ETTA LOTZKAR ..... APPELLANT;

1965

*May 9
Oct. 14

AND

MARY SOUTHIN representing the issue born or unborn of the residuary beneficiaries under the Will of the late Benjamin Lotzkar ..... RESPONDENT;

AND

THE MONTREAL TRUST COMPANY, LEON LOTZKAR, EVA GOLDBERG, BRANNA JAMES, RUTH BECKER, HELEN LAMER, DOLLY VAN HOLTUM and CECIL SLANZ ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Executors and administrators—Payment of debts and succession duties—Whether rule in Allhusen v. Whittell applicable so as to require apportionment of liability between life tenant and those entitled ultimately to the capital—Expressed intention of testator.*

The issue involved in the present appeal was as to whether or not the rule in *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295, was applicable in respect of the estate of B L, deceased, so as to require, in respect of the obligations of the estate, including debts, income taxes owed by the deceased, succession duties, interest upon such taxes and duties, and administration expenses, an apportionment of liability as between E L, the widow of the deceased, who became entitled to the income of the estate until her death or remarriage, and those persons who would be entitled ultimately to the capital of the estate. On motion for the construction of the will of B L the trial judge held that the wording of para. (*e*) thereof excluded the application of the rule to the payment of succession duties. He did apply it, as from the date of death, to debts and expenses. In the case of income tax and interest thereon, he applied the rule as from April 30, 1954, this being the month in which sales of the deceased's stock-in-trade were completed. In the case of administration expenses, he applied the rule as from the date the expenses became payable. In each case the rate of interest used in the application of the rule was the rate actually earned by the estate.

On appeal, by a majority of two to one, the Court of Appeal held that the rule applied to all of the above categories of estate liabilities, including succession duties, the determination to be made as from the date of death in each case. It was also held that the amount of duties and taxes, for the purpose of applying the rule, should include the interest and penalties paid thereon. From the judgment of the Court of Appeal E L appealed to this Court.

*PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

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*Held:* (Cartwright J. dissenting): The appeal should be allowed.

*Per* Martland, Judson, Ritchie and Hall: The will was construed as indicating the intention of the testator that all his debts and the succession duties should be paid by his executors, not out of the general residue of his estate, but out of the ready money of which he was possessed at the time of his death and the cash proceeds of the sale of a limited part of the residue, constituting a part of the capital of the estate. The rule in *Allhusen v. Whittell* was not applicable because, in view of the provisions contained in this will, the testator did not intend that it should apply. He designated a specified capital fund for the payment of debts and succession duties. The terms of the will displaced the application of the rule. *In re Wills, Wills v. Hamilton,* [1915] 1 Ch. 769; *Re Coulson,* [1959] O.R. 156, referred to; *Re Darby, Russell v. MacGregor,* [1939] 1 Ch. 905, statement of Sir Wilfrid Greene M.R., at p. 916, adopted.

*Per* Cartwright J., *dissenting:* For the reasons given in the judgment of the majority in the Court of Appeal the appeal should be dismissed. By the terms of the will it was the income from what remained after excluding the testator's "just debts, funeral and testamentary expenses and all probate and succession duties" that was given to the widow. There was no gift to her of the income derived from the moneys required to make payment of these items.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal and allowing a cross-appeal from a judgment of Verchere J. Appeal allowed, Cartwright J. dissenting.

*Allan D. McEachern,* for the appellant.

*Kenneth C. Binks, Q.C.,* for the respondent Mary Southin.

*Brian Crane,* for the respondent Montreal Trust Company.

CARTWRIGHT J. (*dissenting*):—The questions to be decided on this appeal, the facts, and the terms of the will of the late Benjamin Lotzkar which are relevant are set out in the reasons of my brother Martland and need not be repeated.

I have reached the conclusion that the appeal fails. I find myself so fully in agreement with the reasons of Davey J.A. who gave the judgment of the majority in the Court of Appeal that I propose to add only a few words.

The gift to the appellant with which we are concerned is contained in cl. (*f*) of the will which is quoted in full in the

[1] (1965), 50 D.L.R. (2d) 338.

reasons of my brother Martland. It is a gift of the net income from "the *residue* of the moneys realized from said sale or sales, calling-in or conversion, and any ready money . . . together with the income from any property which from time to time may remain unsold or unconverted".

To ascertain what is meant by the word "residue" which I have italicized, it is necessary to refer to cl. (*e*) which directs the trustees to sell, call in and convert into money all the remainder of the testator's estate not consisting of money and to pay out of the moneys so realized from such sale and conversion and any ready money that he may be possessed of his "just debts, funeral and testamentary expenses and all probate and succession duties". It is the income from what remains after excluding these items that is given to the widow. There is no gift to her of the income derived from the moneys required to make payment of the items specified. The trustees have however paid the income from the whole estate to the widow. I agree with Davey J.A. that the trustees were in error in so doing and also with his direction as to the method of taking the accounts to correct this error.

Having already indicated my full agreement with the reasons of Davey J.A. it follows that I would dismiss the appeal, but, in view of the differences of opinion in the Courts below and in this Court, this appears to me to be a proper case in which to direct that the costs as between solicitor and client of all parties who appeared on the appeal in this Court be paid out of the capital of the estate, and I would so order.

The judgment of Martland, Judson, Ritchie and Hall JJ. was delivered by

MARTLAND J.:—The issue involved in this appeal is as to whether or not the rule in *Allhusen v. Whittell*[1], is applicable in respect of the estate of Benjamin Lotzkar, deceased, so as to require, in respect of the obligations of the estate, including debts, income taxes owed by the deceased, succession duties, interest upon such taxes and duties, and administration expenses, an apportionment of liability as between Etta Lotzkar, the widow of the deceased, who became entitled to the income of the estate until her death

[1] (1867), L.R. 4 Eq. 295.

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or remarriage, and those persons who would be entitled ultimately to the capital of the estate.

Benjamin Lotzkar, hereinafter referred to as "the testator", carried on business in the City of Vancouver, as a dealer in junk. His business was still in operation at the time of his death on July 7, 1951. He was married, and had six daughters, of whom, at the time of his death, the two eldest were married, and the three youngest were infants, the youngest then being aged eleven years. The four unmarried daughters subsequently married. At present all the daughters are living and none is an infant.

The beneficiaries under the testator's will consisted solely of his wife and daughters, with certain contingent interests for the issue of the four youngest daughters.

The main provisions of the will, which was made on September 2, 1948, are summarized, or quoted, as follows:

All of the testator's property was devised and bequeathed to his executors, Montreal Trust Company, his wife, and his brother Leon, as trustees upon the trusts contained in the will.

Paragraph (*a*) provided for delivery to the testator's wife of all furniture and household effects, automobile, and articles of personal, household, or domestic use or ornament.

Paragraph (*b*) permitted his wife to use his residence during her lifetime or until remarriage, all taxes, insurance and water rates and reasonable repairs to be paid from the estate. Provision was made for the use of the house by unmarried children after the wife's death or remarriage.

Paragraph (*c*) directed the Trustees:

> (*c*) To receive the income from my junk business carried on after my death by the manager thereof, pursuant to the authority herein given in respect thereof, or such portion of the income as the manager shall not require for the operation of the business, and also the proceeds of the sale of the said business when the same has been sold by the manager pursuant to the authority hereinafter set forth.

This paragraph must be read in conjunction with a later paragraph in the will, reading as follows:

> I DO HEREBY APPOINT my said brother and my wife, or the survivor of them, to carry on my junk business for a period of one year after my death, with a view of selling the same; but no junk or other stock shall be bought after my death. My said brother and my wife, or the survivor of them, herein referred to as the manager, shall be accountable to the Trustees of my estate in respect to the income therefrom, and the proceeds of the sale of the said business; and the manager shall operate the

business for such period and shall sell the said business SUBJECT to the direction and control of my Trustees or a majority of them. My said manager shall quarterly from the date of my death account for and pay over to the Trustees all income in respect of the said business, but not so as to impair the funds required to operate the said business; and forthwith after the sale of the said business the manager shall render an account thereof to the Trustees, and the sale price thereof shall be paid to the Trustees and form part of the capital of my estate to be dealt with as herein provided. My Trustees are authorized to pay to my wife and my said brother as remuneration while engaged in carrying on my said business as herein provided the sum of ONE HUNDRED ($100.00) DOLLARS monthly to each of them.

Paragraph (*d*) related to a business block owned by the testator. The Trustees were directed to stand possessed of this property for ten years following his death, after which it might be sold. The Trustees were to lease the premises upon monthly tenancies. The income thus derived was to be used for payment of taxes, insurance, water rates, carrying charges and necessary repairs, the balance to be subject to "the same trust as hereinafter provided in respect of the income from the remainder of my estate."

Paragraphs (*e*) and (*f*) read as follows:

(*e*) SAVE as herein otherwise expressly provided, to sell, call in and convert into money all the remainder of my estate not consisting of money at such time or times, in such manner, and upon such terms as my said Trustees in their direction may decide upon, with the power and discretion to postpone such conversion of such estate or any part or parts thereof for such length of time as they may think best; and I HEREBY DECLARE that my said Trustees may retain any portion of my estate in the form in which it may be at my death, and to pay out of the moneys so realized from such sale and conversion and any ready money that I may be possessed of, my just debts, funeral and testamentary expenses and all probate and succession duties that may be payable in connection with any insurance or gift or benefit given by me to any person either in my lifetime or by this will or any codicil thereto; such duties to be paid out of the capital of my estate so that any benefit, other than in respect of the residue, passing to any beneficiary shall accrue to such beneficiary without any deduction whatsoever for probate or succession duties.

(*f*) To keep the residue of the moneys realized from said sale or sales, calling-in or conversion, and any ready money, invested in securities of, or guaranteed by the Dominion of Canada; and to pay the net income therefrom, together with the income from any property which from time to time may remain unsold or unconverted, to my said wife in monthly instalments during her lifetime or so long as she shall remain my widow, and in the event of the death or remarriage of my wife during the infancy of any of my children, I DIRECT that my Trustees shall apply the income from my estate for the support, maintenance, education and advancement of my infant children, and in the event of this being insufficient for these purposes, or in the event of the illness of my wife or after the death or remarriage of my wife, in the event of the illness of any child or the child of any deceased child of mine, referred to in paragraph (*g*)

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(V) hereof, or for any other reason my Trustees deem advisable, I EMPOWER my Trustees in their sole discretion to encroach on the capital of my estate to such extent as they consider necessary and proper, including the capital of the presumptive share of any child of mine.

The next following paragraphs contain provisions as to what is to occur following the death or remarriage of the wife.

Two annuities were to be purchased, one for each of the two eldest daughters. The amount to be expended for each was five per centum (5%) of the value of the estate at the time of the wife's death or remarriage.

Income from the residuary estate was to be applied for the maintenance, advancement and education of the other four daughters. As each one attained the age of twenty-one years she was to receive a Dominion of Canada annuity, guaranteed for twenty years, paying annually the sum of $1,200.

The residue of the estate was to be divided, when the testator's youngest living child attained the age of twenty-one years, into four equal shares, one such share for each of the four daughters. Each was to receive the income from her share, with one-quarter of the capital to be received at the age of thirty years, one-quarter at age thirty-five and the balance at age forty. This clause concluded with the following proviso:

> PROVIDED that should any one or more of my said children die before receiving the whole or any part of her said share, the same shall be distributed per stirpes amongst the survivors of the said four children or their issue at such time or times as she would have received distribution had she lived to attain the ages herein mentioned.

The first succession duty return, dated October 25, 1951, disclosed the gross value of the estate at $609,594.77, of which the major items were:

| | |
|---|---|
| Real Estate | $ 145,350.00 |
| Bonds | 30,975.97 |
| Cash | 339,100.49 |
| Stock-in-trade | 70,750.00 |

Debts were shown as $28,170.25, leaving a net estate of $581,424.52.

After appraisals had been made of the stock-in-trade, a revised return, filed on January 30, 1952, disclosed a gross estate of $778,230.18, with debts of $163,186.24, showing a net value of $625,043.94. The value of the stock-in-trade was shown at $208,862.

At the insistence of Mrs. Lotzkar, instead of selling the stock-in-trade in bulk, it was sold piece-meal over a period of time, up to April 1954, and ultimately realized a net amount of $1,034,678.17.

In June 1956, income tax was assessed for the years 1943 to 1951 totalling $727,639.14. This was paid out of capital and an appeal filed. Counsel retained by Mrs. Lotzkar undertook the carriage of this matter, with the Trustees' consent, and ultimately a refund was obtained of $419,-807.93 and interest in the sum of $2,294.79.

A large part of the refund was applied in settlement of succession duties. Ultimately the amounts paid for income tax and succession duties were:

| | | |
|---|---|---|
| Income Tax | $388,508.54 | |
| Interest | 58,274.12 | $446,782.66 |
| Succession Duties | $417,657.09 | |
| Interest | 41,890.42 | 459,547.51 |
| | | $906,330.17 |

During the period from the testator's death until October 31, 1961, the net income of the estate (other than $30,-451.76) was paid to Mrs. Lotzkar, and totalled $405,946.80, on which income she paid tax.

Following this, Montreal Trust Company applied by originating notice, returnable on January 9, 1962, later amended, for advice and directions in the form of five questions submitted to the Court. Only the first four of these are now relevant:

1. Are the Succession Duties, Probate Fees, just debts, funeral and testamentary expenses of the said deceased and of the estate of the said deceased payable out of the capital only of the said estate to the exclusion of the earnings of the money used to pay debts?
2. Is the total amount of interest charged upon the said Succession Duties, Probate Fees and said debts payable out of the capital only of the said estate to the exclusion of the earnings of the money used to pay debts?
3. Is the total net income of the estate of the said deceased, apart from the specific bequests in Paragraphs (*a*) and (*b*) on Page One of the said Will, which has been received by the Executors and Trustees from time to time since the date of death of the said deceased, payable to the widow of the said deceased, namely, ETA LOTZKAR, until her death or remarriage?
4. If the answer to any of the above questions is in the negative then what, if any, equitable rule of apportionment should be applied in each such case as between the beneficiaries of the income and the beneficiaries of the capital of the said estate?

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All of the testator's daughters supported the position of the widow, contending that each of the first three questions should be answered in the affirmative. Counsel appointed to represent issue of the testator's daughters, born or unborn, who might, contingently, acquire an interest in the estate, opposed this position.

The issue raised by the first three questions is as to whether the rule in *Allhusen v. Whittell* is applicable in respect of the items of expenditure mentioned in the first two questions. That case, which was decided almost a hundred years ago, related to a will, by whose terms certain legacies were bequeathed, and which devised and bequeathed the residue of the estate, after payment of debts, funeral and testamentary expenses, to trustees upon trust to sell and convert and to invest the clear moneys, after payment of all incidental expenses, in specified investments. The income was to be paid to a life tenant, and, thereafter, the residue was to be divided among certain relatives of the testator.

The rule is stated by the Vice-Chancellor, Sir W. Page Wood, as follows:

> There appear to be two points well covered by authority. One is, that every tenant for life of residue is entitled to the income of all such part of the residue as is not required for the payment of debts, and which is found to be in a proper state of investment. He is entitled to the income of that property from the death of the testator. There have been numerous decisions on this point, some of the earliest being those of *Angerstein v. Martin*, T. & R. 232, and *Hewitt v. Morris*, T. & R. 241. These authorities clearly shew that, supposing a testator has a large sum, say £50,000 or £60,000, in the funds, and has only £10,000 worth of debts, the executors will be justified, as between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration. But the executors, when they have dealt with the estate, will be taken by the Court as having applied in payment of debts such a portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts. It is curious that I find none of the authorities pointing out this rule, but probably it has never been thought necessary to make so nice a distinction. It is quite clear that the executors must not be taken to have applied the whole income. Until the debts and legacies were paid, there would have been no interest from the death of the testator which could by possibility have come to the tenant for life. What I apprehend to be the true principle is, that, in the bookkeeping which the Court enters upon for the purpose of adjusting the rights between the parties, it is necessary to ascertain what part, together with the income of such part for a year, will be wanted for the payment of debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted. I have not been

able to find a case in which that calculation has been made, but it appears to me to be the principle upon which alone the rights can be adjusted. It is clear that the tenant for life ought not to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way whatever.

The case is concerned with the adjustment of rights and liabilities, as between the life tenant and the remainderman of the residue of an estate during the "executor's year". Two matters are covered in this statement. The first is as to the right of the tenant for life to the income of that part of the residue not required for the payment of debts, which is in a proper state of investment. That right is to receive such income as from the date of death. The executors are not entitled during the one-year period from the date of death, as between him and the remainderman to apply that income in the payment of debts.

The second is that, in determining the portion of the residue required to meet the debts, the executors are to determine that amount which, together with interest on it for the one-year period, would pay the debts. On that portion of the residue the life tenant is not entitled to income, because that portion never becomes residue.

In essence, in doing the bookkeeping as between life tenant and remainderman the executors are required to set aside out of capital a fund which, applying the principles above stated, will provide for payment of the estate debts. This is done on the assumption that it is the intention of the deceased to do so. However, this must be subject to the specific directions of the testator who might, in his will, himself designate that fund which is to be applied for the payment of debts.

In the case of *In re Wills, Wills v. Hamilton*[1], Sargant J. held that the principle was not limited to payments made during the first year from the testator's death, but applied equally to payments made during the subsequent years. In that case he also held that the interest payable on estate duty should be included with the duty itself as being a debt to be discharged.

There has been a number of decisions regarding the applicability of the rule, many of which are reviewed in the judgment of Wells J. in *Re Coulson*[2]. I do not propose to recite them here. In none of them was the wording of the will the

[1] [1915] 1 Ch. 769. [2] [1959] O.R. 156.

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same as in the present case. The question to be decided is as to whether the rule applies in respect of this will, and, in that connection, I adopt the statement of Sir Wilfrid Greene M.R. in *Re Darby, Russell v. MacGregor*[1], at p. 916:

> The rule in *Allhusen v. Whittell,* like so many other rules which the Court of equity has adopted, is for the purpose of giving effect to an equitable arrangement which the testator may be presumed to have intended in making the dispositions which he did make. It can be displaced by any language of the will which sufficiently shows an intention to displace it and, in my opinion, it also ceases to be applicable where the nature of the property concerned or the circumstances affecting it are such as to make it impossible to apply the rule as it ought to be applied.

In the present case, the learned trial judge held that the wording of para. (*e*) of the will excluded the application of the rule to the payment of succession duties. He did apply it, as from the date of death, to debts and expenses. In the case of income tax and interest thereon, he applied the rule as from April 30, 1954, this being the month in which the sales of the stock-in-trade were completed. In the case of administration expenses, he applied the rule as from the date the expenses became payable. In each case the rate of interest used in the application of the rule was the rate actually earned by the estate.

On appeal, by a majority of two to one, the Court of Appeal for British Columbia[2] held that the rule applied to all of the above categories of estate liabilities, including succession duties, the determination to be made as from the date of death, in each case. It was also held that the amount of duties and taxes, for the purpose of applying the rule, should include the interest and penalties paid thereon.

Sheppard J.A. dissented, holding that the terms of the will displaced the application of the rule.

From the judgment of the Court of Appeal Mrs. Lotzkar has brought the present appeal.

In my opinion the rule is not applicable in the present case because, in view of the provisions contained in this will, the testator did not intend that it should apply.

The general intent of the whole will was to make provision for the testator's wife and daughters, with provision for the issue of daughters only if a daughter entitled to a share in the capital of the residue died before attaining the stipulated ages at which her share of the capital would be

[1] [1939] 1 Ch. 905. [2] (1965), 50 D.L.R. (2d) 338.

payable. The wife was to receive furniture and personal effects outright, plus the use of the family residence and the income of the estate until her death or remarriage. Following that event the two eldest daughters were to receive annuities, while the income from the residue was to be applied for the benefit of the other daughters until the youngest attained the age of twenty-one years, with provision for each one receiving an annuity on attaining that age. None of the four younger daughters was to receive any part of the capital of the residue until she attained the age of thirty years. The whole emphasis is clearly placed on the provision of income for the testator's wife and daughters.

This is not a straightforward case of granting income of the residuary estate to a life tenant, with a gift of capital following the death of the life tenant, after providing for debts and legacies. Here there were no legacies, and the source of payment for the debts was specifically designated by the testator. The major portion of this estate was the stock-in-trade of the junk business. As to this, special provision was made. It was to be operated by the testator's wife and brother with a view to sale. Income of the business was only to be turned over to the Trustees provided that the funds required to operate the business were not impaired. The sale of the business was to be effected by the wife and the brother, subject to the direction and control of the majority of the Trustees. The wife and brother constituted such majority. As previously noted, the sale of the stock-in-trade of the business was not completed until April 1954.

The net income of the business block, which block was required to be retained for ten years, was to be applied on the same trust as provided in respect of the income from the remainder of the estate. I take this to mean that this income is to be applied as provided in para. (*f*), "remainder" meaning what remained of the capital mentioned in para. (*e*) after payment of debts and succession duties.

It should be noted that the provision in the will respecting payment of debts and succession duties was made subordinate to those provisions which related to the testator's business and the business block. Paragraph (*e*) commences with the words "Save as herein otherwise expressly provided".

The effect of this proviso, coupled with the provisions relating to the operation of, income from and sale of the

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business and the provisions of para. (*d*) relating to the business block, was:

1. To limit the wife's right to receive income from the operation of the business to such portion of it as was not required for the operation of the business.
2. To preclude the sale of the business block for a period of ten years.
3. To direct payment of the net income derived from the business block in full to the wife.
4. To make the estate assets other than the business and the business block primarily responsible for the payment of debts and succession duties.

Payment of debts and succession duties is directed to be made out of those assets which are sold by the Trustees and converted into money and out of ready money of which the testator was possessed. Paragraph (*e*) in terms directs such payment "out of the moneys so realized from such sale and conversion", that is, out of the cash obtained from sale of those estate assets which the Trustees were authorized to sell, and out of ready money, which would include cash and bank accounts of the testator at the time he died. This description of the funds to be applied for such payment is of cash capital of the estate, derived from certain sources not comprising the whole of the residue of the estate. The testator designated a specified capital fund for the payment of debts and succession duties.

This view is reinforced by the wording of para. (*f*), relating to investment and income. The investments to be made by the Trustees to provide income are to be made out of "the residue of the moneys realized from said sale or sales, calling-in or conversion and any ready money", *i.e.*, what is left from the ready money and cash realized from the sale and conversion of the specified assets, after payment of debts and succession duties. The wife is to receive the income from those investments plus income from property not sold or converted.

It is further reinforced by the concluding words of para. (*e*):

such duties to be paid out of the capital of my estate so that any benefit, other than in respect of the residue, passing to any beneficiary shall accrue to such beneficiary without any deduction whatsoever for probate or succession duties.

The purpose of this proviso, as indicated in the reasons of Davey J.A. in the Court below, was to exempt beneficiaries, other than in respect of the residue, from the liability for payment of succession duties in respect of the benefits which they received. In order to accomplish that particular purpose, however, it was not necessary to direct payment of such duties "out of the capital of my estate." It would have been sufficient to direct that such benefits be received free of any liability for the payment of succession duties.

The direction to pay succession duties and the description of the source of the funds for their payment are contained in the earlier part of para. (*e*). In my opinion, when the words "out of the capital of my estate" were used they refer back to that source of payment. To paraphrase, the testator is saying, at the conclusion of para. (*e*), that the succession duties, which are payable out of capital, shall, in respect of certain beneficiaries, be so paid that those beneficiaries shall not be liable for payment of them.

In other words, the reference to capital in respect of the succession duties, which are payable in exactly the same way, and from the same sources, as other debts, to me confirms the intention of the testator that all the estate liabilities were to be paid out of capital. They do not indicate that succession duties, as to source of payment, were to be treated in a separate category, distinct from estate debts.

To summarize, I construe this will as indicating the intention of the testator that all his debts and the succession duties should be paid by his executors, not out of the general residue of his estate, but out of the ready money of which he was possessed at the time of his death and the cash proceeds of the sale of a limited part of the residue, constituting a part of the capital of the estate.

In my opinion, for the foregoing reasons, the testator did not intend the rule in *Allhusen v. Whittell* to apply and displaced its operation.

No issue has been raised before us as to the propriety of the conclusion reached in the Courts below that interest payable in respect of income tax should be considered as a part of a total debt for income tax, and similarly with respect to interest in respect of succession duties.

In my opinion the appeal should be allowed, and each of the first three questions stated in the originating notice

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should be answered in the affirmative; consequently, no answer to question 4 is required. The costs of those parties who appeared before us should be payable out of the capital of the estate, those of Montreal Trust Company to be taxed on a solicitor and client basis.

*Appeal allowed,* CARTWRIGHT J. *dissenting.*

EDITORIAL NOTE:—A motion to vary the judgment in this appeal to provide that the costs of all parties who appeared before this Court be paid out of the capital of the estate on a solicitor and client basis was granted on December 2, 1965.

*Solicitors for the appellant: Russell & DuMoulin, Vancouver.*

*Solicitors for the respondent Mary Southin: Ladner, Southin and Roberts, Vancouver.*

*Solicitors for the respondent Montreal Trust Company: Campney, Owen and Murphy, Vancouver.*

*Solicitors for the respondent Leon Lotzkar: Bull, Housser and Tupper, Vancouver.*

*Solicitors for the respondents Eva Goldberg, Branna James, Ruth Becker, Helen Lamer, Dolly Van Holtum and Cecil Slanz: Farris, Farris, Vaughan, Taggart, Wills and Murphy, Vancouver.*