be empowered to ascertain the real unimproved value of the tenement to be assessed.

For these reasons I have come to the conclusion that the legislature has used the word "land" in paragraph (*c*) in its ordinary meaning, namely, the meaning which is capable of including minerals as well as surface where minerals and surface are part of the same tenement, and, as in this case, in the hands of the same owner. I agree, therefore, with the learned Judges of the Supreme Court that the assessment under consideration was made on the right principle and think the appeal should be dismissed.

H. C. OF A. 1911.

COLON PEAKS MINING CO. v. WOLLONDILLY SHIRE COUNCIL.

BARTLETT v. WOLLONDILLY SHIRE COUNCIL.

Appeal allowed.

Solicitor, for appellants, *A. W. E. Weaver.*
Solicitors, for respondents, *Pigott & Stinson.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

COCK AND ANOTHER . . . . . APPELLANTS;

AND

AITKEN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

SYDNEY, *Dec.* 18, 19, 22.

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

Will—Tenant for life and remaindermen—Capital and income—Payment of annuities—Apportionment—Rate of interest—Appeal from High Court to Privy Council—Order of High Court discharged on point not appealed from—Re-affirmance of previous decision of High Court—Construction of will—Direction to make payments out of residuary trust moneys and to pay residue of income to C.—Ambiguity in will—Interpretation by codicil.

H. C. OF A. 1911.

COCK v. AITKEN.

J.M.S., who died in 1898, by his will left his property to his trustees upon trusts for conversion, with power of postponement, and as to £800 a year to apply this sum, or such part as the trustees should think fit, for the maintenance and support or otherwise for the benefit of his daughter A.S., the unpaid portion to fall into residue, and as to £500 a year to pay the same to his daughter E.C. during her life, and as to all the residue and ultimate surplus upon trust for his son V.S. and his daughter L.S. in equal shares absolutely. Under the will of L.S., who died in 1903, her trustees were given a discretionary power to pay such sums as they might think fit in and towards the maintenance and support of her sister A.S., the residue of the income to be paid to the appellant C. M. G. Cock, and the corpus to go in equal shares to his children on his death. The question arose whether, in the administration of the trusts of the will of L.S., half the burden of the payments made in satisfaction of those annuities should be borne by the tenant for life under the will of L.S., or should be apportioned between the tenant for life and the persons entitled in remainder.

Held, that for the purpose of determining the income of the estate of L.S. as between the tenant for life and the persons entitled in remainder under her will it should be ascertained what sum would have been required at the death of L.S. to provide an annuity of £800 during the life of A.S., and an annuity of £500 during the life of E.C., that one-half of the interest at 4½ per cent. upon the sums so ascertained should be deducted in every year from the income of the estate of L.S. during the respective lives of A.S. and E.C., and that, subject to such deduction, the actual net income of the estate of L.S. was payable to the tenant for life under the will of L.S.

Decision of the High Court on this point, *Cock* v. *Smith*, 9 C.L.R., 773, followed, notwithstanding the decision of the Privy Council, *Smith* v. *Cock*, (1911) A.C., 317; 12 C.L.R., 30, reversing the previous judgment of the High Court, as this part of the judgment had not been in fact appealed from.

A testatrix directed her trustees to convert her property into money, and to stand possessed of the residuary trust moneys, upon trust after payment thereout of certain sums for the upkeep of C., to pay the residue of the income to one of the appellants. By a codicil the testatrix recited that she had given her estate to her trustees upon trust, after payment for the upkeep of C., to pay the residue of the income of the trust premises to the above-named appellant. *Held*, that it appeared from the codicil that the testatrix intended that the payment for the upkeep of C. should come out of income.

Decision of *Madden* C.J., 17th October 1911, reversed in part and affirmed in part.

APPEAL from the Supreme Court of Victoria.

The appellant C. M. G. Cock was the nephew of Lucy Smith, and under her will was entitled to the income for his life of her residuary estate. The appellant Howden was the assignee and

trustee of the estate of the first-named appellant under a deed of assignment dated 20th February 1909. An originating summons was brought to determine certain questions arising under the will of Lucy Smith. The facts and the material portions of the will are sufficiently stated in the judgment of the Court and in the report of *Cock* v. *Smith* (1) and *Smith* v. *Cock* (2). The following were the questions asked by the summons:—

1. Whether having regard to the will of Lucy Smith, and to the order of the High Court: *Cock* v. *Smith* (1), and to the will of John Matthew Smith, and to the facts appearing in the plaintiffs' affidavit, for the purpose of further determining the income of the estate of the said Lucy Smith as between the plaintiff C. M. G. Cock and his children it should be ascertained what sum would have been required at the death of the said Lucy Smith to purchase an annuity of £500 during the lifetime of Emily Cock, and one-half of the interest upon the sum so ascertained, calculated at the rate of five per centum simple interest from the death of the said Lucy Smith, should be deemed to be deducted every year from the income of her estate, and subject to such deduction, one-half of the actual net income of the unconverted or undistributed estate of the said J. M. Smith should be deemed to be income of the estate of the said Lucy Smith, as provided by the said order of the High Court, as if no payment in respect of the said annuity of £500 had actually been made out of the income of the estate of the said J. M. Smith and should be deemed to be payable to the said C. M. G. Cock subject to all prior charges upon the same.

2. Whether having regard to the provisions of the will of the said Lucy Smith the trustees thereof are right in paying for—

(*a*) Upkeep of "Castlefield" rates taxes insurance and other outgoings

(*b*) Maintenance of Alice Smith, and

(*c*) The annual sum to William Aitken,

wholly out of income, or whether the trustees should not pay the same either wholly or in part out of capital.

3. All necessary and proper accounts, inquiries and directions.

The object of the first question was to obtain the authority of

(1) 9 C.L.R., 773.

(2) (1911) A.C., 317; 12 C.L.R., 30.

H. C. OF A. 1911.

COCK v. AITKEN.

the Court to apply the principle adopted in *Cock* v. *Smith* (1), as to apportionment of the annuity of £800 also of the annuity of £500.

After the issue of the originating summons the declaration of the High Court in *Cock* v. *Smith* (1) as to the apportionment of the £800, was set aside by the Privy Council (2), although such declaration was not in fact appealed against. The plaintiffs thereupon applied for and obtained leave to amend the summons by adding the following question :—

(1*a*) Whether having regard to the aforesaid wills and order and affidavit, it should be ascertained what sum would have been required at the death of the said Lucy Smith to provide an annuity of £800 during the lifetime of Alice Smith, and one-half of the interest upon the sum so ascertained calculated at the rate of five per centum simple interest from the death of the said Lucy Smith should be deemed to be deducted every year from the income of her estate, and subject to such deduction one-half of the actual net income of the unconverted or undistributed estate of the said J. M. Smith deceased should be deemed to be income of the estate of the said Lucy Smith, as provided by the said order of the High Court as if no payment in respect of the said annuity of £800 had actually been made out of the income of the estate of J. M. Smith and should be deemed to be payable to the said C. M. G. Cock subject to all prior charges upon the same.

The summons came on for hearing before *Madden* C.J., who answered the questions as follows :—

(1) No. (1*a*) No. (2) The payments should be made wholly out of the income of the residuary estate of the testatrix.

From this decision the plaintiffs now appealed to the High Court.

Mitchell K.C., and *Harry M. Stephen*, for the appellants. The plaintiffs are entitled to the income for life of the residuary estate of Lucy Smith. Lucy Smith, under the will of her father J. M. Smith, became entitled to one-half of his residuary estate. This estate was charged with the payment of two annuities of £800 and £500 respectively, and Lucy Smith took a half share in this

(1) 9 C.L.R., 773. (2) (1911) A.C., 317 ; 12 C.L.R., 30.

estate subject to this charge. The first question is upon whom the burden of paying these annuities should fall. This should be apportioned between the tenant for life and the persons entitled in remainder in accordance with the adjustment already ordered by this Court in *Cock* v. *Smith* (1). The reasoning of the majority of this Court is not impugned by the decision of the Privy Council: *Smith* v. *Cock* (2), though the order of this Court was in fact set aside. The order of the High Court was in two parts, and this part of the order was not in fact appealed against. This Court, therefore, notwithstanding the formal reversal of its former order, should follow its previous decision on this point. [They referred to *Allhusen* v. *Whittell* (3); *In re Perkins*; *Brown* v. *Perkins* (4); *In re Thompson*; *Thompson* v. *Watkins* (5); *In re Poyser*; *Landon* v. *Poyser* (6).] If the Court is satisfied that an apportionment should be made, the method of apportionment is in the discretion of the Court.

The second point is whether upon the construction of Lucy Smith's will the upkeep of Castlefield, and the sum paid for the maintenance of Alice Smith, and the payment to William Aitken are payable out of income only, or out of capital and income at the discretion of the trustees. The words "payment thereout" in the will mean payment out of capital and income.

Richardson, for the respondent trustees.

Dixon, for the respondent remaindermen. The annuities are primarily a charge on the income, with recourse to the capital only if the income is insufficient. That is the general rule where the will contains no direction as to the fund out of which they are payable. An annuity charged on the general estate is payable out of income. Where there is a gift of an annuity and a gift of residue the annuity is payable out of the income of the residue. A charge of the annuity on the corpus only means that it shall be so payable if the income is insufficient. If the trustees have a discretion in this case they have exercised their discretion, and paid it out of the income. [He referred to *In re Grant*; *Walker*

(1) 9 C.L.R., 773.
(2) (1911) A.C., 317; 12 C.L.R., 30.
(3) L.R. 4 Eq., 295.
(4) (1907) 2 Ch., 596.
(5) (1908) W.N., 195.
(6) (1910) 2 Ch., 444.

H. C. OF A. 1911. COCK v. AITKEN.

v. *Martineau* (1); *Jarman on Wills*, 6th ed., p. 1135; *Haynes* v. *Haynes* (2); *Harbin* v. *Masterman* (3).] As to the construction of the will, if the words "payment thereout" are ambiguous, the codicil makes it clear that the testator intended that the sums in question should be payable out of income.

Pigott, for the respondents J. M. Vincent Smith and Alice Smith. So long as the conditions dealt with by the Court in *Cock* v. *Aitken* (4) continue to exist, there is no necessity for any further adjustment to be made. If the Court is of opinion that the burden of paying the annuities should be adjusted as between the tenant for life and remainderman, these respondents do not oppose the adoption of the scheme suggested by this Court in *Cock* v. *Smith* (5), or to the reduction of interest from 5 per cent. to 4½ per cent. The sums referred to in the second question are payable out of income.

Mitchell K.C. in reply.

Cur. adv. vult.

GRIFFITH C.J. This case presents some features which, so far as I know, are unique in the history of the jurisprudence of the dominions in relation to the Privy Council. The appellant Cock is entitled to the income for his life of the residuary estate of Lucy Smith, who was herself entitled to half the residuary estate of John Matthew Smith. The appellant Howden is his assignee. Some difficulties having arisen with respect to the rights of the parties, the appellants brought an action in the Supreme Court of Victoria, in which they asked for relief under two heads. They complained that the trustees of the will of John Matthew Smith had been guilty in the administration of his estate of acts which enured to the detriment of the plaintiffs as beneficiaries under the will of Lucy Smith. They also asked for a declaration of the rights of the plaintiff Cock as tenant for life under the will of Lucy Smith as between himself and the

(1) 52 L.J. Ch., 552.
(2) 3 D.M. & G., 590.
(3) (1896) 1 Ch., 351.
(4) 6 C.L.R., 290.
(5) 9 C.L.R., 773.

parties entitled in remainder with respect to certain charges imposed upon the estate which came to her under J. M. Smith's will. These two causes of complaint are entirely independent. The High Court gave judgment in that case and came to the conclusion, by statutory majority, that the trustees of the will of John Matthew Smith had been guilty of conduct which entitled the plaintiffs to relief. That entirely depended upon the conclusion to be drawn from the evidence. The Court also declared the rights of the plaintiffs under the will of Lucy Smith, a matter with which the trustees of the will of John Matthew Smith had nothing whatever to do: *Cock* v. *Smith* (1). The trustees of the will of John Matthew Smith thereupon obtained leave to appeal to the King in Council. I have before me the Order in Council giving leave to appeal, which recites at length, as is the practice, the petition for leave. The appellants, naturally, confined their complaint to the matters as to which they were aggrieved, and said nothing whatever about the other part of the case with which they had nothing to do. But formally they asked for leave to appeal against the order of the High Court, although they complained of only part of it. In the appellants' case presented to the Judicial Committee, they expressly disclaimed any intention to attack the order of this Court so far as it related to the other branch of the case. The case came before the Judicial Committee, who differed from this Court on the conclusion of fact, and therefore absolved the trustees of John M. Smith's will from the charges brought against them. The Committee in giving judgment said (*Smith* v. *Cock* (2)):—"The Order of the Court below is in two parts, the first relating to the method by which income and corpus should be distinguished in the accounts kept by Lucy Smith's trustees for the purpose of regulating the rights of Mr. Cock and his children *inter se*; the second relating to the method of discharging the trusts of J. M. Smith's will. It was suggested at the end of the argument before their Lordships that, in the event of the appeal being allowed, it would be necessary only to discharge the second part of the order. But the two parts in reality form only one order, and, therefore, the whole of it must be discharged, and the judgment of the Judge of first

(1) 9 C.L.R., 773.

(2) (1911) A.C., 317, at p. 327.

H. C. OF A. 1911.

COCK v. AITKEN.

Griffith C.J.

instance must be restored." They accordingly dismissed the suit. I do not know of any other instance in which a judgment not appealed from, and not impeached, has been reversed by the Privy Council, nor do I know of any other instance in which a judgment has been reversed on the appeal of a person who had no interest in the matter. There, however, stands the Order in Council, and the result is that the order of this Court declaring the rights of the plaintiffs as between themselves and the remaindermen under the will of Lucy Smith is no longer an order of a Court of justice. It seems to me that the result must be very much like that in the case in which a judgment of Lord *Cottenham* was reversed by the House of Lords because after its delivery it was discovered that he was a shareholder (as a trustee) in a joint stock company which was a party to the proceedings: *Dimes* v. *Grand Junction Canal Co.* (1). I do not know what was done afterwards, but I have no doubt that the same order was made by some other Judge, and that relief was given on the same principle. It is under these circumstances, then, that we have to deal with the present case.

The plaintiffs have already had their rights declared by this Court, and no one has objected to the declaration. But as the order no longer stands, they very naturally commenced fresh proceedings in the Supreme Court of Victoria asking for a declaration of their rights. The proceedings were taken by way of an originating summons in which three questions were submitted. One was whether, having regard to the order of the High Court, a similar declaration should be made to that which this Court had made. The second question was as to an identical point arising under another disposition in the same will, and the third was a new question with which I will deal later. It might have been anticipated under these circumstances that the Supreme Court of Victoria would have been contented to say, "Here is the judgment of the High Court. No one has objected to it. Let it stand." The learned Chief Justice, however, contented himself with answering the first question "No." That is to say, that the judgment given by the High Court should not be followed. His Honor did not say what should be done. He gave

(1) 3 H.L.C., 759.

reasons for his conclusion which I confess my inability to understand, and counsel on either side have not attempted to elucidate them.

I will state very briefly the nature of the case made by the appellants. I have said that the plaintiffs are entitled to the income for life of the residuary estate of Lucy Smith, which consists in part of a half share in the residuary estate of J. M. Smith. His residuary estate was charged with two annuities, one of £800 and one of £500. There is no doubt that the whole estate, corpus and income, was charged with those annuities, and that Lucy Smith's share came to her subject to the charge. Then the question arises whether half of the burden of these annuities, totalling £1,300 a year, is to be borne by the tenant for life under Lucy Smith's will, or is to be shared between the tenant for life and those entitled in remainder. In the case of *Cock* v. *Smith* (1), decided in this Court, I pointed out that the relief asked for fell within a familiar branch of the jurisdiction of Courts of Equity, and authorities were referred to in which such relief had been given, in particular, the case of *In re Perkins*; *Brown* v. *Perkins* (2), in which the facts were substantially identical with those in this case, except that in that case the annuities had been created by a covenant of the testator himself, whereas in this case the charge was not created by Lucy Smith, but was a charge upon property which only came to her subject to the charge. My learned brother *O'Connor* and I were unable to see any distinction in principle between the two cases. We were not then aware that shortly before that appeal was heard *Joyce* J. had given a decision under circumstances precisely similar to those of the present case and precisely to the same effect: *In re Thompson*; *Thompson* v. *Watkins* (3).

There is one point in the judgment of the learned Chief Justice of Victoria to which I must refer. He thought that the matter was covered by a previous judgment of this Court in the case of *Cock* v. *Aitken* (4). The only question determined in that case was as to the destination of one of the annuities. The question to be determined in this case is by whom the burden of

(1) 9 C.L.R., 773.
(2) (1907) 2 Ch., 596.
(3) (1908) W.N., 195.
(4) 6 C.L.R., 290.

H. C. OF A. 1911.

COCK v. AITKEN.

Griffith C.J.

the annuities is to be borne. The position is so clear as not to need more than the statement. There is no connection between the question of the destination of a sum of money and the question of who is to pay it.

Following our own decision, and upon the clear current of authorities of recent years, I think that in such a case an apportionment ought to be made as between tenant for life and remaindermen. The only question remaining is how it should be made? It has been suggested at the bar that the order which this Court made in the case of *Cock* v. *Smith* (1), should be slightly varied, and no one offers any objection to the variation. The order made was, in effect, that, in order to work out the respective rights of the tenant for life and the remaindermen, it should be ascertained what sum of money—that case had only relation to the annuity of £800—would have been required at the death of Lucy Smith to provide an annuity of £800 for the life of Alice Smith, and that the interest on that sum should be borne by the plaintiffs. The word "purchase" was inadvertently used in the judgment. The rate of interest which the Court mentioned was 5 per cent. It is now suggested and agreed that 4½ per cent. would be a fairer rate. With that variation I think we should simply do what we did before, and make a declaration which will settle the rights of the parties to this suit, and that we should substitute for the answer of the learned Chief Justice as to Questions 1 and 1*a* the following declaration:—

"Declare that for the purpose of determining the income of Lucy Smith's estate as between the plaintiff Cock and the persons entitled in remainder under her will it should be ascertained what sum would have been required at the death of Lucy Smith to provide an annuity of £800 during the life of Alice Smith and an annuity of £500 during the life of Emily Cock, that one half of the interest at 4½ per cent. upon the sums so ascertained should be deducted in every year from the income of the estate of Lucy Smith during the respective lives of Alice Smith and Emily Cock, and that subject to such deduction the actual net income of the estate of Lucy Smith is payable to the plaintiff Cock or his assignees."

(1) 9 C.L.R., 773.

The third question raised by the summons related to the construction of the will of Lucy Smith. Lucy Smith, by her will directed her trustees to convert all her property into money, and, in the meantime, until sale, to allow her sister, Alice Smith, to live in her house called "Castlefield," and directed her trustees to stand possessed of the residuary trust moneys (after payment of certain legacies) upon trust, after payment "thereout" of such sum as they should think fit from time to time, towards the upkeep of "Castlefield," and towards the maintenance and support of her sister, and the payment to one William Aitken of the annual sum of £250, to pay the residue of the income to the plaintiff Cock. Upon those words it is not quite clear whether the intention was that these sums to be applied for the upkeep of "Castlefield," the maintenance of her sister, and the £250 to Aitken were to come from income or were charged on corpus. There were other provisions in the will which made the point still more doubtful; but by a codicil she recited that she had given her estate to her trustees upon trust after payment of such sums as her trustees should think fit for the upkeep of "Castlefield" and the maintenance of her sister and the payment of the annual sum of £250 to Aitken, to pay the residue of the income of the trust premises to Cock during his life. In my opinion it clearly appears from the codicil what she intended the will to mean, and thought that it meant, and that she intended all those payments to come out of income. That was the opinion of the learned Chief Justice.

The order appealed from should, therefore, in my opinion, be varied in the manner I have stated.

With regard to the form of the declaration I may add that various forms have been suggested at different times in England as to the best way of adjusting rights as between tenant for life and remainderman. *Swinfen Eady* J., in the case of *In re Dawson*; *Dawson* v. *Arathoon* (1), gave reasons for making an order which was substantially in the same form as that which I have read. In the later case of *In re Perkins*; *Brown* v. *Perkins* (2) the same learned Judge made an order in a different form. But, as I pointed out in *Cock* v. *Smith* (3), the

(1) (1906) 2 Ch., 211. (2) (1907) 2 Ch., 596. (3) 9 C.L.R., 773.

H. C. OF A. 1911.

COCK v. AITKEN.

Griffith C.J.

order in the later form would have the effect of reducing the income of the tenant for life progressively from year to year, until at the end of 20 years, if the annuitants lived so long, the tenant for life would (at 5 % interest) bear half the annuity. In the still later case of *In re Poyser*; *Landon* v. *Poyser* (1), *Parker* J. pointed out that the method of carrying out the apportionment is in the discretion of the Court. The foundation of the jurisdiction is, I take it, in part at least, the duty of the Court to give effect to the intention of the testator. I think it extremely unlikely that in this case the testatrix meant that the income of the tenant for life should be progressively diminished year by year. The form of order which we adopted was substantially the same as one adopted by *Chitty* J., a Judge of great experience in such matters, in *In re Muffett*; *Jones* v. *Mason* (2). All parties in this case have expressed their willingness to take the order in that form if the Court thinks that an apportionment should be made. The orders appealed from must also be varied by discharging the order as to costs, and substituting an order that the costs of all parties be paid out of the corpus of the estate of Lucy Smith, the costs of her trustees and of the infants being taxed as between solicitor and client. A similar order will be made as to the costs of the appeal.

BARTON J. and O'CONNOR J. concurrred.

Order accordingly.

Solicitor, for appellants, *J. W. Dixon.*

Solicitors, for respondents W. Aitken and A. J. Noall, *Madden & Butler.*

Solicitor, for infant respondents, *J. E. Dixon.*

Solicitors, for respondents J. M. V. Smith and A. Smith, *J. M. Smith & Emmerton.*

C. E. W.

(1) (1910) 2 Ch., 444.

(2) 39 Ch.. D., 534.