[HIGH COURT OF AUSTRALIA.]

COCK . . . . . APPELLANT;
DEFENDANT,

AND

AITKEN AND OTHERS . . . . . RESPONDENTS;
PLAINTIFFS AND DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 4, 5, 9.

Barton, Isaacs and Higgins JJ.

Will—Interpretation—Corpus and income—Annuity, gift of—Residue.

By his will a testator gave his property to trustees upon trust (*inter alia*), as to £800 a year during the life of his daughter A. S. upon trust from time to time to apply the same or such part as they should think fit for the personal maintenance and support or otherwise for the personal benefit of A. S., or to pay the same or such part as they should think fit to her or to any other person to be so applied, or, at the option of the trustees, to pay the whole or such part to his executors to be applied as part of the residue of his estate. The testator gave the residue of his estate equally between his son J. M. V. S. and his daughter L. S. The trustees, during the life of L. S. and after her death, applied only portion of the annuity of £800 for the benefit of A. S.

Held, that one-half of any portion of the annuity which in any year after the death of L. S. was not applied for the benefit of A. S. came to the estate of L. S. as portion of the corpus of the estate of the testator and was part of the corpus of the estate of L. S.

Decision of the Supreme Court affirmed.

APPEAL from the Supreme Court of Victoria.

This was an appeal by Charles Matthew Germain Cock from the judgment of *Hodges* J. on an originating summons wherein William Aitken and John Noall were plaintiffs, and Charles

Matthew Germain Cock (the appellant), Emily Cock, on behalf of herself and of all children who might be born to Charles Matthew Germain Cock, John Matthew Vincent Smith, and the National Mutual Life Association of Australasia Ltd., were defendants.

The facts are fully set out in the judgment of *Barton* J. hereunder.

Weigall K.C. and *Hayes*, for the appellant. The £800 a year given by John Matthew Smith to Alice Smith is charged on the corpus and income of his estate and is primarily payable out of income. So much of it as was applied to her use was in fact paid out of the income of his estate, and out of the income of that part of his estate which was the residue. One half of that residue belonged to Lucy Smith, and after her death formed part of her estate. So that the £800 having been payable out of the income of Lucy Smith's share in the estate of John Matthew Smith, so much of it as was not applied for the benefit of Alice Smith remained income of that share and, after the death of Lucy Smith, remained income of her estate.

[ISAACS J. referred to *Attorney-General* v. *Lord Sudeley* (1); *Cooper* v. *Cooper* (2); *Carmichael* v. *Gee* (3).]

[Counsel referred to *In re Grant*; *Walker* v. *Martineau* (4); *Harbin* v. *Masterman* (*No.* 2) (5); *Gover on Capital and Income*, p. 95.]

Davis, for the respondents Aitken and Noall, referred to *Australian Mutual Provident Society* v. *Gregory*; *In re Timmis*; *Nixon* v. *Smith* (6); *In re Morgan*; *Morgan* v. *Morgan* (7); *In re Chapman*; *Cocks* v. *Chapman* (8); *In re Smith*; *Henderson-Roe* v. *Hitchins* (9); *Lewin on Trusts*, 11th ed., pp. 118, 864.

Guest, for the respondent Emily Elizabeth Cock. By the will of John Matthew Smith a distinct annuity of £800 a year during

(1) (1897) A.C., 11.
(2) L.R. 7 H.L., 53.
(3) 5 App. Cas., 588.
(4) 52 L.J. Ch., 552.
(5) (1896) 1 Ch., 351.
(6) (1902) 1 Ch., 176.
(7) (1893) 3 Ch., 222.
(8) (1896) 2 Ch., 763.
(9) 42 Ch. D., 302.

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the life of Alice Smith is created. That annuity is part of the corpus of the estate of John Matthew Smith. That portion of the annuity, which is not applied for the benefit of Alice Smith, is a portion of the corpus of the estate of John Matthew Smith. If that portion not so applied were not specifically disposed of it would fall into the residue of the estate which is left of the estate after payment of all the gifts and would otherwise not include the annuity. Here, however, that portion not so applied is directed to be applied in the same way as the residue. So that, when Lucy Smith died, half of the portion of the annuity not disposed of in any one year would come to the estate of Lucy Smith as portion of her half-share of the residue of the estate of John Matthew Smith, and would be corpus of her estate and not income.

Weigall K.C., in reply.

Cur. adv. vult.

BARTON J. read the following judgment. John Matthew Smith, by his will made on 11th March 1896, devised and bequeathed all his property, real and personal, to his son, the defendant John Matthew Vincent Smith, his daughter Lucy Smith, and Harry Emmerton, solicitor, "upon trust to sell and get in the same (but with power to indefinitely postpone such sale and getting in) and to dispose of the proceeds in manner following: As to my premises occupied by Messrs. Chambers and Seymour . . . . Melbourne . . . . upon trust to pay the net income to my wife Isabella Fordham Smith for her life without power of anticipation during coverture: And as to my premises known as Ludstone Chambers No. 352 Collins Street . . . . Melbourne upon trust for the said John Matthew Vincent Smith absolutely: And as to my premises in Elizabeth Street . . . . Melbourne leased to McLean Brothers and Rigg and my premises at the rear leased to William Kerr Thomson and Samuel Renwick . . . Melbourne upon trust for the said Lucy Smith absolutely: And as to £800 a year during the life of my daughter Alice Smith upon trust from time to time to apply the same or such part as my trustees may think fit for the

personal maintenance and support or otherwise for the personal benefit of the said Alice Smith or to pay the same or such part as they shall think fit to her or to any other person to be so applied . . . or at the option of my trustees to pay the whole or such part to my executors to be applied as part of the residue and ultimate surplus hereinafter mentioned: And as to £500 a year during the life of my daughter Emily Cock to pay the same to her by quarterly instalments . . . : And as to a sum of £3,000 upon trust for such of my nieces Harriette Markland Hitchcock and Ellen Domsthorpe Hitchcock . . . as shall survive me and if more than one in equal shares: And as to all the residue and ultimate surplus upon trust for the said John Matthew Vincent Smith and Lucy Smith in equal shares and absolutely." He appointed the three trustees above-named to be executors and executrix, and by codicil of 2nd December in the same year (1896) he appointed the plaintiff, William Aitken, to be also a trustee and an executor; and for the rest, he confirmed his will.

The testator, John Matthew Smith, died on 21st April 1898, and his will was duly proved. His daughter Lucy Smith died on 12th November 1903. By her will, dated 6th April 1900, the plaintiff, William Aitken, and the defendant John Matthew Vincent Smith were appointed the trustees and executors. Having first made a specific bequest to her sister (the Alice Smith mentioned in the will of their father), the testatrix devised and bequeathed all her realty and the rest of her personalty to the trustees named, upon trust for conversion, with power to postpone at their discretion, and with a reservation from sale, as a residence for her sister Alice, of her dwelling house and land called "Castlefield," with all household and other effects and live stock in or about that property, during Alice's life, unless she should direct or consent to such sale. Subject to this, the trustees were to stand possessed of the proceeds of the conversion and of all her moneys, upon trust for investment in the prescribed securities and, after paying for the upkeep of "Castlefield," and expending such sums as they should think fit for the maintenance and support of Alice Smith during her life, and after payment of an annual sum named to Mr. Aitken, as and while

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accountant to the trust, then upon trust to pay the residue of the income of the premises to her nephew Charles Matthew Germain Cock (one of the defendants, who is the present appellant), during his life, and after his death (subject as aforesaid) in trust for all Charles Matthew Germain Cock's children in equal shares, "and if there shall be but one such child the whole to be in trust for such one child." It was provided that if any child of her said nephew should die in his lifetime, leaving a child or children surviving who being male should attain twenty-one, or being female should attain twenty-one or marry, then such grandchild or grandchildren of her nephew should take (if more than one, equally between them) the share which the deceased parent would have taken upon surviving and attaining twenty-one.

I pause here to say that so far there is one child of C. M. G. Cock, who is now between two and three years of age, and she is the Emily Elizabeth Cock who is a defendant in the suit, and a respondent in this appeal.

Lucy Smith's will bequeathed the whole residue to the defendant John Matthew Vincent Smith in the event of there being no child of C. M. G. Cock who should acquire, or whose issue should acquire, an absolutely vested interest. The testatrix directed that the income received after her death from such part of her own estate as should for the time being remain unconverted in fact should, after payment of expenses and outgoings, be paid and applied to the person to whom the income of the proceeds would under her will have been payable or applicable, had conversion actually taken place. Lucy Smith executed a codicil on 9th November 1903, but its terms are not material to the questions now to be answered.

The defendant John Matthew Vincent Smith renounced probate of this will and codicil, and on 5th February 1904 probate was granted to the plaintiff (respondent) William Aitken, and subsequently the plaintiff (respondent) A. J. Noall was appointed a trustee of the will and codicil. The estate of the testatrix Lucy Smith consisted in great part of her share under the will of her father, valued for probate duty at over £34,000 at her death. Before the death of Lucy Smith the properties specifically given to her by John Matthew Smith's will were con-

veyed to her unconverted, and she had received nearly all moneys due to her as income from her share in John Matthew Smith's residuary estate. The balance has been received since by the plaintiff Aitken, who carried it to the capital account of her estate. Part of her share in John Matthew Smith's estate was during her life converted into money. She had received on that account £32,814 19s. 6d., while other part of her share of that residue remained unconverted up to her death. This part was not sold until after the Supreme Court of this State had made an order on an originating summons taken out by the trustees of John Matthew Smith's estate, to which the plaintiffs and the beneficiaries under Lucy Smith's will were parties. By this order, dated 11th August 1904, authority was given to the trustees to sell to John Matthew Vincent Smith practically the whole of the unconverted residue of John Matthew Smith's estate. The sale was carried out, and the purchase money was £70,527, of which £30,000 was paid in cash, and the balance remains secured upon a mortgage given by the purchaser. During Lucy Smith's life the trustees of John Matthew Smith's will applied about £400 annually of the £800 for the maintenance and support of Alice Smith, and the balance of about £400 was paid in equal parts, year by year, to Lucy Smith and John Matthew Vincent Smith as residuary legatees. The trustees treated the portion of the £800 a year not applied for Alice's benefit as income of the residuary estate. Since Lucy Smith's death they have pursued a similar course, but in view of the substantial provision made by her will for her sister, they have applied only about £100 a year for the benefit of Alice, and have, as before, divided the annual balance evenly between Lucy Smith's estate and John Matthew Vincent Smith, so that Lucy's estate receives £350 a year, and the other residuary legatee the other £350. Mr. Cock as life tenant received the first named £350 and kept it as income. But doubts were suggested whether, having regard to the provisions of John Matthew Smith's will, these sums of £350 could be income at all. It is asserted on behalf of C. M. G. Cock's infant daughter, Emily Elizabeth, that on the true reading of the will of John Matthew Smith it was and is the duty of the trustees to add each year to the capital of that testator's

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residuary estate the balance left unspent after taking from the £800 a year such sum as is thought proper for the benefit of Alice. If that had been done, the result since Lucy Smith's death would have been that the appellant, C. M. G. Cock, would not have been, as he has been since then, receiving from Lucy Smith's trustees this annual sum of £350 as life tenant. Had it, together with the other half of the unspent balance of the £800, been added to the residue of John Matthew Smith's estate, only the income of the Lucy Smith half would have been payable to Mr. Cock, and the £350 would as capital have been added year by year to the corpus of Lucy Smith's estate for the benefit of those entitled in remainder.

Under these circumstances the plaintiffs Aitken and Noall took out, as trustees of Lucy Smith's estate, an originating summons to C. M. G. Cock, Emily Elizabeth Cock (on behalf of herself and of all children who may hereafter be born to C. M. G. Cock), John Matthew Vincent Smith and the National Mutual Life Association (which holds an assignment by way of mortgage of C. M. G. Cock's life estate), for the determination or direction of the Supreme Court on the following questions:—

1. Whether the plaintiff trustees ought to treat as income, or as corpus, the whole or any and what part of the annual sums received by them from the trustees of John Matthew Smith's estate?

2. In particular, ought the plaintiffs to make any distinction between (*a*) such parts of the said annual sums as represent half of the unapplied portion of the £800 a year referred to in John Matthew Smith's will; and (*b*) the rest of such annual sums?

The matter was argued before *Hodges* J., whose answer to question 1 was that the plaintiffs ought to treat as corpus of Lucy Smith's estate so much of the annual sums received by them from the trustees of John Matthew Smith's estate as represents in each year one-half of the unapplied part of the £800 a year, and that they ought to treat as income of Lucy Smith's estate the residue of such annual sums.

It then became unnecessary to answer question 2, and His Honor did not answer it.

In answer to a third question, His Honor held that the plaintiff

trustees should not make any distinction between sums received before 11th August 1904, and sums received after that date. That question was not argued before us, and may be disregarded now.

Neither John Matthew Vincent Smith nor the National Mutual Association were represented in the Supreme Court, or before us. In this Court the argument was confined to the question relating to the application of the unspent balances of the £800 a year. Were they and are they income or corpus of Lucy Smith's estate? If under the trusts and directions of John Matthew Smith's will they became part of the capital of John Matthew Smith's residuary estate, that settles the matter. They would pass, together with the rest of Lucy Smith's half of that residue, into her estate as corpus, and would remain so, with the result that C. M. G. Cock would be entitled only to the income from them, the capital enuring for the benefit of Emily Elizabeth Cock or such other person or persons as may become entitled to the estate in remainder. And that is what *Hodges* J. has held.

What then is comprehended in the residuary estate under John Matthew Smith's will? The "residue" of a fund means that which remains after the withdrawal of any part or parts of the fund. It must be arrived at by the deduction from the entire estate of all these specific gifts, and it must consist of what is then left. For example, the gift of Chambers and Seymour's premises to Mrs. Smith, the widow, for her life, would have to be satisfied by holding for her those premises until conversion, and afterwards the equivalent in money out of the proceeds of conversion, on the trust and subject to the restraint prescribed in her case, with remainder to the residuary legatees in common and absolutely. The real property specifically given to Lucy Smith absolutely was in fact conveyed to her without conversion. Its purchase money could have been handed to her had it been at that time converted. The specific cash legacy of £3,000 given to the nieces would also have to be withdrawn from the gross estate before the residue could be arrived at. But, if this is true, then the gift of the £800 a year in trust was never part of the residue in the testator's contemplation so as to come out of it. Each of these six gifts is to come out of the general estate—the whole

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estate—and there is no residue conceivable except under a concept which severs them each and all from the general estate. So much must be done, if only in thought, before such a thing as a residue can be mentally perceived. But if this gift also is to come out of the general estate before there can be an ascertained residue, can it be said to be payable yearly out of the income of residue? Counsel for the appellant were earnest in that contention, but I do not see how it can be adopted without holding the gift itself to be payable out of the residue—which I do not think possible unless we totally abandon any consistent notion of that term. Certainly, it has been argued that as the annual sum has been actually debited by the trustees to the income of the residue, therefore the balances should go, as it is phrased, "back" to the residuary legatees as the balances of that part of their income. To sustain that position it must be shown that the debit was a correct one. It was not so if the £800 a year has not been in truth income of the residue, howsoever otherwise described. But if, as I think, the ascertainment of the residue depends on the prior elimination of the specific gifts—if those specific gifts, which are of properties or of capital sums, are thus first taken out of the general estate—then the same rule must apply to the £800 (and, for that matter, the £500 a year for Mrs. Cock), and so far as a specific gift, such as either of these, is payable yearly out of income, it is payable out of the income of the estate before a residue can be arrived at. Thus the provision for the benefit of Alice Smith stands apart from residue, unless there is something which can be correctly designated as residue before ever there is a residue distinguishable from the other parts of the estate. That is an idea which quite eludes my grasp.

As, then, the yearly £800 was not payable out of the income of the residue as such, I do not feel pressed by the argument that the balances should go to the residuary estate as income. If they do become part of the residue, it is as accretions to it in its character of capital. For the residue is itself corpus; it is capital, and that which becomes part of it becomes capital too. Then, do the balances become part of the residue, and merge in the residuary capital of John Matthew Smith's estate, or is there an intestacy as to these savings? It must be the one thing or the other. The

idea of any such partial intestacy was not, I think, suggested at the bar, nor do I think it can be suggested with any show of reason. The discretionary trust as to the £800 has been said to include three options:—(1) To apply all or such part as the trustees might think fit for Alice Smith's benefit; or (2) to pay "the same" or such part as they might think fit to any other person to be so applied; or (3) at their option "to pay the whole or such part to the executors to be applied as part of the residue and ultimate surplus hereinafter mentioned." The third of these alternatives, it is said, is impracticable and insensible. I will not say that. It is true that in this will and codicil the executors and the trustees are the same body of persons. But a testator cannot help contemplating changes in the *personnel* of his trustees (this testator was a solicitor). It is perhaps possible that, as matters stood, these trustees might by some act have definitely set apart from time to time unspent balances to be applied by themselves as executors "as part of the residue and ultimate surplus." I do not see that the evidence shows any such definite action on their part. But even without any such action, the presumption is against any intestacy, and, moreover, this will clearly evinces the testator's intention to dispose of the whole of his estate, and I cannot doubt that the words of the residuary gift mean the residue in the sense of everything not specially given or applied; that is, that the "residue and ultimate surplus," once ascertained as to its ambit, was ample to include such sums as were unapplied after resort to the first or the second alternative, or, as I think, was authorized to both.

I am of opinion, therefore, that *Hodges* J. was right; that the sums in question became part of the residuary corpus of John Matthew Smith's estate; that half of each sum passed into Lucy Smith's estate under her father's residuary gift as part of the corpus of her estate; and that Mr. Cock, the appellant, was not and is not entitled to any part of these sums as income of his life estate. I am therefore of opinion that the appeal fails.

ISAACS J. I agree that the judgment appealed from should be affirmed. There is only one point of difference between the parties, but that point is vital. There is no principle or doctrine of law

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in dispute. It is all a question of the starting point. The matter in controversy is whether the unapplied portion of £800 a year during the life time of Alice Smith is to be considered as income or corpus under the will of Lucy Smith. Mr. *Weigall* claims that it is income for this reason :—He says that John Matthew Smith gave three specific gifts, and then, in effect, gave the " residue and ultimate surplus " of his estate in equal shares to John Matthew Vincent Smith and Lucy Smith, that gift being subject only to a charge for certain general legacies. These are an annuity to Alice Smith, an annuity to Emily Cock, and a sum of £3,000 to his nieces. Mr. *Weigall* then says that the residue, consisting of all but the specific gifts, produces income, and that the annuity to Alice Smith must be paid either out of that income, which belongs to the two residuary legatees subject to the charge, or else it must be paid out of their capital—either mode being proper to satisfy the charge—or it might be paid partly by one method and partly by the other. But then, he says, starting with the assumption that it belongs to the two residuary legatees, whatever is left free, after paying what the trustees think is proper to Alice Smith, falls back into residue, and falls back in its original character either as income or as capital, and so reverts to the residuary legatees, and therefore, he says, what was income remains income, and continues to be income under the will of Lucy Smith, and was given as income by her to his client. Then Mr. *Guest* says—I pass by what I may call collateral arguments, and come to the central point of the respondents' reply to the appellant's argument—that he does not quarrel with the validity of the reasoning or the consequences which follow from it, but he challenges the basis of it. He says the superstructure may be all right but that the foundation is all wrong, and that the proper starting point is to consider the residue, not as the remainder of the estate after providing for the specific gifts only, but that the testator John Matthew Smith must be considered as segregating various portions of his property, not only the specific gifts, but also the sum of £800 a year during the life of Alice Smith, the annuity of £500 during the life of Emily Cock, and the £3,000 on trust for his nieces. Having made provisions with regard to these portions of his property, he then says, as to the

"residue and ultimate surplus" upon trust for John Matthew Vincent Smith and Lucy Smith in equal shares. So that this main residuary clause would not include a single penny of the annuity of £800 a year during the life of Alice Smith. The consequence of that is that the unapplied portion of the annuity of £800 is not part of the produce of the "residue and ultimate surplus" in the main residuary clause. It does not come from that source at all but is outside it, and consequently the main and initial argument of the appellant fails. The unapplied portion of the annuity of £800 does come to the residuary legatees as part of the "residue and ultimate surplus," not, however, by virtue of the main residuary clause, but by virtue of an independent provision of the will expressly attached to the disposition of the annuity of £800, and it comes—and this is the important part—not as the produce of their estate, and therefore income, but as portion of John Matthew Smith's property separately given to them, and therefore is corpus. I think that answer is a valid answer, and therefore I think that the judgment of *Hodges* J. is correct, and that this appeal should be dismissed.

HIGGINS J. I concur in the view that Miss Lucy Smith's half share of the balance of the £800 per annum given by the will of John Matthew Smith is to be treated as corpus of the estate of Lucy Smith, and not paid away as income to the appellant, the tenant for life. The will of J. M. Smith is plain enough in its meaning as to this point, but the scheme of it is so peculiar and so clumsy as to induce an argument that the testator did not mean what he has said. The whole property is given to trustees "to dispose of the proceeds in manner following." Then follow (*a*) three specific devises; (*b*) a gift of £800 a year during the life of Miss Alice Smith, and a gift of £500 a year during the life of another daughter, Mrs. Cock; and (*c*) a legacy of £3,000. These gifts (*b*) and (*c*) are not mere charges in aid of a gift, but are substantive gifts in themselves. The residue of the property is to be held on trust for J. M. V. Smith and Lucy Smith. The only question is as to the gift of £800 a year. The trustees are to apply this sum (or give it to others to apply), so far as they

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think fit, for the benefit of Alice Smith; and the balance is to be "applied as part of the residue and ultimate surplus hereinafter mentioned." Whatever may have been his reason, the testator preferred to provide for Alice Smith in this way, instead of directing the trustees to pay out of the income of his estate such sums not exceeding £800 a year as they think fit for Alice Smith. The £800 a year is to be taken out of the estate before the "residue" is ascertained. There is no residue until the £800 a year has been paid. The "residue" is what remains after deduction of (*inter alia*) £800 a year. Even if we assume that the income and not the corpus is primarily liable for the payment of the £800 per annum, there is the specific direction that so much of the £800 a year as is not applied for the benefit of Alice Smith is to be "applied *as part of the residue*." Even if the money was meant to come out of income, it was meant to fall into corpus. The residue is corpus; and as corpus, it is received by the trustees of the will of Lucy Smith, and goes to swell the corpus of her estate. The balance of the £800 a year is therefore to be treated as corpus as between the appellant (tenant for life) and his children (entitled in remainder) under the will of Lucy Smith.

The order of *Hodges* J., which we affirm, answers thus the substance of the only question which was the subject of controversy before him, and the only question which is the subject of appeal to this Court. No question has been raised as to the propriety of paying the £800 a year out of the income of John Matthew Smith's estate since Lucy Smith's death. Of course, until her death, it made no matter, as Lucy Smith took both capital and income. Nor is there any appeal as to that part of the order of the learned Judge which declares that the trustees of Lucy Smith ought to treat as income of her estate the income of the residue of the estate of J. M. Smith. These points, we are informed, were not contested in the Court below, and they are not contested before us now. I merely refer to them in order that this Court may not be regarded as having, even indirectly, declared any law with respect thereto.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. W. Dixon.*

Solicitors, for the respondents, *Madden & Butler*; *J. E. Dixon.*

B. L.