

S.C.

The judgment of the court below for the respondents will be set aside, and judgment will be entered for the appellant for the sum of £36.1s.0d. with costs in this court and in the court below.

KINGDON, C.J. (Nig.) and WEBBER, C.J. (Sierra Leone) concurred.

*Appeal allowed.*

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IN THE MATTER OF THOMPSON

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Supreme Court (Macquarrie, J.): January 6th, 1934

- [1] Civil Procedure — costs — succession cases — normally payable out of deceased's estate — application for taxation may not be made by residuary legatee because not "party interested" within Solicitors' Act, 1843, s. 39: The title to a testator's estate passes to his executor subject to his obligation to deal with it in accordance with the terms of the will; a residuary legatee has no property in the estate, having a right only to the payment of a debt due to him, and since he is not therefore a "party interested" in the estate within the meaning of the Solicitors' Act, 1843, s. 39, he may not apply for the taxation of a bill of costs which has been or may be paid by the executor out of the estate (page 360, lines 30—36; page 361, lines 20—23). 15
- [2] Succession — costs — application for taxation of costs payable out of deceased's estate — may not be made by residuary legatee because not "party interested" within Solicitors' Act, 1843, s. 39: See [1] above. 20
- [3] Succession — executors and administrators — title to estate of deceased — executor succeeds to title subject to obligation to deal with it in accordance with will: See [1] above. 25
- [4] Succession — wills — legatee has no property in deceased's estate — only right to enforce payment of debt due to him: See [1] above. 30

The applicant, a legatee and residuary legatee under a will, applied to the Supreme Court for the taxation of a bill of costs incurred by the executors in administering the estate.

The executors opposed the application contending that although the costs were to be met from the deceased's estate, the applicant was not a "party interested" in that fund within the meaning of the Solicitors' Act, 1843, s. 39, since he had the right only to enforce the payment of a debt due to him and had no property in the estate. 35

The application was dismissed. 40

Cases referred to:

- (1) *Barnardo's Homes v. Special Income Tax Commrs.*, [1921] 2 A.C. 1; (1921), 125 L.T. 250, *dicta* of Viscounts Finlay and Cave applied.  
5 (2) *Bird v. Philpott*, [1900] 1 Ch. 822; (1900), 82 L.T. 110.  
(3) *In re Leadbitter* (1878), 10 Ch.D. 388; 39 L.T. 286.  
(4) *Sudeley v. Att.-Gen.*, [1897] A.C. 11; (1897), 75 L.T. 398.

Legislation construed:

- 10 Solicitors' Act, 1843 (6 & 7 Vict., c. 73), s. 39:  
[I]t shall be lawful, in any Case in which a Trustee, Executor, or Administrator has become chargeable with any such Bill as aforesaid, for the Lord High Chancellor . . . if in his Discretion he shall think fit, upon the Application of a Party interested in the Property out of which such Trustee, Executor or Administrator may have paid or be entitled to pay such Bill, to refer the same and such Attorney's or 15 Solicitor's, or Executor's, Administrator's, or Assignee's Demand thereupon, to be taxed and settled by the Proper Officer of the High Court of Chancery . . ."

MACQUARRIE, J.:

20 The question for decision in this matter is whether a person who is a legatee and also residuary legatee under a will is a "party interested" within the meaning of s. 39 of the Solicitors' Act, 1843 so as to entitle him to taxation of the bill of costs incurred by the executors under the will in administering the estate.

25 The question becomes this: Is the residuary legatee a party interested in the fund from which the costs are to be paid, that is the estate of the deceased? That is, has he an interest in his testator's estate? For clearly the words "interested in" mean "having an interest in."

30 I have come to the conclusion that he has no interest in the testator's estate; he has a right which he can enforce to have certain monies paid to him in certain events, but in the ordinary meaning of the words in law he has not an "interest" in the property of the deceased, which is the property of the executor 35 subject of course to the latter's obligation to deal with it in accordance with the terms of the will.

There is no direct authority on the points in dispute but certain cases were cited in argument. The discussion in the *Barnardo case* (1) does not help us as it deals with entirely different facts. 40 But there are *obiter dicta* which do, e.g. Viscount Finlay ([1921] 2 A.C. at 8; 125 L.T. at 251) said:

"The legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. . . . The income . . . was the income of the executors. . . . [T]hey were not trustees of any part of it for the charity."

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Until the residue is ascertained the residuary legatee, according to Viscount Cave ([1921] A.C. at 10; 125 L.T. at 252) -- "has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors. . . ." They referred with approval to *Sudeley v. Att.-Gen.* (4) in which case Lord Halsbury, L.C. said that what the legatee had was a debt due to him and no more. Mr. Wright referred to *Bird v. Philpott* (2) as bearing upon *In re Leadbitter* (3) cited by Mr. Betts. In *Bird v. Philpott*, Farwell, J. said ([1900] 1 Ch. at 828; 82 L.T. at 113): "The bankrupt has not the ordinary right of a cestui que trust to intervene until the surplus has been ascertained. . . . He cannot trouble the trustee by taxing the bill of costs. . . ."

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These considerations lead me to the conclusion that a residuary legatee has not an interest in the deceased's estate, and is therefore not "a Party interested" within the meaning of the Solicitors' Act, 1843.

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This is sufficient to dispose of this summons which is therefore dismissed with costs.

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*Application dismissed.*

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