[HIGH COURT OF AUSTRALIA.]

ALTSON . . . . . APPELLANT;
DEFENDANT,

AND

THE EQUITY TRUSTEES, EXECUTORS AND AGENCY CO. LIMITED AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 29, 30.

Griffith C.J., Barton and Isaacs JJ.

Will—Interpretation—Life estate—Gift over in event of life tenant leaving no children—Intestacy—Power of sale.

A testator by his will gave the whole of his real and personal estate to trustees upon trust to sell his sheep and all his other personal estate and effects and to invest the moneys to arise therefrom upon real securities. He directed the trustees to finish the erection of a shop on certain land in Melbourne. He directed that the trustees "do and shall stand possessed of the said trust moneys securities rents and all other the premises in trust for my daughter E.B. . . . until she shall attain the age of 21 years or marry under that age with the consent of her guardian." He directed the trustees during E.B.'s minority "to pay and apply all or any part of the interest and annual produce of the expectant portion of my said daughter" towards her maintenance and education. The will then went on—"Provided always and I hereby declare that if my said daughter shall marry and have any child or children and shall die leaving such child or children her surviving that they my said trustees or trustee for the time being do and shall stand possessed of my said real and personal estate and effects" upon trust to divide the proceeds among such of her children as being sons should attain the age of 21 years or being daughters marry under that age, "and in case there shall be no child or issue of my said daughter who under the trusts hereinbefore contained shall

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become entitled to the said trust moneys and securities then and in such case my said trustees or trustee shall stand possessed thereof" in trust for the testator's brothers and sister. E.B. died never having had any children.

Held, that, in the events which had happened, the testator's brothers and sister or their legal personal representatives were entitled to the testator's real estate, and that there was a power of sale of the real estate given to the trustees which had arisen.

Decision of the Supreme Court (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An originating summons was taken out by the Equity Trustees, Executors and Agency Co. Ltd., as trustees of the will of Alexander Brunton, deceased, and as executor and trustee of the will and codicil of Elizabeth Davies, deceased, for the purpose of obtaining the determination of the Supreme Court of the following questions:—

1. In the events which have happened and according to the true construction of the will of the said Alexander Brunton, deceased, what person or persons are now entitled and if more than one in what shares and interest in the real estate of the testator from and after the death of the said Elizabeth Davies?

2. Under the terms and provisions of the said will was there, in the events which have happened, any power of sale given to the trustees of the said will, and if so has such power of sale now arisen?

The material portions of the will of Alexander Brunton, which was dated 14th July 1840, are set out in the judgment of *Griffith* C.J. hereunder.

Elizabeth Davies, the only daughter of the testator, and referred to in his will as Elizabeth Brunton, died on 23rd October 1911, having been twice married but never having had any children.

By her will she devised the residue of her real and personal property to Barnett Hyman Altson, who was one of the defendants to the action, the other being J. W. Stranger the Curator of Intestate Estates, who had been appointed by an order made by *Hood* J., to represent the estates of the brothers and sister of the testator who were all deceased.

The originating summons was heard by *Hood* J., who answered the questions by saying that in the events that had happened

the brothers and sister of the testator or their legal personal representatives were entitled to the real estate of the testator and that there was a power of sale given to the trustees which had now arisen.

From this decision B. H. Altson now appealed to the High Court.

Weigall K.C. and *Latham*, for the appellant. In the events that have happened the gift over to the testator's brothers and sisters does not take effect. By the will the testator's daughter was given an estate in fee defeasible only in the event of her having children. It is only in that event that the trust to sell the real estate arises. Even if there was not a gift in fee of the real estate to the testator's daughter there was a gift to her of a life estate in it and there was an intestacy as to the fee which the daughter would take as next of kin. [Counsel referred to *Abbott* v. *Middleton* (1); *In re Hedley's Trust* (2); *Hancock* v. *Watson* (3).]

Hayes, for the respondent Company.

Mitchell K.C. (with him, *Pigott*), for the respondent Stranger. The testator has used different expressions to mean the same thing, namely, his real and personal estate, and he intended to make provision for two events, the event of his daughter leaving children and the event of her not leaving children, and he intended the gift over to his brothers and sisters to take effect in the latter event, which has happened.

He referred to *In re Gent and Eason's Contract* (4); *Jarman on Wills*, 6th ed., vol. II., p. 2164.

Weigall K.C., in reply.

GRIFFITH C.J. This is a very inaccurately drawn will, made in 1840, apparently in Melbourne, when I suppose legal advisers were few if there were any. The testator tried to express his

(1) 7 H.L.C., 68, at p. 114.
(2) 25 W.R., 529.
(3) (1902) A.C., 14, at p. 22.
(4) (1905) 1 Ch., 386.

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intentions, and it is the duty of the Court to read the will and discover those intentions. First of all he gave the whole of his property to trustees upon trust to sell some sheep and all his other personal estate and effects and to invest the moneys to arise therefrom upon real securities. Then he directed the trustees to finish the erection of a shop upon land which is the subject matter of the present litigation. Then he directed that the trustees "do and shall stand possessed of the said trust moneys securities rents and all other the premises in trust for my daughter Elizabeth Brunton . . . until she shall attain the age of twenty-one years or marry under that age with the consent of her guardian." There he uses the words "shall stand possessed of" in connection with the words "the said trust moneys securities rents and all other the premises." That phrase, "stand possessed of," is twice repeated in the will. He next directed the trustees during his daughter's minority "to pay and apply all or any part of the interest and annual produce of the expectant portion of my said daughter" towards her maintenance and education. That is conceded on both sides to indicate that the daughter was to have something more than an interest in the rents during minority, whether it be a life estate or an estate in fee. She was the testator's only daughter. Then he wished to provide for two cases, the case of her leaving children and the case of her not leaving children. The will went on, "Provided always and I hereby declare that if my said daughter shall marry and have any child or children and shall die leaving such child or children her surviving that they my said trustees or trustee for the time being do and shall stand possessed of my said real and personal estate and effects" upon trust to divide the proceeds among such of her children as being sons should attain the age of 21 or being daughters marry under that age. That is the second time the testator uses the expression "stand possessed of," but here he uses it with the words "my said real and personal estate and effects" instead of the words "the said trust moneys securities rents and all other the premises." Those two phrases were obviously intended to mean the same thing. Having given that direction the will proceeded "and in case there shall be no child or issue of my said daughter who under the trusts here-

inbefore contained shall become entitled to the said trust moneys and securities then and in such case my said trustees or trustee shall stand possessed thereof" in trust for his brothers and sister. For the third time he uses the expression "shall stand possessed," and this time with the word "thereof."

The daughter had no children, and on her death she left all her property to the appellant. She was heiress at law of the testator, so that, unless the gift over to the brothers and sister of the testator takes effect, whether the daughter took as heiress or as devisee, the appellant is entitled to the property.

There may possibly be a question as to who would have become entitled if the daughter had had issue who attained 21 and died in her lifetime, but she had none.

I think it is clear, on the general construction of the will, that the testator intended to give his daughter a life estate at least in the property, and to provide for two contingencies, that of her leaving children surviving her who attained 21, and that of her leaving no children who attained 21, and that he made two independent alternative provisions for those two cases. The second case happened. I think further that as a matter of grammatical construction the words "shall stand possessed of" used in the three passages should be read in each instance in the same sense, and that the subject matter of them is the same in each instance. In the first contingency the trustees were to "stand possessed of my said real and personal estate and effects" and in the second to "stand possessed thereof." It does not matter much whether "thereof" refers to "all my real and personal estate and effects" or to "the said trust moneys securities rents and all other the premises," for, although the words are different they refer to the same subject-matter.

As to the power of sale, if there is a direction to distribute, there is of course a power of sale implied, in order to provide money for the purpose of distribution.

The appeal therefore fails.

BARTON J. There is no reason why the presumption against intestacy should be departed from. It was evidently the inten-

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tion of the testator to dispose of the whole of his property by this will.

The will, if read literally, would be a mere muddle. But some things are clear. One is that the daughter was intended to have some estate more than the mere receipt of income until she was 21. The use of the words "expectant portion" and the provision for what should happen after her death go to show that she was meant to have a life estate at least. On the whole I think it was to be no more than a life estate, because of the proviso that, in the event of the daughter marrying and leaving children who attained 21, the trustees should "stand possessed of my said real and personal estate and effects," &c. That seems to imply that while the property was to be subject to other dispositions after his daughter's death, yet in the meantime she was to have the enjoyment of it. Taking it to be a life estate, the testator goes on to provide for two contingencies, for one of them by a gift to the daughter's children if they fulfil certain conditions, and for another if there are no children who fulfil the conditions, by a gift to his brothers and sister. There were no children at all, and I think that it was the testator's intention that in that case the brothers and sister should take the whole estate. By the words "my said real and personal estate and effects" he meant to include the whole of his property, and in that view the words "shall stand possessed thereof" present no difficulty. But I am also inclined to the view that the words following the direction that the trustees "shall stand possessed" refer in each of the three cases to the same thing. I have come to the conclusion that *Hood* J. came to the correct decision as to the first question. The power of sale appears to be clearly implied in the direction to distribute, and therefore I think His Honor answered the second question rightly as well as the first. That being so, the appeal should be dismissed.

ISAACS J. I do not see any escape from the conclusion at which my brothers have arrived. The matter depends upon what is meant by "the expectant portion," and in order to ascertain what those words mean you have to read on further and endeavour to discover what the testator intended should be done

with his property after his daughter's death. He appears to have provided for the destination of his property after her death according to two possible events—one, if she should leave children surviving her; the other, if she should not. The first case is clear, because he says that in that event the trustees shall stand possessed of all his real and personal estate and effects; in the other he says that they "shall stand possessed thereof." I agree with what the Chief Justice has said, that the word "thereof" refers to the same things as are referred to in the first alternative case. The result then necessarily is that the decision of *Hood* J. was right and that the appeal should be dismissed.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors, for the appellant, *P. D. Phillips, Fox & Overend.*

Solicitors, for the respondents, *Farmer & Turner*; *Malleson, Stewart, Stawell & Nankivell.*

B. L.