shown.

That, however, is a question of fact which was not in contest previously, on which other evidence might have been adduced. Therefore, we are not in a position to deal with the matter on that ground; and so, dealing with this branch of the case on the basis upon which it was fought, I see no reason for disturbing the conclusion at which the learned primary Judge arrived.

That leaves one subject more to be considered, namely, the declaration in the judgment as to recoupment of Frances Lowther in respect of the mortgage debt of £515 17s. 4d. which the society deducted. Her beneficial interest in those moneys is given after payment of legacies and the Lonsdale Terrace mortgage, but not subject to payment of the society's mortgage. *Knight* v. *Davis* (1) therefore applies, and the specific legatee is entitled to exoneration out of the general assets—that is, residuary estate. And so it has been declared. But there has been added a declaration that the devisees are bound to exonerate the specific legatee, and that the necessary sum should be raised out of their property.

This is objected to by the appellants, on the ground that a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money must, as between himself and other specific legatees and devisees, bear the burden himself, and cannot compel them to share his disappointment. As a general rule this is undoubtedly so; but here there is a general direction on the threshold of the will to pay just debts, and the question is whether that makes any difference. The appellants say it does not, and rely on *In re Butler*; *Le Bas* v. *Herbert* (2), which certainly supports their contention. The respondents admit the applicability of the case, but deny its correctness on this point. It is an extremely important question of wide application, and needs to be carefully considered. *In re Butler* (2) is the only case in which the opinion relied on is found, and it is neces-

(1) 3 Myl. & K., 358.

(2) (1894) 3 Ch., 250.

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

Isaacs J.

sary to examine the groundwork of the matter. *Kekewich* J. puts it as a question of intention, and that is a correct test. In *Middleton* v. *Middleton* (1) the Master of the Rolls, after mentioning the cases upon which *In re Butler* (2) was determined, says:—"The devisees and legatees are all equally objects of the testator's bounty, and one cannot be permitted wholly or partially to defeat the gift to another, by reason of any rule of law, which makes the property so given to that other legatee previously liable to pay the debts of the testator. These are only instances of giving effect to the intention of the testator found in the words he has used." And see *Rickard* v. *Barrett* (3). The question then is: What is the meaning, and what is the effect of the testator's express direction to pay all just debts? First of all, it means all debts whenever and wherever contracted: *Maxwell* v. *Maxwell* (4) *per* Lord *Hatherley*, and (5) *per* Lord *Westbury*, who added that the obligation lies on those who contend for a limitation of the comprehensive meaning of the words. Of course, the debts are those for which the testator is then liable: *O'Connor* v. *Haslam* (6). Then it means, as Sir *Richard Arden* M.R. said in *Shallcross* v. *Finden* (7), "that until his debts are paid, he gives nothing; that everything he has shall be subject to his debts." And the learned Judge adds:—"I am very clearly of opinion, that wherever a testator says, he wills, that his debts shall be paid, that will ride over every disposition, either as against his heir at law, or devisee." Again, in *Rickard* v. *Barrett* (8), a case of marshalling where the will contained the words, "subject nevertheless to the payment of my just debts," *Page Wood* V.C. said:—"He clearly charges all his real estate before it reaches the hands of his wife." And he adds:—"The plain intention here is, that the property shall not pass to the devisees until the debts are paid." Other authorities which establish that such a direction as is found in this will is a charge on the property are: *Conron* v. *Conron* (9); *In re Salt*; *Brothwood* v. *Keeling* (10); *In re Roberts*; *Roberts* v. *Roberts* (11). And the ground of certain decisions in

(1) 15 Beav., 450, at p. 454.
(2) (1894) 3 Ch., 250.
(3) 3 Kay & J., 289.
(4) L.R. 4 H.L., 506, at p. 514.
(5) L.R. 4 H.L., 506, at p. 517.
(6) 5 H.L.C., 170, at p. 178.
(7) 3 Ves., 738, at p. 739.
(8) 3 Kay & J., 289, at p. 291.
(9) 7 H.L.C., 168, at p. 183.
(10) (1895) 2 Ch., 203, at p. 204.
(11) (1902) 2 Ch., 834.

Chancery was, as *Jessel* M.R. said in *In re Newmarch*; *Newmarch* v. *Storr* (1), "that 'just debts' was a known term, and that it included mortgage debts." So that it is manifest that the direction to pay just debts is a charge on all the assets in respect of all debts including the mortgage debt to the society secured on the policy.

And what is always to be borne in mind is that it is the express direction of the testator, and cannot be treated as unmeaning surplusage, or as a simple truism, which the law itself would have satisfied had nothing been said. In a will nothing is to be rejected as surplusage if it can be avoided: *Per Shadwell* V.C. in *Dover* v. *Gregory* (2). This principle was given effect to in *In re Kempster*; *Kempster* v. *Kempster* (3), and in that view the direction affects the interpretation of the will, as to the testator's bounty as well as to his obligations to creditors. *Kekewich* J., in *Butler's Case* (4), thinks this charge is subject to the dispositions of the will; but Sir *Richard Arden* thought the dispositions were subject to the charge. And the turning point of the matter is which of these opinions is correct. Sir *John Leach*, in *Irvin* v. *Ironmonger* (5), assumes Sir *Richard Arden's* view is right.

The general constructive charge, of course, does not exclude marshalling unless the testator so declares. It is impossible to imagine, for instance, that unbequeathed or residuary personalty are to be placed in the same plane with specific gifts by mere force of the direction to pay debts. See *per Romer* J. in *In re Smith*; *Smith* v. *Smith* (6), and *Kekewich* J. in *In re Kempster*; *Kempster* v. *Kempster* (3). The classes are still distinct.

Nevertheless, this question cannot be resolved by confining the attention to marshalling.

Marshalling regulates the order of different classes of assets, and does not operate between assets of the same class. As between the latter the question is, properly speaking, one of contribution, and if that be borne in mind it supplies the answer to the problem we are considering.

(1) 9 Ch. D., 12, at p. 18.
(2) 10 Sim., 393, at p. 399.
(3) (1906) 1 Ch., 446.
(4) (1894) 3 Ch., 250.
(5) 2 Russ. & M., 531.
(6) (1899) 1 Ch., 365.

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

Isaacs J.

A few words of *Knight Bruce* V.C., in *Tombs* v. *Roch* (1) are instructive:—"Contribution, . . . if it differs from marshalling, does so in species rather than generically, in form rather than in nature.

"Marshalling and contribution are, each of them, the adjustment between several persons of their rights respectively, *inter se*, in respect of a charge or claim, which, affecting all of them, or properties belonging to all of them respectively, has been or may be enforced in a manner not unjust, as far as the person is concerned by whom it was or may be enforced, but not just as between the persons or properties liable."

Then his Honor says that the properties given by the will are liable, that is, every part of them is liable, to the debts remaining unsatisfied, and he adds there must be some rule or principle according to which, as between the specific legatees and the devisees, that charge or claim must, by apportionment or otherwise, be borne—a rule or principle by which creditors are not bound. He next inquires what that rule or principle is, and says that it must be found in the rights of the parties as intended by the testator. That is the sole guide and having found that there was no intention of throwing the burden of specialty debts on the specifically given personalty, he made the devised realty contribute. Unless a debt, because it happens to be secured on a particular asset, is to be excluded, no distinction can be made in the present instance.

Having then arrived at the position that the specific gifts are charged with the payment of all debts however secured, they all come within the fourth class in the order of marshalling for payment of debts with a view to distribution.

But being there, then comes into play the doctrine of equality. If the earlier classes were able to sustain the burden, let them; if not, this class must share it, and share it proportionately. To that extent the principle of separateness and the independence, if I may so call it, of the specific gifts *inter se* is qualified. *In aequali jure* the law requires equality; one shall not bear the burthen in ease of the rest: *Dering* v. *Lord Winchelsea* (2). Accordingly, in the case of debts which were without means of

(1) 2 Coll., 490, at pp. 499, 500. (2) 2 Wh. & T. L.C., 7th ed., 535, at p. 538.

payment except by resort to specific legacies, Lord *Langdale* M.R. declared that these legacies should undergo a reduction by contribution to the payment of debts and costs : *Conolly* v. *Farrell* (1). And so fully was the doctrine applied in the same case at a later stage (2), that when one of these specific legatees became insolvent and by his non-payment the fund became insufficient, a further contribution among the rest was ordered to supply the deficiency. It is therefore impossible to regard the specific gifts as completely independent when there is a general direction to pay debts charging the whole estate, and so I am of opinion Mr. *Innes* has made good his position with regard to *In re Butler* (3). The portion of that case relating to the effect of the constructive charge for debts cannot be considered sound law.

I agree with the form of declaration proposed by my learned brother *Barton*.

Order that the decree be varied in the following respects:—(1) *Declare that the bequest in trust to the defendant Frances Lowther of the moneys, stock and funds of which the testator should die possessed and the policy moneys is a specific and not a residuary bequest.* (2) *Declare that the annual rents, profits and income of the real estate devised by the testator to the said defendant for her life are to be deemed as between the parties to be charged in the first instance with the payment of the pecuniary legacies.* (3) *Declare that the direction to the said defendant to pay legacies out of rents and profits does not by implication vest the fee in her.* (4) *The declaration as to recoupment of the defendant Frances Lowther out of the general assets to the extent of the mortgage debt secured on the*

(1) 8 Beav., 347. (2) 10 Beav., 142. (3) (1894) 3 Ch., 250.

H. C. OF A. 1912.

RAMSAY v. LOWTHER.

policy moneys to be varied by substituting for the last clause thereof a declaration that, so far as the general assets are insufficient for that purpose, the real estates devised by the said will and the specific bequests therein mentioned ought to contribute rateably to make good the deficiency according to their respective values at the death of the testator, and direct that for such purpose a value be set on the real estates and bequests respectively and that the proportion attributable to the real estates be raised and paid out of the said real estates or a sufficient part thereof. Decree as varied affirmed. Costs of plaintiffs and of defendant Frances Lowther in respect of the appeal to be paid out of the estate.

Oct. 21. On the motion of *Clive Teece* for the appellants and the infant respondents, the order above set out was amended as follows:—

Declare that the respondent Frances Lowther was by the terms of the will entitled to apply the annual rents and profits of the allotments fronting Waverley Road and Wallis Street in payment of the interest on the mortgage debt over Lonsdale Terrace only so far as the annual rents and profits of the lands devised to the respondent Frances Lowther during her widowhood were insufficient to pay the said interest, but that except as aforesaid the respondents Frances Lowther and John Booth were bound under the terms of the said will to apply the annual rents and profits of the said

allotments of land in discharge of the principal of the mortgage debt secured on the said Lonsdale Terrace. Costs of the infant respondents to be paid out of the estate.

Solicitor, for the appellants, *William Arnott.*

Solicitors, for the respondents, *Stephen, Jaques & Stephen*; *Read & Read*; *Morgan J. O'Neill.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HEDDERWICK AND OTHERS . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

Land tax—Assessment—Equitable tenant for life without power to sell under will taking effect before July 1910—*Right to be assessed as legal tenant—Land Tax Assessment Act* 1910 (*No.* 22 *of* 1910), *secs.* 25, 35—*Land Tax Assessment Act* 1911 (*No.* 12 *of* 1911), *secs.* 3, 13—*Land Tax Assessment Act* 1912 (*No.* 37 *of* 1912), *secs.* 7, 12.

Although under the *Land Tax Assessment Act* 1910 an equitable tenant for life of land, without power to sell, under the will of a testator who died before 1st July 1910 was, in respect of his assessment for the year beginning 1st July 1911, entitled to the benefit conferred by the proviso to sec. 25 of that Act, the effect of the amendments of that section made by sec. 3, and of sec. 13, of the *Land Tax Assessment Act* 1911 was to deprive him of that benefit, notwithstanding the provisions of sec. 35 of the Principal Act. The amendment of sec. 35 by sec. 7 of the *Land Tax Assessment Act* 1912 is a declaration in clear terms that the law is what it really was before, and, therefore, does not affect that result.