[HIGH COURT OF AUSTRALIA.]

JENKINS AND ANOTHER . . . APPELLANTS;
DEFENDANTS,

AND

STEWART AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 29; *June* 1, 5, 8.

Griffith C.J., Barton and O'Connor JJ.

Will—Construction—Gift over if beneficiary die without leaving wife or children—Direction to sell—Absolute gift—Ambiguity—Codicil used to explain will.

A will and codicil being all one testament, the language of the codicil may be used to interpret that of the will if the latter is open to two constructions.

By a will property was given to A. with a gift over in the event of his dying without leaving a wife or children, and the question was whether the contingency was limited to the death of A. before that of the testator, or whether it referred to the death of A. at any time. A codicil to the will contained language which showed that the testator thought he had given an estate to A. which would be absolute if A. survived him.

Held, that A., having survived the testator, took an absolute estate.

Judgment of *à Beckett* J. reversed.

APPEAL from the Supreme Court of Victoria (*à Beckett* J.)

Allan Jenkins, who died on 9th August 1904, left a will, dated 17th July 1900, and a codicil thereto, dated 7th January 1903. The material parts of the will and codicil are set out in the judgment hereunder. The testator left him surviving his wife, Jessie Jenkins, and seven children—viz., two sons, Donald Halley Jenkins and Dugald McKellar Jenkins, and five daughters, Annie Sinclair Jenkins, Kate Maud Jenkins, Nellie Cope Jenkins,

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Agnes Mann Stewart, and Jessie Allan Hill. All the childr were of age at the testator's death, and all were unmarri except the last-mentioned two daughters.

An originating summons was taken out by the executors a trustees asking for the determination of the following questio (*inter alia*) :—

1. Having regard to the provisions of the said will and codi contained, what estate or interest in addition to a bequest £100 does the defendant Donald Halley Jenkins take in t estate of the testator, the said Allan Jenkins deceased?

2. Having regard to the said provisions, and in particular the following words in the said will contained, that is to say: "And I direct that the one-fourth share of my said son Dona Halley Jenkins shall revert to my living son or daughters or th children in equal shares in the event of my said son Dona Halley Jenkins dying without leaving a wife or lawful issue,"

(*a*) Is it the duty of the executors of the said testator wi respect to the said fourth share to transfer and make over t same to the defendant Donald Halley Jenkins, and if so whe

(*b*) And if not, how should the said fourth share be dealt wi by the said executors, and how should the income derived fr the said one-fourth share be applied ?

5 and 6, were similar questions as to Dugald McKellar Jenki

à Beckett J., by whom the summons was heard, held that t shares of Donald and Dugald were each subject to an executo gift over in the event of Donald or Dugald respectively dyi without leaving a wife or lawful issue, and that it was t duty of the trustees to retain the shares under their control, a to invest them and to pay the income to Donald and Duga respectively.

From this decision Donald and Dugald Jenkins now appeal to the High Court.

Starke, for the appellants. The words "in the event of my sa son Donald Halley Jenkins dying" refer to the death of t beneficiary during the lifetime of the testator. The natur meaning of the words is ousted by the context. The interest treated as absolute on the death of the testator. Even if there

n absolute gift which is defeasible on death without leaving a wife or lawful issue, the executors are bound to hand over the property to Donald: *In re Lazarus*; *Trustees Executors and Agency Co.* v. *Levy* (1). There cannot be a gift of personalty for life: *Jarman on Wills*, 5th ed., p. 837. In *In re Luddy*; *Peard* v. *Morton* (2), it was held that, on the construction of the whole will, the direction to convey and assign to the beneficiary absolutely showed that the death of the beneficiary, in the event of which there was a gift over, meant death during the lifetime of the testatrix. See also *In re Hayward*; *Creery* v. *Lingwood* (3); *O'Mahoney* v. *Burdett* (4). The codicil may be looked at to interpret the will: *In re Elcom*; *Layborn* v. *Grover-Williams* (5); *In re Venn* (6); *Grover* v. *Raper* (7).

[GRIFFITH C.J. referred to *Darley* v. *Martin* (8).]

The codicil shows that Donald and Dugald were entitled to absolute estates.

[He also referred to *Wills Act* 1890, sec. 31.]

Bryant, for the respondents the daughters of the testator. The rule is laid down by Lord *Cairns* L.C., in *O'Mahoney* v. *Burdett* (9), that a bequest to A., and, if he shall die unmarried or without children, to B., is, according to the ordinary and literal meaning of the word, an absolute gift to A., defeasible by an executory gift over, in the event of A. dying, at any time, under the circumstances indicated, namely, unmarried or without children. His Lordship further says that this ordinary and literal meaning is not to be departed from otherwise than in consequence of a context which renders a different construction necessary or proper. In the cases relied on by the appellants there were clear words in the contexts rendering it necessary to give a different construction. Here there is nothing in the context which requires a different construction. There is no ambiguity in the will itself, and the codicil cannot be used to explain the will. If there is an absolute gift which is defeasible, the executors must hold the property.

(1) 24 V.L.R., 567.
(2) 25 Ch. D., 394.
(3) 19 Ch. D., 470.
(4) L.R. 7 H.L., 388.
(5) (1894) 1 Ch., 303.
(6) (1904) 2 Ch., 52.
(7) 5 W.R., 134.
(8) 13 C.B., 683.
(9) L.R. 7 H.L., 388, at p. 393.

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[He also referred to *Olivant* v. *Wright* (1); *Lewin* v. *Killey* (2

Starke in reply.

Cur. adv. vult.

GRIFFITH C.J. delivered the judgment of the Court. This an appeal from the decision of *à Beckett* J. upon the construction of a somewhat peculiar will. It is one of those cases in which different minds may reasonably come to different conclusion But we are called upon to exercise our own individual judgment and in doing so we differ with reluctance from a Judge of such great experience in these matters as *à Beckett* J. The testator was a farmer living at Roseneath, near Warrnambool. He had two sons, Donald and Dugald, and five daughters, of whom two were married. By his will he first directed that his debts should be paid. Then he specifically bequeathed to his wife all the furniture and household goods in and about his dwelling house. The will then proceeded: " I give devise and bequeath one-fourth of all my other real and personal estate unto my son Donald Halley Jenkins and also the sum of one hundred pounds, and direct that the one-fourth share of my said son Donald Halley Jenkins shall revert to my living son or daughters or the children in equal shares in the event of my said son Donald Halley Jenkins dying without leaving a wife or lawful issue. I direct that all my real and personal property (except as aforesaid) shall be sold after my decease and that the proceeds thereof shall be divided as follows, one-fourth thereof to my said son Donald Halley as hereinbefore directed." He then gave legacies of £100 each to his wife and his three daughters Annie Sinclair Jenkins, Kate Maud Jenkins, and Nellie Cope Jenkins, and directed that such legacies should be paid within six months of his decease. He next gave an annuity of £100 to his wife while she should remain at Roseneath, to be increased to £150 if she should live elsewhere. The will then proceeded:—" I give devise and bequeath all the rest and residue of my real and personal property and the proceeds of the sale thereof as aforesaid equally between my son Dugald McKellar Jenkins and my

(1) 1 Ch. D., 346. (2) 13 App. Cas., 783.

daughters Agnes Mann, the wife of James Stewart, Jessie Allan the wife of Edward Hill of Colac, Annie Sinclair, Kate Maud, and Nellie Cope, and I direct that the shares of my said daughters Agnes Mann, Jessie Allan, Annie Sinclair, Kate Maud, and Nellie Cope shall be paid to them within twelve months after the decease of my said wife, and that in the meantime their said shares shall be invested by my trustees for their benefit and that the income thereof shall be paid to them for their sole and separate use: And I direct that the share of my said son Dugald McKellar shall revert to my living daughters or their children in equal shares in the event of the said Dugald McKellar dying without leaving a wife or lawful issue." The testator there uses the same words as to Dugald's share as he had used as to Donald's share. The will also conferred a power on the trustees at their discretion to carry on his farm or any other business he might be engaged in at the time of his death, and to permit his wife and children to reside in his dwelling house.

Upon that will the question submitted to us is, what shares do Donald and Dugald respectively take in the estate of the testator? The gifts to Donald and Dugald, though they are of different amounts, are subject to the same direction, viz., that the share is to "revert," in the one case, to the testator's living son or daughters or their children in equal shares, and in the other case, to the testator's living daughters or their children in equal shares, in the event of the particular son dying without leaving a wife or lawful issue. The first question is whether Donald's share is vested absolutely in him on his surviving the testator, or whether he has a vested estate liable to be divested in the event of his dying ultimately without leaving a wife or lawful issue. Strictly and grammatically, of course, the words of the gift imply that the contingency will happen whenever Donald dies, and the case of *O'Mahoney* v. *Burdett* (1) establishes that, if no more appears in the will, the grammatical construction must be applied in construing those words. But that construction may be excluded by the context, as in every other case. It is undesirable in the interpretation of wills to have recourse to fixed rules of construction any further than is necessary. But there are two

(1) L.R. 7 H.L., 388.

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principles applicable to the interpretation of wills the construction of which is open to doubt, that may afford some aid in the present case. One is that the Courts always lean towards a construction in favour of vesting, and the other is that the Courts always lean against a construction that will bring about an intestacy, if any other construction is open. According to the respondents' contention, that is, if Donald's share does not vest on the death of the testator, there would be an intestacy if he were to survive his brother and his sisters, and die without leaving a wife or children. That of itself suggests that there is some doubt whether that is what the testator actually meant. Then, if we look to the context for an explanation, we find that the testator directs all his real and personal property to be sold after his decease and divided. That means, *primâ facie*, immediately or as soon after his death as it conveniently can be sold, as was said by *James* L.J. in *Olivant* v. *Wright* (1), in reference to similar words. So that that direction standing alone would suggest that as soon as is practicable after the testator's death the property was to be sold, and that Donald was then to receive his one-fourth share. In the same case, *Mellish* L.J. said (2):— "I think it is quite clear that by the word 'divided' the testatrix meant that the executors were actually to divide the property, and that the *corpus* of the property, real and personal, was to be actually handed over and given to the children or their issue, as the case might be." We have here, then, an indication of a construction different from the strict grammatical construction, viz., that the testator intended that the money should be handed over to Donald if he was then in existence to receive it. An argument was suggested, founded on the word "revert" which means literally "go back." But it cannot mean that in this will, because it had never been the property of those to whom it was to "revert," and could not, therefore, strictly speaking, revert to them. The word can only be read as "pass" or "go over." Used in that sense it does not throw any light upon the real intention of the testator.

Then it is said that the direction to pay an annuity to the widow indicates that the property is not intended to be realized

(1) 1 Ch. D., 346, at p. 349. (2) 1 Ch. D., 346, at p. 349.

and divided at the testator's death. But the annuity is to be paid out of the other three-fourths of the estate and not out of Donald's one-fourth share. With respect to Dugald's share that answer does not apply. Under these circumstances, and if there were no more in the case, it would be difficult to say what is the proper construction of the will.

But the testator two and one-half years afterwards made a codicil to his will. By it he gave legacies of £100 each to his two married daughters and his son Dugald McKellar Jenkins, and directed that such legacies were in no way to affect their shares or interests in his residuary estate "as hereinbefore provided for in my will," using the word "hereinbefore" as if the will were a part of the document he was then writing. He further gave a legacy of £100 to his son-in-law James Stewart, and directed that all the legacies given by the codicil should be paid within six months of his decease. Then the codicil contained these words:—"And it is my will and I hereby direct that in the event of any of the said legatees predeceasing me without leaving lawful issue then the share or shares to which they would have been entitled if they had survived me or died leaving lawful issue shall go and belong and be equally divided among my surviving children or their lawful issue in equal shares, but so that no child or children of any of my said sons or daughters shall take more than his her or their parents would have taken if he or she had been living; and in all other respects I ratify and confirm my said will."

In that sentence the testator refers to the gift which he had made in his will to Dugald, and speaks of his share as a share to which Dugald would have been entitled if he had survived the testator or had died leaving lawful issue, obviously meaning if he had died in the life-time of the testator leaving lawful issue. The testator therefore thought that he had left a share to Dugald upon such conditions that if he survived the testator he would take it absolutely.

If the words had been "had survived me *and* died leaving lawful issue," no help could have been got from the codicil. But that being the construction the testator has by his codicil placed on the gift to Dugald, we have high authority for the proposition that where a will is obscure we may have recourse to the

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codicil to interpret it. In the case of *Darley* v. *Martin* (1), *Jervis* C.J., in delivering the judgment of the Court said:—"And, as to the effect of the codicil, it was argued, that an erroneous reference in a codicil to the dispositions of the will, cannot constitute a new bequest in opposition to the will: and *Skerratt* v. *Oakley* (2), was relied on. But it appears to us that the argument with respect to the effect of the codicil, when rightly considered, is not that the will is at all revoked or varied by the codicil; but, rather, that the will and codicil being all one testament, the language of the will may be interpreted by that of the codicil; and that, accordingly, the gift over in the will, 'in default of such issue,' being capable of importing a bequest over on failure of issue living at the death, it ought to be inferred that the testator employed it in that sense, because, in the codicil, he refers to it as if it were a gift over in default of his daughter's leaving no issue, which, as regards personalty, is tantamount to a gift on failure of issue living at her death." That case was followed in *Grover* v. *Raper* (3) and *In re Venn* (4).

Therefore we think we may have recourse to the codicil to clear up the obscurity in this will. There clearly is an obscurity since the words are, having regard to the context, capable of two constructions. Doing so, we find that what the testator intended as to Dugald was that, if he survived the testator or died during the testator's lifetime leaving lawful issue, his share should be vested. Finding that that was his intention as to Dugald, how is it possible to say that, when the testator used the same words with regard to Donald, he intended something different?

On the whole, therefore, we have come to the conclusion that the real intention of the testator as expressed by these two testamentary documents was that the shares of both Donald and Dugald should be vested.

The result therefore is that the order of *à Beckett* J. will be varied, and the questions will be answered as follows:—

1. Donald takes a vested interest in one-fourth of the whole estate, other than the furniture and household goods specifically bequeathed, together with the legacy of £100, which is payable out of the remaining three-fourths.

(1) 13 C.B., 683, at p. 690. (2) 7 T.R., 492. (3) 5 W.R., 134.
(4) (1904) 2 Ch., 52.

2. To be paid immediately after sale.

5. Dugald takes a vested interest in one-sixth of the residue of the remaining three-fourths after payment of the legacies and annuity.

6. To be paid immediately after the sale, subject to provision for the payment of the annuity.

Appeal allowed. Order varied. Questions answered as above. Costs of all parties as between solicitor and client out of the estate.

Solicitor, for appellants, *J. H. Maddock*, Melbourne,

Solicitors, for respondents, *G. S. Mackay*, Warrnambool; *A. A. Sinclair*, Melbourne.

B. L.

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New South
ales (1918)
CLR 325

THE COMMONWEALTH . . . . . PLAINTIFF,

AND

THE STATE OF NEW SOUTH WALES . DEFENDANT.

Griffith C.J., Barton and O'Connor JJ.

Taxation of Commonwealth instrumentality by State—Powers of States—Stamp Duty on transfer of Property—Land in State acquired by Commonwealth for Public purposes—Statute not binding on Crown—Stamp Duties Act (N.S.W.), (No. 27 of 1898), sec. 23—Real Property Act (N.S.W.), (No. 25 of 1900)—Property for Public Purposes Acquisition Act (No. 13 of 1901), sec. 3—The Constitution, sec. 51.

By sec. 4, schedule 2 of the *Stamp Duties Act* (N.S.W.) 1898 *ad valorem* duty is payable on every conveyance or transfer on sale of any property; and sec. 23 of that Act provides that no unstamped instrument required by the Act to be stamped shall be registered or capable of being registered in any office.