STANLEY ALEXANDER THOMPSON, PERSONALLY AND AS EXECUTOR OF HARRY ALCROFT THOMPSON, DECEASED, AND JOHN A. NORRIS..... APPELLANTS;

AND

EDYTHE G. LAMPORT

AND

CHARTERED TRUST AND EXECUTOR COMPANY AND STANLEY ALEXANDER THOMPSON, SURVIVING EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALEXANDER MONTGOMERY THOMPSON, DECEASED ..... RESPONDENTS.

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*Nov. 16, 17
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*Feb. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Costs—Trustees—Executors—Direction in will that fund be set apart for benefit of testator's daughter—Executors and trustees of the will also trustees of the fund—Unsuccessful action by daughter against the executors and trustees with regard to the fund as set up—Question out of what fund (said fund or the residuary estate, or both) the solicitor and client costs incurred by the executors and trustees in said action (to the extent that they exceeded the party and party costs) should be paid.

By his will, T., who died in 1929, appointed his two sons and a trust company to be executors and trustees and gave to them all his estate upon trusts, one trust being to set apart for the benefit of his daughter, L., the sum of $100,000, revenue from which was to be paid

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

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to her during her life (should she become a widow she was to receive the corpus). The residue of the estate was to go to T.'s two sons. In 1937, L. brought action against said executors and trustees, as such and also personally, complaining of the inclusion, in a partial setting up of said trust fund in 1929, of a certain mortgage. She asked (*inter alia*) for relief with regard to the inclusion of that mortgage; that an agreement made in 1931, which was in the nature of a family settlement in regard to matters in dispute, and which contained an approval by her of said partial setting up of the fund, be set aside; damages against the executors and trustees personally; and their removal as trustees of said trust fund and the appointment of new trustees. She was unsuccessful in that action. The question now in issue was, out of what fund the solicitor and client costs incurred by the executors and trustees in that action (to the extent that the same exceeded their party and party costs) should be paid. Barlow J. held ([1944] O.R. 31) that they should be paid out of the capital of the said trust fund. The Court of Appeal for Ontario held ([1944] O.R. 290) that they should be paid out of the capital of the residuary estate. The question was brought to this Court.

Held (the Chief Justice and Kerwin J. dissenting): The solicitor and client costs in question should be spread over the capital of the estate, including said trust fund; and should be paid out of the trust fund and the residuary estate proportionately according to their respective values.

Per Hudson J.: It was essential to the success of L.'s action that said agreement of 1931 should be set aside. The Court is now entitled to assume that that agreement served the best interests of all parties, and was not disadvantageous to the trust fund set up especially for L.'s benefit. Under all the circumstances, the executors and trustees were justified in defending the action on behalf of both funds (said trust fund and the residuary estate) as well as on their own behalf.

Per Rand and Estey JJ.: The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly. If the acts of the executors and trustees challenged in said action were properly done within their duty, they were entitled to indemnity for the costs in question within that general principle, without the need of a finding that, in addition to propriety, there was a benefit to the fund as against what was alleged ought to have been done. The indemnity should extend to their whole costs incurred, as their defence personally was merely incidental to that in their representative capacity.

Per the Chief Justice and Kerwin J., dissenting: The solicitor and client costs in question should be paid out of the capital of the residue of the estate. In said action, though the executors and trustees were made defendants both as executors and trustees of the will and as trustees of the fund, any claim set up against them as trustees of the fund should be considered as negligible. If the

action had succeeded, the residue of the estate would have been adversely affected; and the defence was really taken to protect that residue. The principle which determines when liability lies for costs incurred by trustees applies to determine where such liability lies; and an estate which derives the benefit from a defence by trustees ought to bear the expense incurred by it; it would be inequitable to impose the expense of litigation, conducted for the benefit of one estate or fund, upon another.

APPEAL from the judgment of the Court of Appeal for Ontario (1) which allowed an appeal from the judgment of Barlow J. (2) upon an application made in the Supreme Court of Ontario by the surviving executors of the will of Alexander Montgomery Thompson, deceased, for the opinion, advice and direction of the Court upon certain questions.

The said deceased died on or about October 18, 1929. By his will he appointed his two sons: Harry Alcroft Thompson and Stanley Alexander Thompson, and The Chartered Trust and Executor Company, to be the executors and trustees of his will, and gave to them all his estate upon trusts. One of the trusts was to set apart for the benefit of the testator's daughter, Edythe G. Lamport, the sum of $100,000 and to keep the same invested in good legal securities and pay to her $2,500 per year out of the net revenue thereof for ten years, and after the expiration of said ten years she was to receive the full revenue from the $100,000 so set apart for her together with any increase that there might be to the same owing to her receiving only a portion of the net revenue therefrom for the said ten years. The last mentioned full net revenue was to be paid to her for the balance of her natural life only. Should she become a widow she was to receive the corpus of her share in the estate. After her death prior to becoming a widow, the above bequest so set apart for her benefit should revert and become part of the residue of the testator's estate and should be divided equally between the testator's said two sons. The will directed that, after setting apart for the benefit of the testator's said daughter the above bequest of $100,000, all the rest and residue of his estate should be divided between his said two sons in equal shares.

(1) [1944] O.R. 290; [1944] 3 D.L.R. 74.

(2) [1944] O.R. 31; [1944] 1 D.L.R. 354.

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In December, 1929, assets representing the sum of $60,000 were set apart as part of the said Edythe G. Lamport trust fund. (The whole of the trust fund was completed in 1936).

There was an agreement dated August 7, 1931, which was in the nature of a family settlement in regard to matters in dispute, and which contained an approval by Edythe G. Lamport of said partial setting up of the fund.

The said Edythe G. Lamport, on March 19, 1937, brought action in the Supreme Court of Ontario against "Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company, executors and trustees of the last will and testament of Alexander M. Thompson, deceased, and trustees of the Edythe G. Lamport Trust, and the said Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company", complaining of the inclusion in the said partial setting up of the trust fund in December, 1929, of a certain mortgage for $30,000, which she alleged was not a proper security to have been included therein. She asked (*inter alia*) for relief with regard to the inclusion of that mortgage; that the said agreement of August 7, 1931, be set aside, for the reason that, as alleged, she did not have independent advice and was not aware, when she executed the agreement, of the state or condition of the property covered by the said mortgage; damages against the defendants personally; and their removal as trustees of the said trust fund and the appointment of new trustees. In that action she was unsuccessful, at trial and on appeal to the Court of Appeal for Ontario and on appeal to this Court (1). During the course of that litigation the said Harry Alcroft Thompson died, on May 16, 1939, and the said Stanley Alexander Thompson was appointed administrator *ad litem* of his estate.

The party and party costs of the defendants against the plaintiff, Edythe G. Lamport, in that action were taxed (and were being paid by the said plaintiff who was personally liable for them). The solicitor and client costs of the solicitors for the defendants were also taxed (in the presence

(1) [1914] S.C.R. 503, where also the citation is given of the report of the judgments below in that action.

of counsel for the said Edythe G. Lamport, who, however, took the position that there was no right to charge any part of such costs against the trust fund), and exceeded the said party and party costs by $6,596.23. The question arose out of what fund or funds this should be paid.

The present proceedings were begun in the Supreme Court of Ontario by notice of motion on behalf of the surviving executors of the said will, for the opinion, advice and direction of the Court upon questions which in effect were as follows:

(1) Are the executors entitled to recoup themselves in respect to the solicitor and client costs of their solicitors in connection with the aforesaid action, as taxed, out of the income or out of the corpus or out of both the income and the corpus, of the Edythe G. Lamport trust?

(2) If the answer to question (1) is that the executors are entitled to recoup themselves out of both the income and the corpus of the said trust, then on what basis or in what proportions are said costs to be apportioned as between income and corpus?

(3) Are the executors entitled to recoup themselves in respect to said solicitor and client costs, as taxed, out of the income or out of the corpus, or out of both the income and corpus of the residuary estate of the said testator?

(4) If the answers to both question (1) and question (3) are in the affirmative, then on what basis or in what proportion are the said costs to be apportioned as between the said trust and the residuary estate of the said testator?

Barlow J. held that the solicitor and client costs of the executors (over and above the party and party costs, which were being paid as aforesaid) should be paid out of the capital of the Edythe G. Lamport trust. But, on appeal by the said Edythe G. Lamport, the Court of Appeal for Ontario held that they should be paid out of the capital of the residue of the estate of the said testator. The said Stanley Alexander Thompson, personally and

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as executor of the said Harry Alcroft Thompson, deceased, (and John A. Norris, an assignee of certain interests under the will) appealed to this Court.

F. J. Hughes K.C. for the appellants.

J. R. Cartwright K.C. for Edythe G Lamport, respondent.

R. F. Wilson for the executors, respondents.

The judgment of the Chief Justice and Kerwin J., dissenting, was delivered by

KERWIN J.—This is an appeal from a judgment of the Court of Appeal for Ontario reversing the order of Barlow J. on an originating notice launched by Stanley Alexander Thompson and Chartered Trust and Executor Company, the surviving executors of the estate of Alexander Montgomery Thompson, asking the opinion, advice and direction of the Court upon four questions arising in the administration of the estate.

By his last will and testament, Alexander Montgomery Thompson appointed his two sons, Harry Alcroft Thompson and Stanley Alexander Thompson, and the Chartered Trust and Executor Company to be executors and trustees. He gave to them all his real and personal estate upon trust, *inter alia,* to set apart for the benefit of his daughter, Edythe G. Lamport, the sum of $100,000, and to keep the same invested in good legal securities, and to pay to her the sum of $2,500 per year out of the net revenue thereof, for the first ten years after the testator's death, and thereafter to pay her the full revenue from the $100,000 together with any increase that there might be, owing to her receiving only a portion of the net revenue for the first ten years. It was provided that should his daughter become a widow, then she should receive the corpus of her share in the estate, and that after her death, prior to her becoming a widow, "the above bequest so set apart for her benefit shall revert and become part of the residue of my estate, and shall be divided equally between" the two sons. After the setting apart of the $100,000, the rest and residue of the estate was to be divided between the two sons in equal shares.

Mrs. Lamport brought an action in the Supreme Court of Ontario against Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company as executors and trustees of the last will and testament of Alexander Montgomery Thompson and as trustees of the Edythe G. Lamport Trust, and the said Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company personally. The defendants severed in their defences, Harry Alcroft Thompson and Stanley Alexander Thompson being represented by one firm of solicitors, and the Trust Company by another. Harry Alcroft Thompson died but proceedings were continued against the remaining defendants and also Stanley Alexander Thompson as administrator *ad litem* of his brother's estate. The Thompsons by their defence denied that they ever were trustees of the fund while the Trust Company pleaded that the trust fund had been duly and properly completed pursuant to the terms of the will and of a certain family settlement. It must now be taken that the trust fund was duly set apart and that the Thompsons and the Trust Company were trustees thereof as well as executors and trustees of the will.

Mrs. Lamport failed in her action, at the trial, in the Court of Appeal for Ontario and in this Court, with the result that she found herself obligated to pay the party and party costs of the defendants. On the taxation of these costs, it was determined ultimately by the Court of Appeal that the severance by the defendants in their defences was justifiable. The total amount of the party and party costs either have been paid or will be paid by Edythe G. Lamport or from her income from the trust fund. Each set of defendants, however, had a solicitor and clients' bill of costs, and the total of these, after crediting the party and party costs, amounts to $6,596.23.

The questions asked on the originating notice were whether this sum should be paid out of the Edythe G. Lamport Fund or the residue of the estate of Alexander Montgomery Thompson and in either case whether it should be paid out of capital or income. Barlow J. and the Court of Appeal determined that this sum really belonged to the category of costs, charges and expenses

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which the trustees were entitled to charge against the capital of the residuary estate or of the trust fund, as they were entitled to defend Mrs. Lamport's action. No doubt has been raised before us as to the correctness of these findings. However, Barlow J. further held that, while the trustees' defence to the action was for the benfit of the estate, it would be inequitable that the residue should bear the costs since the litigation was with respect to the fund. He directed that the questions be answered accordingly and that the costs of all parties of the motion be paid out of the capital of the fund, those of the executors to be taxed and allowed as between solicitor and client.

The Court of Appeal allowed an appeal by Mrs. Lamport and directed that the sum of $6,596.23 be paid out of the capital of the residue of the estate and that the costs of all parties of the motion and appeal be paid out of that capital, those of the executors to be taxed and allowed as between solicitor and client. They decided that the principle which determines when liability lies for costs incurred by trustees applies to determine where such liability lies; that an estate which derives the benefit from the proceedings defended by trustees ought to bear the expense of them, and that it would be inequitable to impose the expense of such litigation, conducted for the benefit of one estate or fund, upon another. With that determination I agree, and also with the statement that the very essence of Mrs. Lamport's action was to impeach the family settlement made between Mrs. Lamport, her brothers, and the executors of the will (whereby the partial setting up of the fund had been approved), and that, if that action had succeeded, the residue of the estate would be adversely affected.

The trustees for the fund were the same as the executors and trustees of the estate. Counsel for the appellants suggested that if there had been a separate trustee for the fund, it could not be argued that at least the costs, charges and expenses of that trustee could be charged otherwise than to the fund itself. However, if there had been a separate trustee, he might not have been made a party or, if so, only *pro forma*. As it was, the main claims were in connection with the setting up of the trust fund and the approval of part of it by the family settlement and, although the same individuals who were executors and

trustees of the will were made parties as trustees of the fund, any claim set up against the latter should be considered as negligible. The steps taken by the executors and trustees of the will were really taken to protect the residue of the estate.

The case of *In re Chennell* (1) was relied on. There, however, to refer to the headnote, a mortgagee of a share of the proceeds of a real estate devised in trust to sell and to invest the proceeds in government or real securities commenced an action against the mortgagor and the trustee of the will alleging that the money had been invested upon improper securities. Shortly after an order had been made directing accounts and inquiries, and reserving further consideration, the trustee paid into court the amount of the mortgaged share and paid to the other beneficiaries their shares. The plaintiff mortgagee was a solicitor and the way in which the action was looked upon may be gauged by the remarks of Lord Justice James in the Court of Appeal, at page 509, where he says, referring to the plaintiff:—

> He would, I am satisfied, have had his full share of the money without the slightest difficulty and without any expense; and I believe that this action would not have been brought if he had not read some books on trusts, and thought that he, being a solicitor, would make a little profit out of it.

When the matter was before Vice-Chancellor Hall, he stated, at page 499:—

> But, having regard to the form of the order taken by the plaintiff, I do not conceive that he took an administration which applied to the whole of the trust estate, or that he put the estate in a position of having the whole of the accounts gone into.

In the Court of Appeal, the Master of the Rolls remarked at page 508:—

> Now, the Vice-Chancellor came to the conclusion that the action was hastily and improperly instituted, and also was not properly conducted. Having arrived at that conclusion he gave the defendant his costs as against the plaintiff by allowing them to be deducted out of the share to which the plaintiff was entitled.

The decision is not an authority for anything to the contrary of what has been stated.

In the Court of Appeal for Ontario, the decision of the Judicial Committee in *Patton* v. *Toronto General Trusts Corporation* (2) was referred to as indicating that

(1) (1878) 8 Ch. D. 492. (2) [1930] A.C. 629.

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the Edythe G. Lamport Fund could not be made liable for the costs in question because there would be thereby indirectly imposed on Mrs. Lamport an obligation which could not properly have been imposed in the action. The reference is apparently to the following statement at page 639:—

> As for an order directing the appellant to pay any costs of the executors as between solicitor and client, their Lordships know of no principle upon which such an order could have been supported. As against an opposite party executors are no more entitled to solicitor and client costs than is an individual litigant.

This was said in connection with proceedings which had commenced with an originating notice for construction of a will and in which no order had been made that the appellant should pay the costs of the executors as between solicitor and client. In the present appeal we have not to consider the bearing of this dictum because all the judgments in Mrs. Lamport's action directed only party and party costs. In view of several decisions as to the power of a court of equity in certain circumstances to direct payment by a party to litigation of solicitor and client costs, I reserve my opinion until the occasion should arise, as to the extent to which the statement referred to may be applicable.

The appeal should be dismissed, with the costs of all parties to be paid out of the residue of the Alexander Montgomery Thompson estate, those of the executors to be taxed as between solicitor and client.

HUDSON J.—I have had an opportunity of reading the judgment prepared by my brother Rand and concur in his proposal for the disposition of this appeal.

It was essential to the success of Mrs. Lamport's action that she should first set aside the agreement between her and her brothers and the trust company.

This agreement was in the nature of a family settlement of matters which had been long in dispute. It was arrived at after prolonged negotiations and with independent advice. There is no finding that it was unfair or unreasonable and I think we have a right to assume that it served the best interests of all parties. The fact

that Mrs. Lamport, some years later, sought to set it aside, is not convincing evidence that it was not advantageous to the trust fund set up especially for her benefit.

Under all the circumstances, it seems to me that the trustees were justified in defending the action on behalf of both funds as well as on their own behalf.

The remarks of Lord Lindley in *In re Beddoe* (1) seem to me to be pertinent. He said at page 558:

> Such an indemnity [meaning costs paid out by the executor for the defence of an action against the fund] is the price paid by *cestuis que trust* for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred".

I do not see that there is anything in this view that is in conflict with the decision of the Court in the case of *Walters* v. *Woodbridge* (2).

The judgment of Rand and Estey JJ. was delivered by

RAND J.—This appeal concerns the recoupment of the excess of solicitor and client costs over party and party costs in an action against executors and trustees by the *cestui que trust* of a special trust fund of $100,000 which under the will was to be set up from assets of the estate. The action was brought by the respondent Lamport against the appellants, her brothers, and the Trust Company, the executors and trustees. The relief claimed was, (*a*) the setting aside of an agreement made in 1931, two years after the death of the testator, which both modified the terms of the will and confirmed certain action of the executors, with relation to the special trust and the respondent as beneficiary thereunder, and specifically made the remaining assets of the estate, placed in the hands of the Trust Company, a security for the completion of the fund; (*b*) a direction to the executors and trustees "to set apart and appropriate out of the assets of the estate" the full amount directed for the trust; (*c*) a further direction to them to fulfil the covenant of the testator in a mortgage which formed the largest item of the assets appropriated to the trust; (*d*) damages

(1) [1893] 1 Ch. 547. (2) (1878) 7 Ch. D. 504.

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against them personally for any ultimate deficiency; (*e*) and finally, an order for their removal and the appointment of new trustees of the special trust. All of this relief except the last item depended upon getting rid of the agreement: part of the relief, therefore, items (*a*) and (*e*), the vital part, was in respect of the trustees and the special trust and could have been made the subject matter of an independent action; item (*c*) called for action by the trustees against the residue; item (*b*) for the further appropriation of assets from the residue to the trust; and (*d*) concerned the executors and trustees personally. The action was dismissed with costs. The main ground of the judgment, affirmed both in the Court of Appeal and in this Court, was section 46 of *The Limitations Act* which required, as a condition of relief under it, that the interest of the beneficiary should have been in possession. It was held that that possession was present in the life interest of the respondent in the special trust funds. The estate as a whole, including the special trust, was, therefore, in the litigation and it was with reference to that entirety that the court was asked to act.

By the terms of the special trust, the respondent was to be paid the sum of $2,500 a year for ten years and thereafter the entire income from the fund during her lifetime. If she survived her husband, the corpus was to go to her but, if she predeceased him, the capital was to revert to the residue, of which the appellant brothers were the sole legatees.

The costs were taxed as between party and party against the respondent and they are in fact being paid out of the income accruing to the respondent from the special trust. The solicitor and client costs were also taxed and it was proposed that the difference between the two amounts should be recouped out of the trust funds. On the objection of the respondent, these proceedings were launched by originating summons. It came on before Barlow J., who held the executors and trustees entitled to recover the excess out of the capital of the special fund; on appeal, this was reversed and reimbursement directed out of the residue, and from that order the question is brought to this Court.

The judgment of the Court of Appeal is based upon these assumptions: there were two distinct funds, the residue and the special trust; that is was the duty of the appellants and the Trust Company to defend the residue and themselves; in contesting the litigation successfully, the appellants had benefited the residue which should, therefore, bear the expense; and to permit solicitor and client costs to be recovered against the sister by resorting to the trust funds of which she was the beneficiary, would be to condemn her to solicitor and client costs in violation of the rule laid down in *Patton* v. *Toronto General Trusts Corporation* (1).

The position of the residue at that time should perhaps be stated. The action was brought more than seven years after the death of the testator. So far as appears from the record, the duties of the executors had at that time been fully discharged. The accounts were then before the Surrogate Court and the order made on March 30, 1937, about eleven days after the issue of the writ, declared the fulfilment of the direction to set up the trust and provided for allowances to the executors. It seems to be clear, too, that the appropriation to the trust was completed in 1936. From 1931 until that year the duty of the Trust Company towards the assets of the estate had been largely, if not wholly, that appropriation for which, under the agreement, it held the assets in its own name as a special security for the trust. What then remained was simply property owned jointly by the appellants. But, on the other hand, the legal title and possession continued in the executors, including the Trust Company, and the property was, therefore, exposed to any residuum of duty which, in such an action as was brought, might be held by the court to be outstanding towards the trust.

It is desirable also, I think, to keep in mind the precise relation of the executors towards the estate assets vis-à-vis the special trust. By the terms of the will they were bound to set up the trust from those assets. Their paramount duty was towards the respondent, the sole beneficiary, subject to the contingent interest of the appellants. That duty dominated their dealings with the assets: the question was whether they had discharged it:

(1) [1930] A.C. 629.

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they must exercise it against the residue: they could not, of course, go beyond it: but their defence was an assertion of the fulfilment of their duty to the trust rather than a performance of any duty to protect the residue.

Nor can I quite appreciate the reference to a duty to "defend themselves". Certainly it was their interest to do so, but the word in such a context can scarcely carry a fiduciary signification.

The rule laid down in the Court of Appeal was that a trustee must show that his action is for the "benefit" of a trust before his expenses can be recouped from it and that here the only benefit from his resistance to the claims made accrued to the residue. The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly. The original jurisdiction in equity in unsuccessful suits against a trustee went so far as to enable the court to give a personal judgment against not only the *cestui* but third persons for solicitor and client costs. This is put beyond doubt by *Andrews* v. *Barnes* (1); and from the authorities there cited, in proceedings by the *cestui* charging misconduct against the trustee, in the absence of special circumstances, such an order followed where there was no fund. By reason of special statutory provisions as to costs, the jurisdiction of the Supreme Court of Ontario does not apparently extend to such a power (as to which I express no opinion), but a trustee's rights to allowances out of trust funds are in no respect abridged.

The rule applied is based upon *Walters* v. *Woodbridge* (2), the facts of which were somewhat similar to those here. The trustees had obtained from the court approval for the sale of a partnership interest, owned by the testator, to the surviving party, the proceeds of which were then to be held subject to the trusts of the will. A bill was subsequently filed by certain of the beneficiaries to have the decree set aside, alleging that the approval of the

(1) (1888) 9 Ch. D. 133. (2) (1878) 7 Ch. D. 504.

court had been obtained by misrepresentation. This bill was dismissed with costs. They were taxed and execution issued, to which *nulla bona* was returned. An application was then made to have costs in the suit, as between solicitor and client, taxed and paid out of the estate. Lord Romilly considered he had no jurisdiction to make such an order for the reason that the suit was defended by the trustee to clear his own character. On appeal that holding was reversed and, in his reasons, James, L.J., used this language:

> It is agreeable to me personally that we are not obliged to put a trustee in a position which would be disgraceful to the administration of justice. The Court is very strict in dealing with trustees, and it is the duty of the Court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust. Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts; and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs.

It will be seen that it was the challenged act that carried the advantage and not the mere result of the trustee's successful defence of an adverse proceeding: and that the relief sought was the direct setting aside of the trustee's act.

Now, what are the characteristics of this benefit? There the proposed sale required the prior approval of the court, and the effect of the judgment dismissing the bill was to confirm that approval. But what of the case where the trustee carries through a transaction which does not require such an approval? What is to be the measure or test of benefit? Can it be anything more than that the act was properly done within the duty of the trustee? Must the court examine the details of the transaction challenged and find not only propriety but a "benefit" as against what is alleged ought to have been done?

Where the trustee is resisting the assertion of a right by a third person against the trust estate, obviously his action is for its benefit. But a new element is introduced when the complaint is by the beneficiary for a breach of duty, such as fraud or negligence. In that case

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the trustee is in fact defending both his administrative act and his own interest. In the latter aspect, he has no special privilege in costs over an ordinary litigant: he is in the same position as any other person improperly accused of a wrong, and any outlay over the costs allowed by law must be borne by himself as the price of his own vindication. The question in such cases is whether the personal defence is incidental to that in his representative capacity: if it is, the costs will not be split.

From this the Court of Appeal has drawn the conclusion that in suits by beneficiaries it must appear that the defence is for the benefit of the trust in virtually the same sense as in cases brought by third persons: that the trustee is warding off an attack upon his funds: and the court in fact looked upon the litigation as essentially, if not exclusively, a claim against the residue. But, with the utmost respect, that is not, in my opinion, the principle of *Walters* v. *Woodbridge* (1) where, as here, the court is called upon to determine whether an act or transaction carried through by the trustee can be said to have been done within his authority and duty: and where the undoing of the act is the direct object of the litigation. Stirling J., in *In re Llewellin, Llewellin* v. *Williams* (2), uses this language:

> A trustee is entitled in an ordinary case to recover out of the trust estate, as charges and expenses properly incurred, all his costs of an action which he has properly defended; of which the case of *Walters* v. *Woodbridge* (1) is a very strong illustration.

And the same rule was applied in *In re Chennell, Jones* v. *Chennell* (3), and *Bartlett* v. *Wood* (4).

There remains the question of the effect of the *Patton* judgment (5) mentioned in the reasons of Laidlaw J.A. In that case it had been suggested in the courts below that an order could properly have been made giving solicitor and client costs to the executors against one who claimed to be a legatee. In the Privy Council this legatee succeeded in his contentions but it was there intimated that there would have been no more authority to award to executors such costs than to an ordinary litigant. There was no question, however, of strictly equitable costs out

(1) (1878) 7 Ch. D. 504.
(2) (1887) 37 Ch. D. 317, at 327.
(3) (1878) 8 Ch. D. 492.
(4) (1860) 30 L.J. Ch. 614.
(5) [1930] A.C. 629.

of funds. As *Walters* v. *Woodbridge* (1) shows, party and party costs can be supplemented out of the trust estate, and as Mellish L.J., in *Mordue* v. *Palmer* (2) observes,

> The Common Law Courts have no power to give costs between solicitor and client * * * But it is otherwise with Courts of Equity.

A fortiori those costs can be charged as expenses upon trust assets.

The property concerned was that in existence on March 19, 1937, when the proceedings were commenced. Anything beyond that was personal liability of the executors and trustees. The capital of the estate, including the special trust, has remained intact to the present time, and the indemnity must be spread over it. Taking all circumstances into account, the two funds are roughly in the relation of four to one and in these proportions should the costs be borne.

The appeal should, therefore, be allowed and judgment go declaring the difference between party and party and solicitor and client costs of the trustees and executors in the previous action as well as all costs of all parties to these proceedings (as between solicitor and client in the case of the executors and trustees) be payable four-fifths out of the capital of the trust fund and one-fifth out of the residue.

Appeal allowed. Judgment declaring the difference between party and party and solicitor and client costs of the trustees and executors to be payable out of the capital of the two funds, as well as the costs in all Courts of all parties to these proceedings (the executors' and trustees' costs to be as between solicitor and client) in the proportion of four-fifths out of the trust fund and one-fifth out of the residue.

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Solicitors for the respondent Executors: *Day, Ferguson, Wilson & Kelly.*

(1) (1878) 7 Ch. D. 504.

(2) (1870) L.R. 6 Ch. App. 22, at 32.