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WILLIAMS v. MACHARG.

Solicitor, for the appellant, *The Crown Solicitor for New South Wales.*

Solicitor, for the respondent, *G. W. Ash.*

C. A. W.

Appl *McKean v Page* (1999) 25 FamLR 15

[HIGH COURT OF AUSTRALIA.]

SARAH PATIENCE PETER, ADMINISTRATRIX OF WILLIAM PETER . . . . } APPELLANT;

AND

SHIPWAY AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 10, 11, 12, 28.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Will, construction of—Inconsistent provisions—Clear gift, how far affected by subsequent provisions—Intention of testator—Assignability of contingent interest—Assignment for benefit of creditors—Consideration.

A testatrix gave to trustees an estate "F." in trust for her son R. for life and after his death to her daughter M. absolutely. After making certain other provisions she gave the residue of her estate in trust for R. and M. in equal shares, their issue to "take the respective shares which their parent takes," and directed that in the event of either R. or M. "dying without issue" the interests or interest of either under the will should vest in the survivor, and that if both should die without issue the trustees should convert into money all her estate "as shall not already be converted into money" and divide the proceeds in certain proportions between P. and B. There was a direction in the will to the trustees to sell certain furniture and personal and household effects and apply the proceeds for the benefit and advancement in life of R.

Held, that the interest of P. under the will, though its enjoyment was dependent on a contingency, was a vested interest assignable after the death

of the testatrix by appropriate conveyance with or without valuable consideration, and passed by an assignment by deed to trustees for creditors of all the land, stock in trade, furniture, goods, chattels and effects real and personal, and all other property and effects of whatever nature of P.

Ivison v. *Gassiot*, 3 D., M. &. G., 958, applied.

Per Griffith C.J.—An assignment by a debtor of his estate for the benefit of creditors generally in consideration of his debts is an assignment for valuable consideration.

Per Isaacs J.—An agreement by the creditors, parties to a deed of assignment, that the trustees as their attorneys shall have power to grant a release to the assignor, is valuable consideration for the assignment.

After the death of the testatrix, M. became bankrupt, and her interest in "F." was sold by the assignee of her estate to the respondent Shipway. M. and subsequently R. having died without issue, the trustees of the will applied to the Supreme Court for determination of the question who was entitled to "F." The administratrix of P. was made a party as she claimed that P.'s interest in "F." had not passed by the assignment to creditors. There was no probability of any surplus in P.'s estate after distribution. The Supreme Court having held that P. took no interest in "F.," and that therefore no question arose as to the effect of the assignment, the trustees for creditors acquiesced in the decision, but the administratrix of P. appealed.

Held, that, P.'s interest having passed by the assignment to the trustees for creditors, the administratrix had no possible interest in "F." and the appeal should be dismissed on that ground.

Per Griffith C.J. and *O'Connor* J.—There was a clear gift of "F." to M. in fee, subject only to the life estate of R., and the subsequent direction to sell unconverted property did not apply to "F.," or at any rate not with sufficient clearness to cut down the original gift. P. therefore took no interest in the property and, whatever the effect of the assignment, the appeal failed.

Randfield v. *Randfield*, 8 H.L.C., 225, applied.

Per Isaacs J. and *Higgins* J.—M. took an estate in fee simple in "F." expectant on the death of R., subject to a gift over to P. and B. in the event of both R. and M. dying without issue, and therefore, in the events which happened, the gift over took effect, but, as P. had parted with all his interest, he was not aggrieved by the decision of the Supreme Court, and therefore was not entitled to appeal.

Decision of *A. H. Simpson* C.J. in Equity affirmed.

APPEAL from a decision of *A. H. Simpson* C.J. in Equity, New South Wales, upon an originating summons for the determination of questions arising upon the construction of a will.

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His Honor found in favour of the respondent Shipway, the effect of his decision being that a certain property called "The Firs," which had been the subject of a specific devise in the will in question, had in the events which had happened become vested in that respondent by purchase from the official assignee in the estate of Margaret Baylis. The appellant claimed to be entitled to the property either by virtue of an assignment to her by her husband during his lifetime or as his administratrix *ad litem*.

The present appeal was from that decision.

The facts and the material portions of the will and other documents are sufficiently set out in the judgments hereunder.

Harriott, for the appellant. Mrs. Baylis did not take an absolute estate in fee simple in "The Firs." It was a fee simple liable to be cut down in the event of her death without issue. The words "die without issue" in the will mean, *primâ facie*, die at any time without issue, and there are no words in the will to negative that meaning. [He referred to *O'Mahoney* v. *Burdett* (1); *In re Schnadhorst*; *Sandkuhl* v. *Schnadhorst* (2); *Ingram* v. *Soutten* (3).] The gift over to William Peter and Mrs. Burrows therefore took effect on the death of Mrs. Baylis. The words "all my estate as shall not be converted into money" are wide enough to cover "The Firs," and should be read in conjunction with the rest of the will in order to ascertain the intention of the testator. It should not be treated as an independent provision which may or may not cut down the prior gift. There is no inconsistency between the provisions. The testatrix dealt with all her property piecemeal, and made provision for every event.

Langer Owen K.C. (*Rich* with him), for the respondents. The first reference to "The Firs" constitutes a clear gift to Margaret in fee simple, subject to the life estate of Reginald. That cannot be cut down by any subsequent provision unless the words clearly indicate an intention on the part of the testatrix to dispose of the property otherwise: *Moran* v. *Attorney-General of New South Wales* (4); *Randfield* v. *Randfield* (5). The words "die without

(1) L.R. 7 H.L., 388.
(2) (1901) 2 Ch., 338; (1902) 2 Ch., 234.
(3) L.R. 7 H.L., 408.
(4) (1905) 5 S.R. (N.S.W.), 142, at p. 145.
(5) 8 H.L.C., 225.

issue" refer to death in the lifetime of the testatrix, not death at any time, and are intended to prevent lapse. The Court will endeavour to find a vested estate rather than a defeasible one. [He referred to *Jenkins* v. *Stewart* (1); *In re Schnadhorst*; *Sandkuhl* v. *Schnadhorst* (2); *In re Hayward*; *Creery* v. *Lingwood* (3); *Minors* v. *Battison* (4).] The words of the subsequent provision, taking the most favourable view for the appellant, are ambiguous, and, if so, the original gift should stand. The reference to unconverted property is quite inappropriate to "The Firs," which was not subject to any direction or power to convert.

But, whatever the interest of William Peter under the will, the appellant has no interest and is not entitled to obtain the opinion of the Court on the construction of the will. It is immaterial whether the interest of Peter did or did not pass to the appellant under the two earlier assignments. The assignment of 7th May 1896 by Peter and the appellant covered every kind of property. Nothing could be more general than the words used. [He referred to *Ivison* v. *Gassiot* (5).] The assignment was made for valuable consideration, if consideration was necessary, and it was irrevocable. The assignors retained interest in a possible surplus, but it is clear on the evidence that there was no possibility of any surplus. [He referred to *Tailby* v. *Official Receiver* (6); *In re Fitzgerald*; *Surman* v. *Fitzgerald* (7).] Any interest that the appellant might have had under the will has passed to the trustees for creditors, and they are not appealing from the decision of the Chief Judge in Equity as to the construction of the will. The appellant is in no better position regarded as the representative of her husband. The Court should refuse to entertain the appeal, or if the appeal is entertained, dismiss it on the ground that upon the true construction of the will the appellant never had any interest in "The Firs."

Harriott, in reply. The *primâ facie* meaning of "death without issue" being death at any time without issue, that should

(1) 3 C.L.R., 799, at p. 804.
(2) (1902) 2 Ch., 234.
(3) 19 Ch. D., 470.
(4) 1 App. Cas., 428.
(5) 3 D., M. & G., 958.
(6) 13 App. Cas., 523.
(7) (1904) 1 Ch., 573, at p. 592.

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be adopted unless it appears that some other meaning is necessary in order to give sense to the will. It is not enough that the different meaning is merely probable: *O'Mahoney* v. *Burdett* (1); *In re Schnadhorst*; *Sandkuhl* v. *Schnadhorst* (2). The use of the word "absolutely" in the gift to Margaret does not make any difference to the estate which she is to take. It is a mere accentuating word, and is not necessary to the construction. [He referred to *Married Women's Property Act* 1893; *Wills, Probate and Administration Act* 1898, sec. 24.]

[O'CONNOR J.—Particular words, though they may not affect the nature of the interest given, may be of assistance in gathering the intention.

GRIFFITH C.J. referred to *Edyvean* v. *Archer*; *In re Brooke* (3).]

"Absolutely" does not negative an intention to make a gift over. However clear the original gift may be, it may be cut down by subsequent words, if they are clear enough to show that the testatrix so intended.

[ISAACS J. referred to *In re Jones*; *Richards* v. *Jones* (4).]

That case is somewhat cut down by *Comiskey* v. *Bowring-Hanbury* (5). The words of the subsequent direction here are just as applicable to "The Firs" as to the furniture, &c. The executors had a statutory power to convert the whole or any part of the estate into money.

Assuming that under the will William Peter had an interest in "The Firs," it did not pass to the trustees by the assignment of May 1896. The interest was at that date an equitable executory chose in action and could not pass without valuable consideration, and there was no valuable consideration for the assignment. A past debt is no consideration unless it is released or forborne. [He referred to *Story, Equity Jurisprudence*, sec. 1,040; *Caraher* v. *Lloyd* (6); *Currie* v. *Misa* (7).] Such an interest is a mere possibility and cannot be assigned at law, though it may be bound by a contract in equity for valuable consideration. Even if it could pass by such an assignment as that of May 1896, it was not included in the deed. None of the

(1) L.R. 7 H.L., 388.
(2) (1902) 2 Ch., 234; 71 L.J. Ch., 454, at p. 457.
(3) (1903) A.C., 379, at p. 384.
(4) (1898) 1 Ch., 438.
(5) (1905) A.C., 84.
(6) 2 C.L.R., 480.
(7) L.R. 10 Ex, 153.

kinds of property specified include it, and "other" property should be construed as *ejusdem generis*. [He referred to *Re Wright's Trusts* (1); *In re Ellenborough*; *Towry Law* v. *Burne* (2); *Pope* v. *Whitcombe* (3); *Norton on Deeds*, p. 231.]

If the interest was assignable in equity by a voluntary deed, it passed to the appellant by the settlement of August 1893, and, a release having been given to her by the trustees of all after acquired property, it is still in her.

Cur. adv. vult.

August 28.

GRIFFITH C.J. The main question for determination in this case is as to the construction of the will of a Mrs. Read, made in March 1893. A subsidiary question arises under a deed of assignment for the benefit of creditors made in 1896. In construing a will the paramount rule is that you must first ascertain the intention of the testator. It may be that on ascertaining that intention effect cannot be given to it, either in consequence of some positive rule of law, or because the testator has attempted to deal with property that is not in his control. But neither circumstance can make any difference as to the testator's intention.

Mrs. Read had been twice married. By her first marriage she had two children, William Peter and Charlotte Peter, now Mrs. Burrows, and by her second marriage also she had two children, Reginald and Margaret, afterwards Mrs. Baylis. The testatrix first bequeathed to her trustees and executors all her household furniture and effects in trust for her son Reginald with power to sell and dispose of the same or any part thereof and to hold the moneys received from such sale for the use, benefit and advancement in life of her son Reginald.

It is clear that the testatrix meant that the trustees should take the property mentioned and keep it during the life of her son Reginald, and apply it for his benefit. Whether in point of law that is a disposition to which effect could be given is quite immaterial in ascertaining the intention. The will then, after reciting that she was entitled to certain real property in her own right, which includes the property now in question called

(1) 15 Beav., 367. (2) (1903) 1 Ch., 697. (3) 3 Russ., 124.

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"The Firs," recited a marriage settlement made upon her second marriage under which the trustees of the settlement stood possessed of certain moneys upon trust for the children of that marriage as she and her husband, or the survivor, should appoint. She then devised "The Firs" as follows: "unto my said trustees . . . to be held by them in trust for my son Reginald Bligh Read for the term of his natural life and to receive the rents issues and profits thereof for the sole use and benefit of the said Reginald . . . and after the death of the said Reginald . . . I devise the same to my daughter Margaret Charlotte Baylis absolutely for her sole and separate use free from the control and debts of any husband with whom she may intermarry." If there were no more in the will I do not suppose anyone would dispute that under that disposition Margaret took an equitable estate in fee expectant on the death of Reginald. That is the plain meaning of the words, and unless there is something later on in the will to qualify them, that is the effect that must be given to them. Having thus dealt with her real property, the testatrix proceeded to deal with the personal property subject to the marriage settlement, which she appointed in these words: "I hereby appoint all moneys stocks funds and securities upon which the same shall be invested and devise and bequeath the same in equal shares one moiety or half share . . . to the said William Peter and J. W. Flood (the trustees) in trust for my said son Reginald . . . for his support and advancement in life and the other moiety or half share to the said Margaret Charlotte Baylis absolutely free from the control of her present or any future husband with whom she may intermarry"; using the same words, practically, as in the devise of the realty. If there were no more in the will it is impossible to doubt that Margaret would have taken an absolute interest in half that property. It appears that Reginald was a person of weak intellect, and was directed, or at any rate expected, to be kept under the control of the trustees, for the will contained a direction that under no circumstances was he to be put into an asylum, and also an appointment of William Peter (who was Mrs. Read's son by the former marriage) as his guardian. What effect, if any, could be given to this direction is not material. So

far the will seems quite clear. Then the testatrix went on:— "As to the rest and residue of my estate I devise and bequeath the same in equal shares to" the trustees "in trust for my said son Reginald . . . and the remaining share to the said Margaret . . . for her sole and separate use; I direct that the lawful issue of any child of mine shall take the respective shares which their parent takes under this my will." It is suggested—and I think there is a good deal in the suggestion—that these last words were intended to prevent lapse in the event of the death of either of the children in the lifetime of the testatrix. But in the view I take it is not material whether that is what she intended or not. Then followed the direction not to put the son Reginald in an asylum and then:—"in the event of the death of either of the said Reginald . . . or Margaret . . . without issue I direct that the interests or interest taken by either of them shall vest in the survivor." It is to my mind absolutely clear that that direction did not apply to "The Firs," which had been devised to the trustees in trust for Reginald for life and after his death for Margaret absolutely. It is, to my mind, impossible to suppose that the testatrix intended by such general words as these to provide that only in the event of the death of Reginald without issue in Margaret's lifetime should "The Firs" pass to Margaret. It was perfectly immaterial whether he died without issue or not: all that he took was a life estate. It is equally impossible to suppose that the intention of the testatrix was that, if Margaret died without issue, her interest in "The Firs" should go over to Reginald. At this point, it appears to me, the testatrix was not contemplating "The Firs" at all.

Then we pass to another paragraph in the will, as to which the controversy arises. "Should both my aforesaid children die without leaving lawful issue I direct my trustees to convert into money all my estate as shall not already be converted into money and to divide the same into five equal parts and pay unto Charlotte Elizabeth Burrows . . . two shares or parts and unto the said William Peter the remaining three parts or shares."

Both Reginald and Margaret survived the testatrix. Reginald

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having survived his sister, the question arises who became entitled to "The Firs" upon his death. After her mother's death Mrs. Baylis became bankrupt, and her assignee sold her interest in "The Firs" as an asset in her estate to the respondent Shipway. After the death of the testatrix William Peter made an assignment of his estate for the benefit of his creditors with a resulting trust of any surplus for the assignor. He has since died, and the appellant represents his interest. It is alleged that before the execution of the deed Peter had assigned all his interest under the will to his wife, but, as she joined in the deed of assignment to creditors, that fact is not material. The trustee of the will then took out an originating summons for the determination of certain questions by the Court. The first, which is the only material question, was whether upon the true construction of the will and in the events which have happened the respondent Shipway as purchaser from the assignee of Margaret Baylis is absolutely entitled to "The Firs" and other real and personal property devised and bequeathed to her by the will. The trustees of Peter's assignment were admitted as parties, and the appellant was also admitted as a party, representing the estate of her husband, and also as claiming under the assignment made to her before the deed of assignment for the benefit of creditors. The learned Judge decided only the first question. He held that under the will the respondent was absolutely entitled to "The Firs," that is, that Margaret Baylis took under the will an estate in fee simple expectant upon the life estate of her brother Reginald, and that it had been effectually disposed of by the assignee in her bankruptcy.

As I have already said, the paramount rule of construction is to ascertain the intention of the testator. There are, however, some subsidiary rules, one of which has been appealed to in this case, which I venture to call a rule of common sense, and which has been laid down in various ways. It has been put thus: That where there is a clear gift of property in a will, it cannot be cut down by anything subsequent unless it is equally clear. That statement of the rule has been said to be inaccurate. In *Randfield* v. *Randfield* (1), which is, I suppose, the leading case

(1) 8 H.L.C., 225.

now upon the subject, *Kindersley* V.C. had stated the rule in the words I have just used, but Lord *Campbell* L.C. said (1): —"If there be a clear gift, it is not to be cut down by any thing subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down; but the maxim cannot mean that you are to institute a comparison between the two clauses as to lucidity." Lord *Wensleydale* stated the rule in slightly different language (2):—"The gift being in terms absolute cannot be cut down, unless there is a sufficiently clear indication of an interest" (intention) "to defeat it by the subsequent clause. I quite agree with the Lord Chancellor in the construction of those words to which he referred, that you need not have a clause equally clear, but it must be reasonably clear, and the clause to which that effect is attributed by the respondents is capable of a construction confining its effect to the real estates only." The question was whether the words in question applied to both the real and personal estate. Lord *Kingsdown* said (3):—"The language used in strictness applies only to the realty, and the improbability I think is great, having regard to the enumeration of the articles of which the personal estate consisted, that the testator should intend to make it the subject of a gift over, and that during the whole period of his life his son should be left in doubt whether he was an absolute owner of it or not. The original gift is clear, and I think there is not sufficient certainty in the subsequent words to restrict it." That is a rule of common sense, as well as a rule of construction by which the Court is bound.

Now, I find here, first of all, a clear gift of the estate to Margaret absolutely. These words seem to leave no room for doubt. They are repeated in a gift of property which the testatrix had no power to give to anyone except to her children. Having made these two gifts, and having other property to dispose of, she proceeds to make the disposition in question, which is said to apply to the first, although it cannot by any possibility apply to the second. It is said that it applies to the first because it appears with reasonable certainty or sufficient clearness of

(1) 8 H.L.C., 225, at p. 235. (2) 8 H.L.C., 225, at p. 238.
(3) 8 H.L.C., 225, at p. 241.

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language that she intended to cut down the original gift to a life estate—an estate in property devised absolutely to a conditional estate. The words relied upon are: "I direct (should both my children die without lawful issue) my trustees to convert into money all my estate as shall not already be converted into money and to divide the same," &c. Now, these words, if they stood alone in the will, might and probably would be large enough to include the whole estate of the testatrix, but, *primâ facie*, they suggest a limitation. What the trustees are directed to convert is what has not already been converted, which certainly assumes—to my mind, at any rate—that the testatrix was dealing with some property over which she had given the trustees a power of conversion, property which they might or might not have converted. Such a power of conversion was certainly assumed to exist with respect to what she was dealing with. That seems to be the plain *primâ facie* meaning of the terms. Reference to the earlier part of the will shows that it contained a disposition of property to which such a description would be quite apt. Property was given and appointed to the trustees of the will to be applied by them for Reginald's benefit during his life, and the testatrix rightly or wrongly thought that the trustees would or might keep it in their hands in specie during his life, so that, if he survived Mrs. Baylis, it would be in their hands unconverted at the death of the survivor without issue. Whether she thought (erroneously) that this direction to convert and divide unconverted property would be effectual also as to the share in the settlement funds appointed to Reginald is not material. In my opinion, the words "as shall not be already converted into money" aptly describe this property, and do not on their face purport to include "The Firs," and I think they should be so interpreted. It is, therefore, unnecessary to call in aid the rule to which I have referred, because the words said to be contradictory of the clear gift in fee apparently do not refer to the same subject matter at all. But supposing they are capable of that construction, is it reasonably clear that that is their real meaning? For my part I think that the language is reasonably clear, that it is not ambiguous. If, however, it is not reasonably clear, then it is ambiguous and cannot cut down the clear gift.

I confess that, but for the difference of opinion which I know exists on the bench, I should have thought—which was the view taken by the learned Chief Judge in Equity—that the words were absolutely clear, and did not on their face refer to the same subject matter. But in deference to the opinion of members of this bench, I will assume that they might apply to the same thing. We find, then, first of all, a clear gift, and later on another set of words which to one set of Judges appear to clearly mean one thing and to another set of Judges not necessarily to bear that meaning; that is, in effect, that the view taken by one set is not the necessary or only meaning of the words. I am bound, therefore, to accept the position that there is some ambiguity—though it does not seem to me that there is any—as to whether the testatrix intended to cut down the clear gift, and, that being so, the rule in *Randfield* v. *Randfield* (1) applies and the original gift stands.

For these reasons I am of opinion that the respondents have a good title to the property in question. That was the opinion of the learned Judge of the Court below. We were not favoured with his reasons at length, but I understood them to have been substantially the same as those I have expressed.

There is another question in the case, arising under the deed of assignment made by Peter whose interest the appellant represents. His claim was that the effect of the words I have been commenting upon was to cut down the gift in fee to Margaret to an estate defeasible in the event of both herself and Reginald dying without issue. In that event William Peter and his sister Mrs. Burrows would have taken, one three-fifths and the other two-fifths. The deed of assignment to which I have referred, dated 7th May 1896, witnessed that William Peter and his wife Sarah Patricia Peter did each of them thereby grant, release, convey, enfeoff, assign and transfer unto the trustees their heirs, executors, administrators and assigns the lands, shares, stock in trade, goods, moneys, debts, credits and effects, real and personal, of or to which they or either of them were or was seized or possessed or otherwise entitled and all other the property and effects of them, or either of them, of what nature and kind soever where-

(1) 8 H.L.C., 225.

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soever situate and being in whomsoever's hands, custody or power the same now are or at any time hereafter may be to have and to hold the same unto and to the use of the trustees upon the usual trusts for the benefit of creditors, with the usual powers included in deeds of assignment of that kind.

There was also a trust of any surplus in favour of the assignors, and a power in the trustees to grant a release.

It is contended by Mr. *Harriott* that these words did not effectually pass this interest, which was an executory equitable interest, because there was no consideration for the deed. In my opinion a conveyance of property by a debtor to his creditors in consideration of his debts is not without consideration. I think it must be taken that the assignment was made for valuable consideration.

The second point was that whatever interest Peter took under the will was such a contingent interest as to be incapable of assignment at all, or, at any rate, without valuable consideration. As I have said, I do not think he took any interest under the will in this property, but I think that what interests he did take were capable of assignment. They were interests the enjoyment of which depended upon a future contingency, but were vested interests and capable of assignment by an appropriate conveyance. It cannot be suggested that there was any more appropriate mode of conveyance than a deed under seal. In my opinion, whether the deed was voluntary or not, his interests effectually passed by that deed. I have already stated my opinion that the interest of Peter did not include any interest in "The Firs." On both grounds, therefore, the appellant entirely fails.

Another question was raised, whether under these circumstances the Court ought to decide the question of construction in this appeal. The appeal is from a judgment that the appellant is not entitled to any interest in the property. In my opinion that judgment is right. But, it is said, whether that is so or not, the appellant is not entitled to appeal, and is not entitled to argue the question whether the respondents are entitled to the property. The appellant, in order to succeed, has to establish, first, that under the will Peter took an interest

in "The Firs," and, secondly, that that interest did not pass by the assignment for the benefit of creditors. I suppose that the Court may decide against him on either or both grounds, and need not decide both unless it likes. If the first question is decided against her it is not necessary to decide the second. On the other hand, if Peter took an interest under the will, the Court must determine the question as to the effect of the assignment for the benefit of creditors. I think it is right to express an opinion on both points. Again, supposing we confine our attention to the effect of the deed, another interesting question suggests itself for consideration, whether, the appellant having been allowed in the Court below to argue the point of construction, this Court should refuse to hear her. The Court is bound to hear her to the extent necessary to determine whether the deed operated upon Peter's interest, if any, and, if it did operate on that interest, the appellant has still a possible, though shadowy and remote, interest in the surplus. Under these circumstances the question what the Court ought to do, whether it should dismiss the appeal on the ground that, having heard the appellant upon both points, it is of opinion that Peter and, therefore, the appellant, never had any interest in "The Firs," or upon the ground that the interest of Peter, whatever it was, passed by the deed of assignment, or upon the ground that the appellant has no substantial interest in any view of the case, is a question not worth deciding.

In my opinion the appellant fails upon both grounds and the appeal should be dismissed.

O'Connor J. read the following judgment:—

The object of this appeal is to review the interpretation placed on the will of Elizabeth Read by the Chief Judge in Equity. The appellant is Sarah Patience Peter, a beneficiary under the will, the respondent appearing is the assignee of Mrs. Baylis, another beneficiary, but the trustee of the will who initiated the proceedings in the Court below is not represented here.

The respondent's first ground of objection is that the appellant ought not to be allowed to raise any question as to the interpre-

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tation of the will, because she has parted with all her interest. The deed of assignment to creditors of 7th May 1896 vested in the trustees under it all the interests of Peter and his wife under the will, but subject to a trust in their favour in respect of any surplus that might remain after payment of debts. Mrs. Peter had therefore an interest as *cestui que trust* contingent on there being a surplus, and so long as that interest was a real interest she would be properly a party in a suit of this kind. It is contended that she has no longer any real interest; upon that question she is certainly entitled to have the decision of this Court.

It seems clear that there never can be a surplus in the hands of the trustees after payments of debts because the whole property will pay no more than a small proportion of the debts due. The appellant has, therefore, in fact no interest which could be affected by the interpretation of the will, and on that ground alone the respondent would, in my opinion, be entitled to have the appeal dismissed. The respondent, however, also contended that the learned Judge in the Court below had rightly interpreted the will, and that contention was thoroughly argued on both sides before us. The question has now arisen whether the Court should confine its decision to the first ground or should go on to declare its interpretation of the will on the points dealt with in the Court below. This Court is at liberty, in my opinion, to take either course, and should adopt that which appears to be in the best interests of all persons interested in the interpretation.

In the absence of the trustees as parties to this appeal, I should have felt it inadvisable to throw any doubt unnecessarily on the interpretation of the learned Judge in the Court below, but as, after hearing very full argument, I am of opinion that he came to a right conclusion, I think it may be in the interests of all parties interested under the will to express that view and shortly state my reasons. In that portion of the will dealing with all the testatrix's real estate she has specifically devised "The Firs" in such a way as to vest that property at her death in Mrs. Baylis for an absolute estate in fee simple subject to the life estate of Reginald Bligh Read.

But it is urged, admitting that to be the true interpretation of

that portion of the will, that the devise comes within some general words in a subsequent part of the will, the effect of which is to alter the specific disposition very considerably. The words relied on are as follows :—"In the event of the death of either of the said Reginald Bligh Read or Margaret Charlotte Baylis without issue I direct that the interests or interest taken by either of them under my will shall vest in the survivor. Should both my aforesaid children die without leaving lawful issue I direct my trustees to convert into money all my estate as shall not already be converted into money and to divide the same into five equal parts and pay unto Charlotte Elizabeth Burrows the wife of Loftus Burrows of London Gentleman two shares or parts and unto the said William Peter the remaining three parts or shares."

Interpreted as the appellant contends, the words relied on by her contradict the earlier portion of the will dealing specifically with "The Firs," or, putting it in another way, they divest the estate which the earlier portion has expressly and specifically vested. Under these circumstances it is important to remember the principle of interpretation relied on by Mr. *Owen* and quoted by him from *Moran* v. *Attorney-General of New South Wales* (1):—"'Where there is a clear gift in a will it cannot afterwards be cut down except by something which with reasonable certainty indicates the intention of the testator to cut it down. It need not (as sometimes stated) be equally clear with the gift. You are not to institute a comparison between the two clauses as to lucidity: *per* Lord *Campbell*, *Randfield* v. *Randfield* (2). But the clearly expressed gift naturally requires something unequivocal to show that it does not mean what it says.' In other words, a divesting clause must be construed strictly."

That is really only another way of stating a principle of interpretation applicable to the construction of all documents where the intention of the writer is to be gathered from what he has written, namely, that a document must be construed as a whole, and it will not be taken without strong compelling words that the writer intended one portion of it to be contradictory of another portion. In my opinion the general words relied on by the appellant, when read with the whole will and with the con-

(1) (1905) 5 S.R. (N.S.W.), 142, at p. 145. (2) 8 H.L.C., 225.

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text in which they are found, are entirely inapplicable to the prior specific disposition of "The Firs." That position may be established in two ways. First, in the portion of the will relied on by the appellant the testatrix is dealing with property not theretofore disposed of. The general words relied on by the appellant "the interests or interest taken by either of them under my will" and the direction given later "to convert into money *all my estate* as shall not already be converted into money" must, in my opinion, be read as governed by the words "And as to the rest and residue of my estate," which head that portion of the will. There is in the residuary estate property to which all those words are applicable, and, if read as applying to that property only, full effect would be given to them while the will would remain consistent with itself. If it were not for the interpolation amongst the dispositions of the residuary estate of the directions for the personal care of the testatrix's son, it would be impossible to find an answer to that reading. But the interpolation in my opinion makes no difference. It has nothing to do with the disposition of property, and might just as well have been inserted in any other part of the will, and with just as little effect on the disposition of the testatrix's property.

The position which I have stated is established, in the second place, by a consideration of the remaining words relied on by the appellant. The direction to convert into money "all my estate as shall not already be converted into money" must obviously refer to some part of the estate which the trustees had then been empowered to convert into money. The power to convert some of the estate is given to the trustees, and to that portion these words would be applicable, but there is no power previously given expressly or impliedly to convert "The Firs" into money.

For these reasons I have come to the conclusion that there is nothing in the words relied on, interpreting them reasonably and in the light of the other portions of the will, to cut down the estate in "The Firs" specifically vested in Mrs. Baylis by the earlier portion of the will, and that the interpretation placed on the will by the learned Chief Judge was right. I agree therefore that the respondent's contention must be upheld on both grounds and the appeal dismissed.

ISAACS J. read the following judgment:—

The only appellant is Sarah Patience Peter and she appeals in two capacities—in her own right, and as representing the estate of William Peter. The first question is whether she has any interest in either capacity in the subject matter of the litigation.

As both she and her husband were parties to the deed of May 1896, and as the subsequent deed of 8th January 1898 did not revest any property assigned by the former deed, her rights in both capacities may be considered together. Mr. *Harriott* argued, first, that the property described by the deed of 1896 does not include the executory interest of William Peter under the will, and next that, even if it be included, the assignment amounted to a mere covenant to assign future property when it came into existence, and being unsupported by valuable consideration, equity would not lend its assistance to volunteers to obtain a title to the property.

The deed of 1896 is a deed for the benefit of the creditors of William and Sarah Patience Peter.

It recites that the assignors had respectively carried on business, and had trade and also private liabilities, and being unable to pay their creditors in full, had agreed to assign all their joint and separate estate to trustees upon certain trusts and agreements. The deed which has been placed before the Court described the arrangement and the property assigned in terms that are very material. "And whereas the said William Peter and Sarah Patience Peter being unable to pay either their joint or their separate creditors the whole of their respective demands have agreed to convey and assign all their joint and separate estate unto the said trustees upon and for the trusts and purposes and with under and subject to the powers provisoes and agreements hereinafter expressed declared and contained Now this indenture witnesseth that in pursuance of the said agreement they the said William Peter and Sarah Patience Peter do and each of them doth hereby grant release convey enfeoff assign transfer and set over unto and to the said trustees their heirs executors administrators and assigns All and singular the lands tenements and hereditaments shares in any joint stock company stock in trade plant furniture goods chattels moneys debts credits and effects both real

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and personal of or to which the said William Peter and Sarah Patience Peter or either of them are or is seized possessed or otherwise entitled for their or either of their own benefit in any manner howsoever And all other the property and effects of them the said William Peter and Sarah Patience Peter or either of them of what nature and kind soever and wheresoever situate and being in whomsoever's hands custody or power the same or any of them or any part or parts thereof now are or at or at any time hereafter may be with their or any of their appurtenances And all the estate right title interest claim and demand whatsoever of them the said William Peter and Sarah Patience Peter and each of them as well jointly as separately of to in or out of the same premises and any of them respectively (the wearing apparel of themselves and family excepted) To have and to hold all and singular the said premises hereby granted and assigned or expressed or intended so to be and every part thereof unto and to the use of the said trustees their executors administrators and assigns according to the nature and quality thereof respectively Upon the trusts nevertheless and for the several intents and purposes hereinafter expressed and declared concerning the same that is to say *Upon trust*" &c.

As applied to the terms of this deed, and the evident intention of the assignors, the case of *Ivison* v. *Gassiot* (1) cited by Mr. *Owen* entirely covers and includes the first point raised.

William Peter's interest under his mother's will therefore was included. With regard to the second point, *Ivison* v. *Gassiot* (1) does not decide it, because the assignment was there expressed to be in consideration of the release, and it is argued here that as there was no release there was no valuable consideration. Independently of consideration I agree that the interest was a present interest, and assignable in equity; and having been assigned as far as it was possible, nothing more remaining to be done, the title of the assignees was complete.

But even on this point of consideration the argument, in my opinion, fails.

I have already said that the assignment was expressed to be

(1) 3 D.M. & G., 958.

upon certain trusts and agreements. Now, one of the agreements was as follows:—

"And it is hereby further agreed and declared that the said trustees or the survivor of them or the trustees or trustee for the time being of these presents shall have a discretionary power as the Attorneys or Attorney of all the creditors parties hereto of the fourth part to execute to the said William Peter and Sarah Patience Peter or either of them a release in full of all claims and demands reserving only in such release all rights and remedies as against persons jointly liable to the said William Peter and Sarah Patience Peter or either of them or liable as sureties for the said William Peter and Sarah Patience Peter or either of them."

This agreement by the creditors parties of the fourth part, that the trustees as their attorneys should have a discretionary power to give a binding release to the assignors from their debts to those creditors, seems to me to come clearly within the accepted definitions of valuable consideration: *Forth* v. *Stanton* (1); *Fleming* v. *Bank of New Zealand* (2).

As to both capacities Mrs. Peter's point of *nudum pactum* therefore fails. With regard to herself there is the further fact, that by the deed of 8th January 1898 the power was acted upon and a release given to and accepted by her.

Mr. *Harriott* then contended that, assuming all else against him in point of interest, there nevertheless existed a right to any surplus after payment of debts sufficient to establish his right to sue. As the trustees of the deed have not appealed, and are probably moved as to whatever course of action or inaction they adopt by the interests of the creditors, there is no reason for questioning the decision of the Court below to admit Mrs. Peter to protect her rights if she has any. But the undisputed facts clearly establish she has no interest whatever, nor any possibility of a surplus. The deed provides as one of the trusts that "in case there shall remain or be any surplus of the joint or separate estates of the said William Peter and Sarah Patience Peter after all such payments and distributions as aforesaid then upon trust to pay and divide the same to and between the said William Peter and Sarah Patience Peter," &c.

(1) 1 Saund., 210. (2) (1900) A.C., 577.

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Mr. Brierley's affidavit, uncontradicted and unchallenged, establishes that even with the assistance of the interest now in controversy the creditors will probable not get even a shilling in the £, and that there can be no possible surplus.

Consequently the appellant, in my opinion, has not in either right in which she appeals any interest which entitles her to call for the decision of this Court upon the rights of the parties who are concerned with the provisions of the will.

As between the respondents Shipway, Sheehy, and Everett the matter is *res judicata*—no appeal having been brought by any of them from the decision below.

Mrs. Burrows, the only other person interested, apparently gave notice of appeal, but whether she persevered so far as to give the necessary security and regularly institute her appeal does not appear. She did not in any way appear on the hearing of the appeal, and no argument was raised on her behalf. In these circumstances it seems to me the proper course is to dismiss the appeal on the ground that the appellant has failed in the first essential step of any litigation, namely, to establish any interest in the subject matter.

But, as my learned brothers who have preceded me think the appellant is technically entitled to demand the decision of the Court upon the construction of the will, it is my duty to express my opinion. And as I have the additional misfortune to hold a different view upon that question from those already expressed by my learned colleagues, I feel bound out of respect for their opinions to state my reasons. The testatrix when she made her will was a widow. She had been married twice. William Peter and, as stated during the hearing, Mrs. Burrows were the children of the first marriage. Reginald and Margaret were the issue of the second marriage, the latter being married at the date of the will. Reginald was in need of special personal care. These constituted the only persons having any claims upon the testatrix. By her will she proceeded upon what appears to me a regular and fixed scheme of disposition.

1. Household furniture and effects, linen, china, wines, spirits, and stores were given in trust for Reginald, with power to sell and dispose of them for his benefit and advancement in life. If

nothing more appeared he had the complete equitable ownership of this property with the immediate right of calling for it. Until he did so the trustees could realize it as required and apply the proceeds at once accordingly. The nature of the property was of a wasting and disappearing character, and does not suggest itself to me as a fund for sole and special bounty in remainder to the first family of the testatrix.

2. She recited that she had real property in her own right and also the marriage settlement of 1861, by which certain moneys were settled in trust for any children of the second marriage "for such interest," &c., as might be appointed in the events which happened by her will, and named her children Reginald and Margaret as the children of that marriage.

3. She devised "The Firs" for Reginald for life expressly stating that it was for "the term of his natural life," and after his death to Margaret "absolutely for her sole and separate use free from the control and debts of any husband with whom she may intermarry." With nothing more appearing, it is quite clear Mrs. Baylis took a fee simple in remainder in "The Firs."

4. She then appointed the settled property in equal "shares" to Reginald and Margaret, and as to the latter "absolutely free from the control of her present or any future husband with whom she may intermarry." This gave each of the beneficiaries, if the will had contained no further provision, the most complete estate in their respective shares.

5. Lastly, the testatrix dealt with the residue, styling it "the rest and residue of my estate." She gave it in equal "shares" to Peter and Margaret, and as to the latter "for her sole and separate use." This completed the statement of the primary desires of the testatrix, and then followed some general provisions to complete her testamentary intentions. First, a clause providing for possible lapse—which did not occur—was inserted, and from the wide words "respective shares which their parent takes under this my will," this may possibly be read as applying to all the dispositions of the will, but the result is the same if it be restricted to the residue.

Following this is a direction as to the personal treatment of Reginald, the testatrix having already provided a home for him,

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and apparently what she considered necessary for his care and support.

The third general provision was in the event of the death of either Reginald Bligh Read or Margaret Charlotte Baylis without issue, and in that case the will directs that "the interests or interest taken by either of them under my will shall vest in the survivor." As to "death without issue," there is nothing to displace the rule laid down by the House of Lords in *O'Mahoney* v. *Burdett* (1) and *Ingram* v. *Soutten* (2), and therefore the clause cannot be limited to a lapse. It applies to the case of death of either Reginald or Margaret at any time after the death of the testatrix.

As to "interests or interest," the phrase includes all the several interests given by the will, using the word "interests" distributively as referring to the respective benefits conferred, or alternatively employs the word "interest" in the more abstract sense of the combined and general right or claim which the beneficiary possessed.

The expression "under my will" corresponds in its generality with the previous phrase "under this my will"; and stands in this respect in contrast with the words "all my estate" in the next clause.

I take this provision to apply to every disposition previously made, so far as it can apply. The fact that Reginald's life estate could not vest in Mrs. Baylis if she had survived him is no reason why her remainder should not vest in him if she predeceased him. Solicitous as the will shows the mother to have been to make the welfare of Reginald and Margaret her first consideration and that of the other two children her second, it would be a strange departure from her general scheme to intend that on Mrs. Baylis's death without issue, not Reginald, nor William Peter, nor Mrs. Burrows, but some outside person should have the ultimate fee in "The Firs." I see no reason for departing from the primary meaning of the words of the will, supported as they are by the general plan of disposition.

Then comes the provision to meet the case of both Reginald and Margaret dying without issue. In that case the will says:—

(1) L.R. 7 H.L., 388. (2) L.R. 7 H.L., 408.

"I direct my trustees to convert into money all my estate as shall not already be converted into money and to divide the same into five equal parts" and to distribute between the other children.

The words "my estate" exclude the appointed property—for the excellent reason that it was not her property and her powers of appointment were limited to certain objects; and the word "all" before them includes everything else. "The same" means "all my estate"; and unless some canon of construction forbids me from interpreting this clause so as to ascertain the true meaning of the testatrix, I feel no doubt that it was intended to apply to every preceding disposition by the testatrix of her own property. Is there any such canon of construction? I know of none. *Randfield* v. *Randfield* (1) was relied on to establish a rule of construction that, where one portion of a will read by itself makes a clear and indefeasible gift, the Court, in the absence of other unambiguous words establishing beyond any possible doubt a limitation of that gift, is bound to deny defeasibility. I cannot find any such canon in the case. In fact it is an authority to the contrary. In the Court below (2) *Kindersley* V.C. had said: "I must apply the broad and well-known principle, that if you have a clear gift, it shall not be cut down by anything subsequent, unless it is equally clear; and it appears to me, that in this case there is so much doubt about the residuary clause, that the prior gift of the real and personal estate must prevail." Lord *Cranworth* L.C. (3) reversed the decree of the Vice-Chancellor. The House of Lords upheld the Lord Chancellor as to the realty and reversed him as to the personalty. But in doing this their Lordships interpreted the will for themselves; and neither they in differing from the Lord Chancellor as to the personalty, nor the latter in differing from the Vice-Chancellor as to both, thought the fact of a doubt existing in the mind of another Judge sufficient to relieve any member of the tribunal of his responsibility to interpret the document for himself. Lord *Campbell* L.C. referring to the Vice-Chancellor's words, said (4):—"If there be a clear gift, it is not

(1) 8 H.L.C., 225.
(2) 4 Drew., 147, at p. 150.
(3) 2 DeG. & J., 57.
(4) 8 H.L.C., 225, at p. 235.

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to be cut down by any thing subsequent which does not with *reasonable certainty indicate the intention* of the testator to cut it down; but the maxim cannot mean that you are to institute a comparison between the two clauses as to lucidity." The learned Lord Chancellor went on to apply his observations. Dealing with the will before him he said:—"There may be considerable doubt as to some of the conditions," (that is as to the limitation over) "but there is by no means *such obscurity* as to justify the holding that the latter part of the will is to be taken *pro non scripto*." That was as to the realty. With regard to the personalty his Lordship not only found from the nature of most of the property the improbability that it could be advantageously used by one not having the absolute property in it, but that in framing his will the testator had kept the devise of the realty separate from the bequest of the personalty, and had so expressed himself as to make the natural and consistent meaning of the words in the collocation in which they were found inapplicable to the personalty.

Lord *Wensleydale* after requiring only that the defeasibility of a gift in absolute terms should be by "a sufficiently clear indication of an interest" (an evident misprint for *intention*) "to defeat it by the subsequent" clause, added (1):—"You need not have a clause equally clear, but it must be *reasonably clear*." He then finds that the clause relied on is capable of restriction to the realty, and adding upon that the words "taking into consideration the nature of the personalty, the impracticability of making it the subject of a settlement, and the terms of the bequest over," he agrees that the clause is in fact so restricted. Lord *Cranworth's* observations in the House of Lords, following upon those of the other learned Lords, clearly show that it is a matter of individual interpretation; and I accept the decision as one which merely enjoins upon a Court the observance of a natural and obvious precaution in such a case, namely, that before so deciding, it should be "reasonably certain" on the construction of the whole will that prior words in themselves conferring an absolute gift are really limited by the subsequent portion of the document.

(1) 8 H.L.C., 225, at p. 238.

In *Inderwick* v. *Tatchell* (1) Lord *Halsbury* L.C. said:—"My Lords, I confess I approach the interpretation of a will with the greatest possible hesitation as to adopting any supposed fixed rule for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction; and if I cannot, why then I think one must read the whole instrument as well as one can, and conclude what really its effect is intended to be by looking at the instrument as a whole."

In *Morrall* v. *Sutton* (2) *Parke* B. lays down in succinct terms the established rules of construction for ascertaining the intention of a testator. Although there was a difference of opinion between himself and Lord *Langdale* M.R. on the one hand and *Coleridge* J. on the other regarding the conclusion to be arrived at in the particular case, there was none, as I understand, as to the accuracy of the observations quoted. *Parke* B. said:—"These rules, so far as they are applicable to the present question, are admitted to be, that technical words are, *primâ facie*, to be understood in their strict technical sense; that the clause is, if possible, to receive a construction which will give to every expression in it some effect, so that none may be rejected; that all the parts of the will are to be construed so as to form a consistent whole; that of two modes of construction, that is to be preferred which would prevent an intestacy; and that where two provisions of a will are totally irreconcilable, so that they cannot possibly stand together, and there is nothing in the context or general scope of the will which leads to a different conclusion, the last shall be considered as indicating a subsequent intention, and prevail." Now, there are here no technical words, and therefore proceeding upon the lines stated by *Parke* B., and with all the care enjoined by *Randfield* v. *Randfield* (3), and seeking for "reasonable certainty" or "a reasonably clear intention" to limit the apparent absolute gift contained in the earlier words, it appears to me that condition is fulfilled. *A. H. Simpson* C.J. in Equity, as learned counsel for the appellant informed us, gave no reasons when pronouncing judgment, but from his previous

(1) (1903) A.C., 120, at p. 122. (2) 1 Ph., 533, at p. 536.
(3) 8 H.L.C., 225.

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observations appeared to regard the limitations over as applicable to the residue only. His Honor therefore could not have proceeded upon any supposed rule in *Randfield* v. *Randfield* (1), because the absolute gift of residue is as clear as that of "The Firs." But if he did, these limitations are as applicable to Mrs. Burrows' interest in "The Firs" as to her interest in the residue notwithstanding the word "absolutely" occurs in the former case and not in the latter. The word "absolutely" has not always the same signification. It may mean the quantity of estate given, or that its nature is beneficial and not in trust, or even as adverbially emphasizing the words following it. But assuming the first meaning, the words of Lord *Davey* in *Comiskey* v. *Bowring-Hanbury* (2) are most pertinent. His Lordship said:—"I do not myself attach any great importance to the use of the word 'absolutely.' Reading it as qualifying or expressing the estate which the wife had to take, it does not seem to me to do more than to give her a fee simple. It is now admitted that she has a fee simple, and the question is whether there is a good executory limitation capable of taking effect upon her death. The use of the word 'absolutely,' as defining the amount of the estate which is given to the wife, must of course be subject to any executory limitation or any other valid limitation or exception which you find engrafted on that estate in fee simple; therefore I attach no importance, or very little importance, to the use of the word 'absolutely.'"

I follow the course adopted in *In the estate of Lupton* (3) by *Sir Gorell Barnes*, reading the will as a whole and so gathering its intention as to whether the absolute gift in the first instance is cut down. It is to my mind—and I say this with the utmost deference to the weighty opinions to the contrary that have just been delivered—reasonably certain that the division into fifths of the estate remaining after the death of both Reginald and Margaret, and its distribution between the other two children of the testatrix was not confined to the furniture, wines and spirits &c., left at her death; nor could it exclude the unused proceeds of any part of the furniture, &c., that had been converted

(1) 8 H.L.C., 225.

(2) (1905) A.C., 84, at pp. 89 and 90.

(3) (1905) P., 321.

into money for Reginald's support and advancement. "All my estate" means in its primary sense everything previously dealt with as her own property, and I think that sense should be adhered to, and that William Peter and Mrs. Burrows, on the death of Mrs. Baylis without issue, became entitled in the respective shares mentioned in the will to the proceeds of "The Firs" upon conversion.

HIGGINS J. read the following judgment:—

I concur with all my colleagues in their decision that this appeal should be dismissed. But, in my opinion, it should be dismissed on this ground only—that the appellant, Sarah P. Peter, has no interest, and no possible interest in "The Firs" (the subject matter in dispute), and that therefore she is not entitled to attack the judgment of the learned Judge below, still less to have it set aside in favour of those interested, who might have appealed, but who have failed to appeal.

It is, to my mind, startling to find one who has no interest in the property in dispute attacking the decision of a Court as to the ownership of that property. If, in an administration suit, the Court had decided between A. and B. as to Whiteacre, and a dispute between C. and D. as to government stock, I have yet to learn that any Court of appeal would allow counsel for A. to argue that the decision was wrong as to the stock. No appellant is entitled to succeed unless he can show that the judgment of the Court below does him hurt, contrary to law; and in this case the appellant cannot show any hurt done to her, even to the amount of a shilling, either now or hereafter or in any contingency whatever. In the present case, if this Court should come to the conclusion that the learned Judge below did not rightly construe this will, it would, in effect, allow an appeal in favour of parties who have not appealed, and who are concluded as to their rights against the respondents by having failed to appeal. Subject to the right of the trustees of the deed of assignment, or of Mrs. Burrows, to appeal as prescribed, the right of the respondent to hold the judgment in his favour is absolute and indefeasible. He can plead *res judicata* to any action brought by the defeated party; and his right ought not to be

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disturbed at the instance of any one whose only interest is the interest which all persons have in common—an interest in securing ideal accuracy in the decisions of the Court.

In the present case we are all agreed that, whoever is entitled properly to "the Firs," Mrs. Peter is not. She and her husband by indenture of 7th May 1896 assigned all their property whatsoever to Messrs. Kent and Moore, as trustees for their creditors. It appears, from the uncontradicated affidavit of the accountant for the assigned property, that there can be no possible surplus for the assignors even if the proceeds of "The Firs" should be included. Mrs. Peter, therefore, has not any interest as beneficiary under the deed; and any action brought by her or against her, in that capacity, if it showed that there is no possible surplus, would be demurrable. It seems that Mrs. Peter was made a party, merely because, through her legal advisers, she contended that the deed of assignment did not assign her husband's interest under this will. For the purpose of having this contention decided, the plaintiff trustee was probably right—as she requested it—to make her a party to the summons. The learned Judge took that view of the will which gives all the proceeds of "The Firs" to Shipway, and he therefore had no need to decide the secondary contest as between the trustees of the deed and the Peters, had no need to decide what would happen if Shipway had not been successful; but he did not allow Mrs. Peter her costs out of the estate. At the opening of this appeal, however, when it was clear that Messrs. Kent and Moore were not, nor was Mrs. Burrows, appealing, Mr. *Owen*, as counsel for the respondent, took at once the objection that Mrs. Peter had no interest which entitled her to appeal. The Court postponed its decision on this point until it should have grasped the position in full; and it now turns out that the only ground on which Mrs. Peter claims any interest in "The Firs" is that there was no valuable consideration for the assignment to trustees for the creditors, and that future property cannot be assigned without valuable consideration.

Counsel for Mrs. Peter has relied for his argument on expressions used in cases in which property to be hereafter bought or acquired by the assignor is the subject in question, not, as in this case, a future and contingent interest already existing in the

assignor in existing property. *Holroyd* v. *Marshall* (1) is the leading case as to property to be hereafter acquired. But there is positively no ground for saying that a contingent or future equitable interest under a will cannot be assigned by deed without valuable consideration. As *Knight Bruce* L.J. said in *Kekewich* v. *Manning* (2), it is clear "that a person *sui juris* . . . . has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced, so, on the other, while it is as clear generally, if not universally, that a gratuitously expressed *intention*, a promise merely voluntary, or to use a familiar phrase, *nudum pactum*, does not (the matter resting there) bind legally or equitably." I prefer to rest my judgment on this ground, as it is so important to prevent doubts as to the full assignability of all beneficial interests in equity, whether value has been given or not. But I express no opinion contrary to the view taken by my brother *Isaacs*, to the effect that here there was valuable consideration.

I am clearly of opinion that the contention raised by Mrs. Peter cannot be sustained; and that, as she has no interest whatever in "the Firs" or in the proceeds thereof, her appeal ought to be dismissed. We cannot reverse, or consider the question of reversing, a judgment in which the respondent has a vested interest, at the instance of a person who is, by virtue of the deed of assignment, a total stranger to the subject matter in dispute.

Personally, I should have been in favour of dismissing the appeal without expressing any opinion on the question of construction. Any opinion that we express is an unofficial dictum, and a dictum that may embarrass the respondent, may even lead to further litigation. In fact, having ascertained that the appellant has no interest in the subject matter, we are *functi officio*, and have, strictly speaking, no right to express an opinion. But as my learned colleagues have thought it well to express their opinions, I am compelled to say, in order to prevent any misapprehension, that, in my opinion, Mr. *Harriott's* contention as to the construction of the will is clearly right. The grounds

(1) 10 H.L.C., 191. (2) 1 D.M. & G., 176, at p. 188.

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Higgins J.

on which I rely are substantially those set forth elaborately by my brother *Isaacs*; and I do not think it necessary to recapitulate the reasoning merely in order to state it in my own way. The words (dealing with the event of one child dying without issue) "I direct that the *interests or interest* taken by either of them under my will shall vest in the survivor," are applicable, without any straining of language, to the fee simple in remainder given to Mrs. Baylis after her brother's life interest. Then the words following (dealing with the event of both children dying without issue) "I direct my trustees to convert into money *all my estate as shall not already be converted into money* and to divide the same," &c., are also applicable, without any straining of language whatever, to the interest taken in "The Firs" by Mrs. Baylis, and afterwards by her brother. I cannot see why the meaning of these plain words should be cut down. These are unambiguous words to which effect must be given. They do not produce any inconsistency or anomaly, or any contradiction of the previous words. The prior gift to Mrs. Baylis was "absolute," in the sense that there was no trustee interposed, and that she was to have the highest estate that the law recognizes—the fee simple (cf. sec. 24 of *Wills, Probate and Administration Act* 1898 (N.S.W.). The word "absolutely," as lawyers well know, is often used with regard to real estate in wills, as meaning that a fee simple title is given (and see *Comiskey* v. *Bowring-Hanbury* (1)). But a fee simple is not inconsistent with a gift over on certain events. The gift over does not contradict, is not repugnant to, a fee simple. A fee simple may be defeasible. Here, it was defeated by the death of Mrs. Baylis before her brother. All the beneficial interests then combined in her brother; but his fee simple was defeated when he also died without issue. This natural interpretation of the words gives a consistent scheme to the whole will without doing violence to any of the words. The children of the second marriage are, primarily, the sole beneficiaries; but if their stock should fail, the mother wishes all her estate to go to her children by her first marriage rather than to strangers. There are no outside beneficiaries.

(1) (1905) A.C., 84, at pp, 89, 90.

Except by this interpretation, I cannot see how effect can be given to all the words of the will.

The appeal, however, should in my opinion be dismissed, because the appellant has no possible interest in the subject of dispute.

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Appeal dismissed with costs. Costs not to exceed £50.

Solicitor, for appellant, *J. D. Sly.*
Solicitors, for respondents, *P. W. Berne*; *W. D. Schrader.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

PATRICK ANDREW CONNOLLY . . APPELLANT;
PLAINTIFF,

AND

"SUNDAY TIMES" PUBLISHING CO. LIMITED AND E. W. FINN . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Practice—Order 61, *Rule* 1 (*W.A.*)—*Successful party deprived of costs of action—"Good cause."*

Order 61, Rule 1, provides that where any action is tried with a jury, the costs shall follow the event unless the Judge by whom such action is tried or the Court shall for good cause otherwise order.

In an action for defamation of an aggravated character, to which the defence of truth was pleaded, the jury found a verdict for the plaintiff with one

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PERTH, *Nov.* 3, 4.

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