

[HIGH COURT OF AUSTRALIA.]

THE MELBOURNE HOSPITAL . . . APPELLANT;

AND

THE PERPETUAL EXECUTORS AND	}	RESPONDENTS.
TRUSTEES ASSOCIATION OF AUS-		
TRALIA LIMITED AND OTHERS .		

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Will—Codicil—Construction—Provision for accumulation—Revocation of provision for distribution of accumulations—Effect. H. C. OF A.
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By his will a testator, after directing the payment out of the income of his estate of certain annuities, directed his executors for the period of ten years after his death to invest the balance of the income "and all accumulations during the said term of ten years in and on freehold estate." He then gave "the accumulations during the said ten years together with the whole of" his residuary estate to certain persons. By a codicil he said:—"I herewith revoke and cancel all provision made" in the will "for the distribution of all monies accumulated after and during the ten years named therein and in lieu thereof direct my executors to remit to the Corporation of the Borough of Walsall Staffordshire England the sum of £10,000," for a certain purpose. The codicil then proceeded:—"I direct my executors to give to" various persons named several legacies of £2,000 each. He then gave the residue of his estate absolutely to certain charitable institutions.

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Griffith C.J.,
Gavan Duffy
and Rich JJ.

Held, that the revocation of "all provision" made in the will "for the distribution of all monies accumulated after and during the ten years" involved a revocation by implication of all the provisions regarding the moneys which would be accumulated, including those as to their investment, and that the direction in the codicil for payment of the legacies to the Borough of Walsall and the other legatees, which *prima facie* imported present payment, was not cut down by the original direction as to accumulation.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

An originating summons was taken out by the Perpetual Executors and Trustees Association of Australia Ltd., as executors

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of the will and codicil of James Mason, deceased, for the purpose of obtaining the determination of the Supreme Court of Victoria of several questions arising out of that will and codicil, including the following:—"At what date are payable the sum of £10,000 directed by the codicil to be remitted to the Corporation of Walsall and the several sums of £2,000 directed by the codicil to be given to the several persons therein named?"

The material provisions of the will and codicil are stated in the judgment of *Griffith* C.J. hereunder.

The Full Court answered the above question by saying that the several sums were payable only at the expiration of ten years after the date of the death of the testator.

An appeal to the High Court having been brought by certain of the parties to the originating summons in respect of the answers to others of the questions, notice of cross-appeal was given by Dorothy Nell, acting on behalf of herself and the other parties interested in the gifts referred to in the above question. The matter in respect of which the main appeal was brought was settled before the appeal came on for hearing, and the only question for argument was the cross-appeal.

Mitchell K.C. (with him *Miller*), for the appellant the Melbourne Hospital as representing various charities interested.

Hayes, for the respondent Dorothy Nell.

Pigott, for the respondent the Talbot Colony for Epileptics.

Weigall K.C. (with him *Lewers*), for the respondent executors.

Cur. adv. vult.

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The judgment of the COURT, which was read by GRIFFITH C.J., was as follows:—

The testator, a wealthy but not highly educated man, by his will "written and composed," to use his own words, by himself, and dated 3rd May 1909, after the appointment of executors and trustees and a bequest to his wife, gave her an annuity of £300 and the occupation of his house. He then gave "out of the income" of his estate sums amounting in the

aggregate to £2,400 annually to certain charitable institutions. The income of the estate, which was very large, was much more than sufficient to meet these payments. He directed his executors after paying over the said amounts for the term of ten years from his death to invest the balance of the income "and all accumulations during the said term of ten years in and on freehold estate." He then gave "the accumulations during the said ten years together with the whole of" his residuary estate to the children of two nieces of his first wife.

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By a codicil, dated 20th November 1912, he said:—"I herewith revoke and cancel all provision made" in the will "for the distribution of all monies accumulated after and during the ten years named therein and in lieu thereof direct my executors to remit to the Corporation of the Borough of Walsall Staffordshire England the sum of £10,000 with which to erect a James Mason Ward at the site or adjoining the present Hospital and for the support and upkeep of the same in all and any necessary expense to carry out the object of such an Institution as the Walsall Hospital." The codicil proceeded:—"I direct my executors to give to" various persons named several legacies of £2,000 each. He then gave the residue of his estate absolutely to certain charitable institutions.

The will and codicil must be construed together as a single disposition.

The Corporation of Walsall and the other legatees named in the codicil claim that the bequests given by it are presently payable. Mr. *Mitchell's* clients contend that the payment is suspended for ten years, and the Supreme Court have so held, *Cussen J.* doubting.

The words "I direct my executors to remit," and "I direct my executors to give," *primâ facie* import present payment, but it is contended that their effect is controlled by the words of the will, which, it is said, direct an accumulation of the surplus income for ten years before any distribution of it. The will does not expressly direct accumulation, but merely provides for the investment during the period of ten years of the surplus income of the estate as to the disposition of which during the period it makes no provision. In our opinion this provision cannot be

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construed as an independent direction to accumulate irrespective of the gift to the legatees whom the testator then intended to take the accumulated surplus after the ten years had elapsed, but must be treated as ancillary to that gift. When he revoked that gift the purpose and object of the provision came to an end. We think, therefore, that the revocation of "all provision" made in the will "for the distribution of all monies accumulated after and during the ten years," which undoubtedly operated as a revocation of the gift of the accumulated surplus, involves a revocation by implication of all the provisions regarding the moneys which would be accumulated, including those as to their investment. No independent reason can be suggested for accumulating. The nature of the gift to the Corporation certainly does not suggest a postponement.

It follows that the words of the will relied upon are not sufficient to cut down the *primâ facie* meaning of the words of the codicil importing a direction for present payment.

We think, therefore, that the legacies to Mr. *Hayes's* clients are payable immediately, and the question should be answered accordingly.

Order appealed from varied by declaring that the £10,000 directed by the codicil to be remitted to the Corporation of Walsall and the several sums of £2,000 given by the codicil to the several persons therein mentioned are payable immediately. Costs of all parties of the application of the respondent Dorothy Nell by way of cross-appeal, including her costs of the appeal, as between solicitor and client, to be paid out of the estate. Order that the deposit of £50 be returned to the appellant.

Solicitor, for the appellant, *H. C. Godfrey.*

Solicitors, for the respondents, *Gair & Brahe; J. M. Smith & Emmerton; H. T. W. Stillman.*

B. L.