[HIGH COURT OF AUSTRALIA.]

GELLIBRAND . . . . . APPELLANT;
DEFENDANT,

AND

MURDOCH AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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MELBOURNE, *Mar.* 11, 12.

Latham C.J., Rich, Dixon and McTiernan JJ.

Executors—Will—Construction—Administration of estate—Payment of debts—Land—Devise of undivided moiety—Acquisition of further two-tenths—Mortgage of seven-tenths—"And all other . . . the . . . interest of . . . the mortgagor"—Acquisition of remaining interests in land—Direction to pay debts out of residuary real and personal estate—"Contrary . . . intention"—Not an exoneration of the mortgaged land—Locke King's Act—Bank overdraft—Shares—Deposit—General banker's lien—Realty equitably mortgaged to secure overdraft—Mortgaged land primarily liable—Administration and Probate Act 1935 (*Tas.*) (26 *Geo. V. No.* 38), *sec.* 35.*

At the date of his will in 1921 the testator was entitled to one undivided half share of certain land in fee simple. The testator divided his interest into fifth shares, that is, tenths of the entirety, and made specific devises of his

* The *Administration and Probate Act* 1935 (Tas.) sec. 35, provides:—"(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of, an interest in property which at the time of his death is charged with the payment of money, whether by way of mortgage, equitable charge, or otherwise, including a lien for unpaid purchase money, and the deceased has not, by will, deed, or other document, signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof. (2) Such contrary or other intention shall not be deemed to be signified by—I. A general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or II. A charge of debts upon any such estate—unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge. (3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise."

whole interest. He then directed his residuary real estate and his personal estate to be sold and his debts &c. to be paid out of the proceeds, and directed the balance to be held upon certain trusts. In 1925 the testator acquired another two-tenths interest in the land. He then mortgaged his seven-tenths interest "and all other (if any) the part, share and interest of him the mortgagor of and in the said lands." He later acquired the remaining three-tenths interest in the land, and at the time of his death he was the owner of the whole interest in the land.

Held that, under sec. 35 of the *Administration and Probate Act* 1935 (Tas.), the mortgage debt should be borne by the seven-tenths interest mortgaged, that is, as to five-sevenths by the interests specifically devised, and as to two-sevenths by two undivided one-tenth shares included in the residue; the words of the mortgage, "all other (if any) the part share and interest of the mortgagor in the lands," did not relate to the further interest subsequently acquired in the land by the testator, and the will did not signify any contrary intention within the meaning of sec. 35.

Immediately after becoming entitled to the entirety of the estate, the testator deposited the title deeds at his bank to secure advances and undertook to execute a mortgage if called upon. At his death his bank account was in debit and the bank also held certain shares of the testator's under a general banker's lien.

Held that, the shares being non-negotiable securities, the general lien would not enable the bank to sell the shares as a pledgee might with securities passing by delivery, and that the shares were not subject to any part of the testator's overdraft.

Decision of the Supreme Court of Tasmania (*Nicholls* C.J.) varied.

APPEAL from the Supreme Court of Tasmania.

William Tice Gellibrand made his will on 24th June 1921. At that time he owned one undivided half share in three estates, known as "Cleveland," "Lachlan Vale" and "Ousedale." By his will he disposed of this half share, giving two-fifths to his brother, Sir John Gellibrand, two-fifths to his sister, Isabella Selina Lloyd Geidt, and one-fifth to his brother, Thomas William Gellibrand, who predeceased him, and whose interest went under the will to his son, Thomas Ianson Gellibrand. After disposing of the five-tenths of the estates as above mentioned the will proceeded: "I give and devise all my residuary real estate and I give and bequeath all my personal estate of every nature and kind to my trustees upon trust to sell and dispose of my said residuary real estate and to collect call in and convert into money my said personal estate and I direct my trustees to stand possessed of the net proceeds to be received

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by them in respect of my said residuary real estate and of my personal estate upon trust after payment thereout of my debts and funeral and testamentary expenses and of all probate and death duties both Federal and State payable in respect of the whole of my estate to stand possessed of the balance thereof" upon trust to invest and to pay the income thereof to the testator's wife with provisions for the disposition of the estate after her death. In 1925 he acquired another two-tenths interest. When he acquired this interest he mortgaged his then interest, amounting to seven-tenths, to secure the repayment of a sum which at the date of the originating summons amounted to £9,600 with interest. The mortgage provided that "the mortgagor as beneficial owner hereby grants and conveys unto the mortgagees all those seven undivided tenth parts or shares and all other (if any) the part share and interest of him the mortgagor of and in the lands" described in the schedule, which comprised the three estates mentioned. In 1926 the mortgagor acquired another one-tenth interest and became the owner of eight-tenths, and in 1931 he acquired a further two-tenths. Thus, at the time of his death on 20th November 1935 the testator was owner of the whole of the three estates.

The testator's trustees, George Murdoch and Douglas Edward Hopkins, applied to the Supreme Court of Tasmania by originating summons for the determination of questions which included the following:—(3) Whether the principal sum of £9,600 and interest secured on first mortgage of the lands in question should be borne in the following proportions namely:—(*a*) (i) Five-sevenths of £9,600 by the devisees in their respective proportions in which the land is devised to them under the will; and (ii) Two-sevenths of £9,600 by the residuary estate; or (*b*) (i) Five-tenths of £9,600 by the specific devisees in their respective proportions in which the land is devised to them under the will, (ii) five-tenths of £9,600 by the residuary estate, or in other proportions? (4) Whether the testator's overdraft to the English Scottish and Australian Bank Ltd. amounting to £8,557 9s. 5d., secured by equitable charge of the lands in question and deposit of certain shares, should be borne ratably by the devisees and the residuary estate in the proportions which the value of the interests in the estates devised to the devisees bears to the

other property charged with the said overdraft or how otherwise. *Nicholls* C.J. held that the mortgage was charged on the whole ten-tenths of the estate and must be borne ratably between the specific devisees and the residue of the estate.

From that decision Grace Penwarne Gellibrand, being one of the persons interested in the residue, appealed to the High Court.

In 1931, immediately after he became entitled to the entirety of the estate, the testator deposited the title deeds at his bank to secure advances and undertook to execute a mortgage if called upon. At his death his bank account was in debit. His bankers then held certain shares of his in companies and the question arose whether they formed part of the security for his overdraft. *Nicholls* C.J. held that the overdraft must be borne by the land alone.

From that decision Sir John Gellibrand, one of the persons entitled to the land, gave notice of cross-appeal to the High Court.

Baker, for the appellant. The mortgage was charged only on the seven-tenths interest and not on the whole estate. There is nothing in the will which amounts to a contrary intention under sec. 35 of the *Administration and Probate Act* 1935 (Tas.), which corresponds to sec. 35 of the English *Administration of Estates Act* 1925 (15 Geo. V. c. 23).

Murdoch, for the trustees, submitted to the judgment of the court.

Wright, for the respondent Sir John Gellibrand. A contrary intention appears in the will sufficient to exclude sec. 35 (1) of the *Administration and Probate Act* 1935. The fund out of which the debts of the testator are directed to be paid does not come within any of the expressions used in sec. 35. The direction in the will to pay probate and death duties indicates a sufficient contrary intention that the whole mortgage debt should be paid out of residue. [He referred to *Brownson* v. *Lawrance* (1); *Hensman* v. *Fryer* (2); *Gibbins* v. *Eyden* (3); *In re Smith*; *Hannington* v. *True*; *Giles* v. *True* (4); *Sackville* v. *Smyth* (5).] Since sec. 35 of the *Administration and Probate Act* 1935 a residuary devise of realty for the

(1) (1868) L.R. 6 Eq. 1.
(2) (1867) 3 Ch. App. 420.
(3) (1869) L.R. 7 Eq. 371.
(4) (1886) 33 Ch. D. 195.
(5) (1873) L.R. 17 Eq. 153, at p. 155.

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payment of debts falls into the same class as a residuary bequest of personalty. Sec. 34 (3) obliterates the distinction between a residuary devise and a residuary bequest (*Administration and Probate Act* 1935, Second Schedule, Part II.; *Williams* on *Executors*, 12th ed. (1930), p. 1102). The mortgage was charged on the seven-tenths but was for the purpose of acquiring the two-tenths, and the mortgage money should be primarily chargeable on the two-tenths. Only if that is not sufficient do the five-tenths become liable. Since 1925 in England and since 1935 in Tasmania a specific devise subject to a mortgage prima facie is a gift free from the mortage (See *In re Dunlop*; *Dunlop* v. *Dunlop* (1); *Lipscomb* v. *Lipscomb* (2); *de Rochefort* v. *Dawes* (3); *Leonino* v. *Leonino* (4)). The subject matter of the mortgage is expressed as seven-tenths "and all other (if any) the part share and interest of him the mortgagor of and in the lands" described in the schedule. At the time of the mortgage, the mortgagor had only a seven-tenths interest in the property. The effect of the words quoted is that the mortgage is charged on the whole interest of the testator. They impose a charge on any interests in the land acquired by the mortgagor during the continuance of the security. The phrase should not be regarded as simply surplusage. On the cross-appeal:—The shares in the hands of the bank were chargeable with the testator's overdraft, and the whole of the overdraft should not have been thrown on the land. The finding that the shares were not liable to satisfy the overdraft is in the teeth of the evidence that "the depositing or lodging of the said scrip was not accompanied by any memorandum in writing and there is no record in the bank of any verbal arrangement having been made between the said Walter Tice Gellibrand and the bank at the time of the said deposit or lodging, but from a perusal of the records of the bank it appears that the said scrip was entered in the security register of the bank and not in the register of documents held for safe custody." The shares were either deposited as further security or were subject to a banker's lien (*Williams* on *Executors*, 12th ed. (1930), p. 1101).

(1) (1882) 21 Ch. D. 583.
(2) (1868) L.R. 7 Eq. 501.
(3) (1871) L.R. 12 Eq. 540.
(4) (1879) 10 Ch. D. 460.

Baker, in reply. The evidence is not conclusive on the question of the banker's lien, but merely states conclusions of fact. The banker's lien arises only where he has received the security as a banker (*Grant's Law of Banking*, 7th ed. (1924), pp. 288, 289 ; *Hart's Law of Banking*, 4th ed. (1931), pp. 843, 844 ; *Evidence Act* 1910 (Tas.), secs. 33, 34 ; *In re Boldero* ; *Ex parte Pease* (1) ; *Arnott* v. *Hayes* (2) ; *Hart* v. *Minister for Lands* (3)). There must be something which makes it clear that the banker has received the security in his capacity as banker. On the evidence the matter is left in an ambiguous position as to how the banker received the securities. Personal securities would not be liable to debit on a partnership account (*Grant's Law of Banking*, 7th ed. (1924), p. 295 ; *In re Dunlop* ; *Dunlop* v. *Dunlop* (4) ; *Hopkinson* v. *Mortimer Harley & Co. Ltd.* (5) ; *In re Hawkes* ; *Reeve* v. *Hawkes* (6)).

The following judgments were delivered :—

LATHAM C.J. William Tice Gellibrand made his will on 24th June 1921. At that time he owned one undivided half share in three estates, known as " Cleveland," " Lachlan Vale " and " Ousedale." By his will he disposed of this half share, giving two-fifths of it to his brother Sir John Gellibrand, two-fifths to his sister, Isabella Selina Lloyd Geidt, and one-fifth to his brother Thomas William Gellibrand, who predeceased him, and this brother's son, Thomas Ianson Gellibrand, took his father's share under the will. Thus, at the time when the testator made his will he owned a five-tenths interest in the three estates and he disposed of the total of this interest by his will. In 1925 he acquired another two-tenths interest. When he acquired this interest he mortgaged his then interest, amounting to seven-tenths, to secure the repayment of a sum which at the present time is £9,600 with interest. The mortgage, after certain recitals, provides that " the mortgagor as beneficial owner hereby grants and conveys unto the mortgagees all those seven undivided tenth parts or shares and all other (if any) the part share and interest of him the mortgagor of and in the lands "

(1) (1812) 19 Ves. 25 ; 34 E.R. 428.
(2) (1887) 36 Ch. D. 731, at p. 735.
(3) (1901) S.R. (N.S.W.) (L.) 133, at p. 138.
(4) (1882) 21 Ch. D., at p. 592.
(5) (1917) 1 Ch. 646, at p. 655.
(6) (1912) 2 Ch. 251.

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described in the schedule. The lands so described were the three estates mentioned.

In 1926 the testator acquired another one-tenth interest and became owner of eight-tenths, and in 1931 he acquired a further two-tenths. Thus, at the time of his death on 20th November 1935 he was owner of the whole of the three estates.

By his will the testator, as already mentioned, specifically devised five-tenths of the estates to three persons. The part of the will following after these devises was in these terms : " I give and devise all my residuary real estate and I give and bequeath all my personal estate of every nature and kind to my trustees upon trust to sell and dispose of my said residuary real estate and to collect call in and convert into money my said personal estate and I direct my trustees to stand possessed of the net proceeds to be received by them in respect of my said residuary real estate and of my personal estate upon trust after payment thereout of my debts and funeral and testamentary expenses and of all probate and death duties both Federal and State payable in respect of the whole of my estate to stand possessed of the balance thereof " upon trust to invest and to pay the income to the testator's wife with provisions for the disposition of the estate after her death. The question which arises is how, in the administration of the estate, the burden of the mortgage debt should be distributed. The learned Chief Justice of the Supreme Court of Tasmania has held that the mortgage was charged on the whole ten-tenths of the estate " and must be borne ratably between the specific devisees and the residue of the estate, that is, one-half each." The beneficiaries interested in the residue have appealed from this judgment.

The determination of this question depends upon the terms of sec. 35 of the *Administration and Probate Act* 1935 (No. 38). Sec. 35 is in the same terms as sec. 35 of the English *Administration of Estates Act* 1925, representing *Locke King's Acts*. This section provides that, prima facie, mortgaged property, shall as between the different persons claiming through a testator, be primarily liable for the payment of moneys charged upon it and that every part of the property according to its value shall bear a proportionate part of the charge on the whole thereof. This rule, however, only applies

where " the deceased has not, by will, deed, or other document, signified a contrary or other intention."

The appellant contends that no contrary or other intention has been signified and that therefore the mortgage debt must be borne by the seven-tenths interest in the lands in proportion of five-tenths by the specific devisees and two-tenths by the residuary devisees of the land. In my opinion this contention is right.

The mortgage is a mortgage, not of all the land, but of seven-tenths interest in the land. It is so expressed, and the words " all other (if any) the part share and interest of him the mortgagor of and in the lands " cannot be so construed as to impose the liability on another interest which the mortgagor did not possess at the time when the mortgage was executed. These words are only an estate clause, which do not produce the effect of including after-acquired property, but which only make it certain that all of the interest which the grantor had in the land at the time the document was executed passed under the grant. Thus it cannot be said that the testator as mortgagor indicated in the mortgage an intention that the mortgage moneys should be chargeable upon anything other than the seven-tenths interest which he then had.

It has been suggested in argument that surrounding facts and circumstances show that the testator raised the mortgage money for the purpose of buying the additional two-tenths which increased his interest to seven-tenths, and that therefore the mortgage money should primarily be charged upon the two-tenths interest which was acquired with the mortgage money. It is sufficient to say that the words of the mortgage plainly charge the mortgage upon the seven-tenths interest and not only upon the two-tenths newly acquired interest.

The next question which arises is whether the will indicates a contrary intention. Reliance is placed upon the provision in the will for the payment of debts out of the testator's residuary real estate and personal estate. The *Administration and Probate Act* 1935, sec. 35, sub-sec. 2, provides that a " contrary or other intention shall not be deemed to be signified by—(1.) A general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his

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residuary estate . . . unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge." The direction which the testator gives is a direction that his debts shall be paid out of his residuary real estate and his personal estate. In my opinion there is no reason for regarding the three sources of payment mentioned in the part of sub-sec. 2 which I have quoted as being mutually exclusive. In this case the testator has directed that his debts be paid out of the third source mentioned in the sub-section (his residuary real estate) together with the first source mentioned in the sub-section (his personal estate). Thus, the sub-section applies unless an intention to exonerate the charged property is further signified by some words expressly or by necessary implication referring to all or some part of the charge. There are no such words in the will, and therefore the general provision of the sub-section applies.

The order of the Supreme Court so far as it answers the third question should be discharged and in lieu thereof it should be declared in answer to that question that the principal sum of £9,600 and interest secured on first mortgage from the testator to the late Cecil Allport and the said Sir John Gellibrand over the testator's seven-tenths share and interest in the estates known as "Cleveland," "Lachlan Vale" and "Ousedale" should be borne in the following proportions, namely, five-sevenths of £9,600 by the said devisees in the respective proportions in which the land is devised to them under the will and two-sevenths of £9,600 by two undivided one-tenth shares of the land which are included in the residuary estate.

As to the cross-appeal, I am of opinion that the decision of the Supreme Court was right.

RICH J. I have had an opportunity of considering the statements made by the Chief Justice and *Dixon* J. and have nothing to add beyond expressing my appreciation of counsel's argument.

DIXON J. At the date of his last will the testator was entitled to one undivided half share as a tenant in common of the lands in question for an estate in fee simple. By his will he notionally divided this interest into fifth shares, that is, tenths of the entirety,

and made the fifth shares the subject of three specific devises. His will contained a residuary disposition amounting to a general devise of residuary realty and a general bequest of personalty. After the date of his will the testator acquired by purchase from his co-tenants in common two additional undivided tenth shares in the lands. He was thus the owner as tenant in common of a seven-tenths undivided share in the lands. As part of the transaction of purchase apparently the testator gave a fixed mortgage, not of the two tenth shares only, but of all seven tenth shares. This mortgage subsisted at his death. After the date of the mortgage he acquired the remaining three tenth shares and became, subject to the mortgage, entitled to an estate in fee simple in the entirety. Immediately after becoming entitled to the entirety, he deposited the title deeds at his bank to secure advances and undertook to execute a mortgage if called upon. At his death his bank account was in debit.

The effect of *Locke King's Act* is, of course, to throw the specific mortgage debt and the overdraft secured by equitable mortgage on the property upon which these debts are secured unless some contrary intention appears.

The testator died after the passing of the *Administration and Probate Act* 1935 (Tas.) and the case is governed by sec. 35 of that Act, which reproduces sec. 35 of the English *Administration of Estates Act* 1925 and contains the modern legislation representing the *Locke King's* provisions. That legislation extends to personalty. It relates to property charged with the payment of money whether by way of mortgage, equitable charge, or otherwise, including a lien for unpaid purchase money. Under it the contrary or other intention may be signified in a deed or other document as well as in a will. Further, a general direction for the payment of debts out of the personal estate, the residuary real and personal estate or the residuary real estate and a charge of debts upon any such estate are expressly declared insufficient to signify a contrary or other intention unless it is further signified by words expressly or impliedly referring to the charge.

By the order under appeal half the fixed mortgage has been thrown on to the specific devises in question and half on to residue. This part of the order cannot, in my opinion, be supported. Its only

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foundation is a supposition that the fixed mortgage came to include the entirety of the lands. If this were so, as an undivided half share is the subject of specific devises, and as the other half share falls into residue, the order would be correct. But the supposition is clearly erroneous. The parcels of the mortgage are limited to the seven undivided tenth parts or shares and all other (if any) the part share and interest of him the mortgagor, i.e., the testator, in the lands. These latter words appear to have been treated as covering the three tenth shares afterwards acquired, but they have no such effect. They are mere general words covering any then existing interest of the mortgagor not specifically described.

For the respondent, Mr. *Wright* put forward some interesting arguments in support of an alternative apportionment favourable to the specific devisees. He suggested that the two undivided seventh shares covered by the mortgage but falling into residue should bear the specific mortgage debt in exoneration of the devised shares. There is in the will a general direction to pay debts out of residue. To this he added the circumstance which was relied upon by Lord *Romilly* in the discredited decision of *Brownson* v. *Lawrance* (1), viz., that different interests over which one debt was secured were devised some specifically and some by a general or residuary devise. This, it was said, signified an intention that the shares comprised in residue should be the primary source whence the debt should be satisfied. The reason so far given for discrediting Lord *Romilly's* view has been that for the purpose of the administration or application of assets a general or residuary devise has been considered specific. Under the new legislation this distinction has ceased to possess significance, and it is said, therefore, that there is now no reason why the inference drawn by Lord *Romilly* should not be made. In the case before Lord *Romilly* the mortgage over all the property existed at the date of the will. If there was any foundation for his interpretation of the instruments before him, there is none for a similar interpretation of those before us in the present case. The testator at the time of his will had not given the mortgage and moreover owned only the specifically devised shares. The argument is opposed to the authority of *In re Sullivan* (2).

(1) (1868) L.R. 6 Eq. 1.

(2) (1866) 5 S.C.R. (N.S.W.) (Eq.) 20.

Mr. *Wright* further suggested that by the very nature of the transaction on the occasion of which the mortgage was given the debt was impliedly thrown on the two tenth shares then acquired. It does not clearly appear that the mortgage represented the balance of purchase money for those two interests, but, on that view of the facts, he contended that the mortgage really was a substitute for a vendor's lien over those shares. It is, however, quite clear that no contrary intention is disclosed by the mortgage itself, which includes all seven shares indifferently, and speculative inference from the nature of a transaction is not an allowable means of ascertaining the testator's intention.

The appeal should therefore be allowed and the order discharged and an affirmative answer given to question 3 (*a*) in the summons.

At the death of the testator his bankers held certain shares of his in companies, and a question arose whether they formed part of the security for his overdraft. The bank's records do not clearly exclude the possibility of their being deposited for safe custody, but the bank placed them on its security register. The executors considered they were a security for the overdraft, but we should not rely on their affidavit, which is based only on their inference from circumstances which are now placed more fully before the court. At best the bank's security amounted only to a general banker's lien. The shares were not negotiable securities, and the general lien would not enable the bank to sell the shares as a pledgee might with securities passing by delivery. In these circumstances the existence of a banker's lien would not for the purpose of the provisions replacing *Locke King's Act* put the shares in the same plight as the realty equitably mortgaged to secure the overdraft. The giving of the equitable mortgage may be regarded as an indication of intention that, as between the property mortgaged and the subject of a mere general lien, the former should be the primary security or source of payment; or the same result may be reached by considering the fact that the bank had no means by its own act of satisfying the overdraft out of the shares, although it could, of course, retain them until payment. On the other hand, it was entitled to resort to the equitable mortgage for payment, as a specific security.

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Whichever view is taken the result is fully supported by *In re Dunlop*; *Dunlop* v. *Dunlop* (1). Accordingly, the shares do not bear any part of the overdraft. In this respect the order appealed from was right and the cross-appeal should be dismissed.

McTIERNAN J. I agree and do not wish to add anything.

Appeal allowed. Order of the Supreme Court, so far as it answers the third question discharged and in lieu thereof declared in answer to that question that the principal sum of £9,600 *and interest secured on first mortgage from the testator to the late Cecil Allport and Sir John Gellibrand over the testator's seven-tenths share and interest in the estates known as "Cleveland," "Lachlan Vale" and "Ousedale" should be borne in the following proportions, namely, five-sevenths of* £9,600 *by the said devisees in the respective proportions in which the land is devised to them under the will and two-sevenths of* £9,600 *by two undivided one-tenth shares of the land which are included in the residuary estate. Cross-appeal dismissed. Costs of appeal and of cross-appeal to be paid to all parties out of the residuary estate of the testator, those of the trustees as between solicitor and client.*

Solicitors for the appellant, *Dobson, Mitchell & Allport.*

Solicitors for the respondents, *Murdoch, Cuthbert & Clarke* and *Crisp & Wright.*

H. D. W.

(1) (1882) 21 Ch. D., at p. 592.