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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1921-1922.

HIGH COURT OF AUSTRALIA.]

DEAN AND ANOTHER . . . . . APPELLANTS;
PLAINTIFF AND DEFENDANT,

AND

COLE AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1921.

SYDNEY, *Nov.* 7, 8, 17.

Knox C.J., Higgins, Gavan Duffy, Rich and Starke JJ.

Will—Interpretation—Absolute gift or trust.

By his will a testator appointed his wife executrix and another person executor, and directed that his debts, funeral and testamentary expenses should be paid as soon as conveniently might be after his death. The will then continued:—"I give devise and bequeath unto my wife . . . all my real and personal estate, but subject to the following conditions:—First, that out of my estate the sum of one thousand pounds and the further sum of three hundred pounds with any bonus additions (being the value of a policy of assurance on my life . . .) shall be forthwith invested in the name of my executrix and executor for the maintenance and support of my son A.D., . . . provided that if it shall please God so to order that at any time he the said A.D. shall be . . . capable of managing his own affairs, then the above-named sums of money with all and every residue of interest shall be paid to the said A.D. on his arriving at the age of twenty-one years or subsequently, provided further that should the said A.D. die incapable of managing

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his own affairs, then these aforenamed sums of money with any accrued interest thereon shall be at the absolute disposal of my wife . . . Second, with the exception of these two sums of money just before named, I give all and every portion of my real and personal estate to my wife . . . trusting to her that she will at some time during her lifetime or at her death divide in fair just and equal shares between my children J.D., S.D., E.A.D. and C.F.D., or such of them as may survive, all such part and portion of my estate as she may be in the use and enjoyment of, but with this stipulation in the case of each and every of my daughters (1) that they shall not marry without the consent of my executrix and executor, whom I appoint as their guardians, and (2) that when at any time they do marry care shall be taken by my executrix and executor that the portion given to each of my daughters shall be so secured upon them by deed of settlement that the portion given is for the sole use and enjoyment of each and such daughter as may marry and placing such portion out of the power use or control of each and every their respective husband. My other two surviving sons W.D. and H.D. having been already provided for by me are to have no part nor share in my estate and are by this my will excluded from all participation in the same."

Held, by *Knox* C.J., *Gavan Duffy* and *Rich* JJ. (*Higgins* and *Starke* JJ. dissenting), that the will should not be construed as imposing a trust upon the testator's wife, and therefore that the gift to her of all and every portion of the testator's real and personal estate with the exception of the two specified sums was absolute.

Decision of the Supreme Court of New South Wales (*Harvey* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

The following statement of the facts is taken from the judgment of *Knox* C.J., *Gavan Duffy* and *Rich* JJ. :—

William Dean died in the year 1894, having made his will in the following words :—" This is the last will and testament of me William Dean of Turee Creek near to Cassilis in the Colony of New South Wales, grazier. I hereby revoke all wills by me at any time heretofore made. I appoint my wife Sarah Dean executrix, and the Reverend Thomas Davenport Warner, Clerk in Holy Orders, now the incumbent of the Parish of Cassilis, executor, and I direct that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease. I give devise and bequeath unto my wife Sarah Dean all my real and personal estate, but subject to the following conditions :—First, that out of my estate the sum of one thousand pounds and the further sum of three hundred pounds with any bonus additions (being the

value of a policy of assurance on my life effected in the . . . and known as policy No. . . .) shall be forthwith invested in the name of my executrix and executor for the maintenance of and the support of my son Alexander Dean, the interest accruing upon the said sums, or so much of it as they may deem to be necessary, is to be expended by them for his education care and support provided that if it shall please God so to order that at any time he the said Alexander Dean shall be (in the opinion of the aforenamed executrix and executor) capable of managing his own affairs, then the above-named sums of money with all and every residue of interest shall be paid to the said Alexander Dean on his arriving at the age of twenty-one years or subsequently, provided further that should the said Alexander Dean die incapable of managing his own affairs, then these aforenamed sums of money with any accrued interest thereon shall be at the absolute disposal of my wife the said Sarah Dean. Second, with the exception of these two sums of money just before named, I give all and every portion of my real and personal estate to my wife the said Sarah Dean, trusting to her that she will at some time during her lifetime or at her death divide in fair just and equal shares between my children Jane Dean, Sarah Dean, Emily Ann Dean and Charles Frederick Dean, or such of them as may survive, all such part and portion of my estate as she may be in the use and enjoyment of, but with this stipulation in the case of each and every of my daughters (1) that they shall not marry without the consent of my executrix and executor, whom I appoint as their guardians, and (2) that when at any time they do marry care shall be taken by my executrix and executor that the portion given to each of my daughters shall be so secured upon them by deed of settlement that the portion given is for the sole use and enjoyment of each and such daughter as may marry and placing such portion out of the power use or control of each and every their respective husband. My other two surviving sons William Dean and Hanken Dean having been already provided for by me are to have no part nor share in my estate and are by this my will excluded from all participation in the same." Probate of this will was granted to Sarah Dean, the executrix named therein, the Rev. Thomas Davenport Warner, who was appointed executor, having renounced probate.

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The testator left him surviving four sons, viz., the plaintiff Charles Frederick Dean, Alexander Dean, William Dean and Hanken Dean, and three daughters, viz., the defendant Jane Cole, the defendant Emily Ann Swanston and Sarah Woods, who married the defendant Henry Thomas Woods and died in the year 1902. Alexander Dean died in the year 1894, after the death of the testator, an infant and incapable through mental infirmity of managing his affairs. Sarah Dean, the widow of the testator, died in the year 1920, having made her will whereby she disposed of all the real and personal estate which belonged to her or over which she had any disposing power under the will of the testator. No division of the estate of the testator was made by his widow during her lifetime between the three daughters of the testator and the plaintiff, and no settlement was made by her on the marriage of either of the daughters.

Doubts having arisen as to the true construction of the will, an originating summons was taken out by the plaintiff, Charles Frederick Dean, for the determination of the following (among other) questions, viz. :—

(1) Whether, upon the true construction of the will of the said William Dean deceased and in the events that have happened, Sarah Dean, the widow of the above-named William Dean, became absolutely entitled for her own use and benefit to the whole of the residuary real and personal estate of the said William Dean deceased remaining after payment of the debts, funeral and testamentary expenses and costs of administration and the two several sums of one thousand pounds sterling and three hundred pounds sterling and bonus additions in the said will mentioned, or to any portion thereof and if so what ?

(4) What share or interest in the said residuary real and personal estate of the said William Dean deceased was taken by the said Sarah Dean deceased ?

(5) Whether, according to the true construction of the said will and in the events which have happened, the testator's children in the said will named, namely, Jane Dean now the defendant Jane Cole, Sarah Dean afterwards the wife of the defendant Henry Thomas Woods and now deceased,

Emily Ann Dean now the defendant Emily Ann Swanston, and the plaintiff Charles Frederick Dean, or any of them and if so which, took any and if so what share or interest in the said residuary real and personal estate of the said William Dean deceased.

The summons was heard by *Harvey* J.; and on 11th March 1922 he made a decree, the relevant portion of which is as follows:— "This Court doth declare that according to the true construction of the will of the above-named William Dean deceased Sarah Dean the widow of the above-named William Dean deceased was not absolutely entitled for her own use and benefit to the residuary real and personal estate of the said William Dean deceased remaining after payment of the debts funeral and testamentary expenses and the costs of administration of his estate and the two several sums of one thousand pounds and three hundred pounds and the bonus additions in the said will mentioned And this Court doth further declare that the said Sarah Dean took an estate for life only in the said residuary real and personal estate of the said William Dean remaining after payment of the said debts funeral and testamentary expenses and costs of administration and the said sums and bonus additions And this Court doth further declare that according to the true construction of the said will and in the events which have happened the testator's children Jane Dean now the defendant Jane Cole Sarah Dean afterwards the wife of the defendant Henry Thomas Woods and now deceased Emily Ann Dean now the defendant Emily Ann Swanston and the plaintiff Charles Frederick Dean became on the death of the said William Dean deceased indefeasibly entitled subject to the estate for life of the said Sarah Dean to one fourth share each of the said residuary real and personal estate remaining as aforesaid."

Against this decision the plaintiff and the defendant Emily Ann Swanston appealed to this Court.

No note was taken of the reasons given by the learned Judge for his decision, but the grounds on which he arrived at it have been stated by him from memory as follows, viz.:—"This was an originating summons for construction of the will of William Dean who died in the year 1894. The case was decided by me about three months

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ago. I did not reserve my judgment, and no note appears to have been taken of the reasons which I gave for my decision. Under these circumstances I can only recall in a general way either the arguments addressed to the Court or the grounds of my decision. The principal point arose upon a typical case of precatory words which may amount to a trust or merely to the expression of a wish which the beneficiary might disregard. As far as my memory serves me, I thought that the particularity with which the shares of daughters are provided for and the final words definitely excluding two named sons from all share in his estate indicated that the testator did not intend to leave it to his widow to deal with his estate as she thought fit."

The appeal was first argued before *Higgins*, *Gavan Duffy* and *Rich* JJ. on 29th July and 1st and 2nd August 1921, and the first question was subsequently directed to be reargued before a fuller Bench. It now came on for argument before *Knox* C.J., *Higgins*, *Gavan Duffy*, *Rich* and *Starke* JJ.

The nature of the arguments sufficiently appears in the judgments hereunder.

Loxton K.C. (with him *R. K. Manning*), for the appellants.

Maughan K.C. (with him *Evatt*), for the respondent Jane Cole.

During argument reference was made to *Ellis* v. *Ellis* (1); *Mussoorie Bank* v. *Raynor* (2); *Curtis* v. *Rippon* (3); *Pope* v. *Pope* (4); *Webb* v. *Wools* (5); *In re Atkinson*; *Atkinson* v. *Atkinson* (6); *Groves* v. *Wright* (7); *Baker* v. *Mosley* (8); *Te Teira Te Paea* v. *Te Roera Tareha* (9); *In re Hanbury*; *Hanbury* v. *Fisher* (10); *Comiskey* v. *Bowring-Hanbury* (11); *In re Hanbury's Settled Estates* (12); *Brown* v. *Higgs* (13).

Cur. adv. vult.

(1) (1875) 31 L.T., 875.
(2) (1882) 7 App. Cas., 321, at p. 330.
(3) (1820) 5 Madd., 434.
(4) (1839) 10 Sim., 1.
(5) (1852) 2 Sim. (N.S.), 267.
(6) (1911) 103 L.T., 860, at p. 866.
(7) (1856) 2 Kay & J., 347.
(8) (1848) 12 Jur., 740.
(9) (1902) A.C., 56, at p. 72.
(10) (1904) 1 Ch., 415.
(11) (1905) A.C., 84.
(12) (1913) 2 Ch., 357.
(13) (1803) 8 Ves., 561.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND RICH JJ. [After stating the facts as above set out, their Honors continued :—] The question for decision is whether on the true construction of the will as a whole the words " trusting to her that she will at some time during her lifetime or at her death divide in fair just and equal shares between my children Jane Dean, Sarah Dean, Emily Ann Dean and Charles Frederick Dean, or such of them as may survive, all such part and portion of my estate as she may be in the use and enjoyment of," create a trust in respect of any, and if so what, portion of the property of the testator. In order to determine this it is necessary to decide what portion of the property of the testator is included in the words " all such part and portion of my estate as she may be in the use and enjoyment of."

The expression " my estate " is used by the testator in an earlier portion of the will—" First, that out of my estate the sum of one thousand pounds and the further sum of three hundred pounds . . . shall be forthwith invested " &c. In this passage it is clear that the expression is used as denoting all the real and personal property of the testator, including the sums of £1,000 and £300. The same expression is used later in the will in the direction that his sons William and Hanken " are to have no part nor share in my estate." In this context also it is clear that the expression covers the whole estate of the testator. The phrase " my real and personal estate " is used in the bequest to his wife as denoting the whole of his property, including the £1,000 and the £300, and later in the will is, in our opinion, used with the same meaning in the provision " Second, with the exception of these two sums of money just before named " (referring to the £1,000 and £300), " I give all and every portion of my real and personal estate to my wife," for it is clear that the exception of the named sum would not have been made had not the draftsman regarded the words of gift as appropriate to include them but for the exception.

Under these circumstances we think it is proper to construe the expression " my estate " in the phrase " such part and portion of my estate " as including the sums of £1,000 and £300 if in the event it fell to be enjoyed by the widow of the testator.

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On this footing the testator has in the earlier part of the will directed that, in the events which have happened, the £1,000 and £300 should be at the "absolute disposal" of his widow, while in the provision now under consideration he has expressed himself as "trusting to her" that she will divide such part and portion of his estate, including the £1,300, as she may be in the use and enjoyment of among certain named children. If the words "trusting to her to divide" are read as imposing on the widow a trust to divide, as contrasted with the expression by the testator of a wish that she may divide the property in question, they are inconsistent with the direction that the £1,300 is to be at her absolute disposal.

In our opinion the words "trusting to her" should be construed as an expression of the testator's confidence that his wife would make a just, fair and equal division of the property which he left her, and not as imposing on her a binding trust to make an *equal* division of that property between the named children.

If the will were construed as attempting to impose a trust, a new difficulty would arise because some meaning must be given to the words "all such part and portion . . . as she may be in the use and enjoyment of" which qualify the words "my estate." In our opinion their true effect is to make the precatory words apply only to such property as the widow has chosen to retain, and is actually in the use and enjoyment of at the time when she proceeds to make the division. Such a trust would not be enforceable (*Mussoorie Bank* v. *Raynor* (1)).

HIGGINS J. The only question to be reargued before the Court as now constituted is this: Did the widow of the testator take the residuary property absolutely, or did she take it as trustee?

The will was made in 1886; the testator died in 1894, leaving seven children; the widow died in 1920. The widow by her will purported to appoint and give all the property over which she had a power of appointment under the will of the testator, as well as residuary property of her own, to two of her children, Charles Frederick Dean and Emily Ann Swanston. *Harvey* J. declared in an order on originating summons that the widow was not absolutely

(1) (1882) 7 App. Cas., at p. 331.

entitled for her own use and benefit to the testator's residuary property, but that she took a life interest therein. The two children above named, as they would take more under the will of the widow than under the will of the testator, appeal from that order.

The will has been set out already in full. It will be observed that after the payment of any debts and expenses by the two executors (of whom the widow was one) the whole real and personal estate is given to the widow, "but subject to the following conditions." The conditions are numbered "First" and "Second." So far at all events, there is no indication of any intention to give any of the testator's property to the widow beneficially. It is not an uncommon practice to interpose trustees between the executors and the beneficiaries; and the widow takes the whole property "but *subject to the following conditions.*" The "first" condition so called is that two sums amounting to £1,300 odd are to be invested for the son Alexander for life (he was mentally incapable and died a few days after the testator), and then were to be at the "absolute disposal" of the widow. The "second" condition is this: "with the exception of these two sums of money just before named, I give all and every portion of my real and personal estate to my wife the said Sarah Dean, trusting to her that she will at some time during her lifetime or at her death divide in fair just and equal shares between my children Jane Dean, Sarah Dean, Emily Ann Dean and Charles Frederick Dean, or such of them as may survive, all such part and portion of my estate as she may be in the use and enjoyment of, but with this stipulation in the case of each and every of my daughters" (a stipulation as to marriage with consent, and for settlement of their shares).

The first condition is easily understood as such; for it imposes a restriction, an obligation, on the widow so long as Alexander should live. The second condition is not easily understood as a condition, if it means, as the appellants contend, that the widow took the residue absolutely, unconditionally.

In my opinion it is our duty, in the face of such express words as "but subject to the following conditions," to reject such a construction of the second condition as would involve the conclusion that the

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widow takes the property therein referred to unconditionally, absolutely, free from any restriction or obligation at all—unless the words of the will cannot otherwise possibly be reconciled. *Primâ facie*, so far, the widow's interest in that property is not absolute.

When Alexander dies, his £1,300 is to be at the "absolute disposal" of the widow. These words are perfectly clear; and they show that when the testator intended to give property absolutely, he knew appropriate words to express that intention. But on examining the second condition, it is to be noticed that neither these words nor any equivalent words are used in the gift to the widow. Moreover, in the very same sentence, one might say in the very same breath, as the testator gives to the widow the residuary property, he adds the words "trusting to her that she will . . . divide" &c. (among the four children named or the survivors).

But the appellants contend that the words "trusting to her" are mere precatory words, not intended to impose any obligation on the widow (although the testator speaks of the gift as being subject to a "condition"), and that they are equivalent to "hoping," "in full confidence," "suggesting," &c., with, perhaps, some such words added as "without in any way putting any obligation on her." I heartily approve (if I may say so) of the decisions of the Courts in recent years, refusing to declare an obligation of trust where words of this latter kind are used. The Judicial Committee expressed clearly the present attitude of the Courts in *Mussoorie Bank* v. *Raynor* (1). There the will gave to the wife "the whole of my property both real and personal . . . feeling confident that she will act justly to our children in dividing the same *when no longer required by her.*" Their Lordships treated these last words as meaning "I give to my children so much as is not required by her." Such words imply that the widow can spend as much of the property as she likes, and in such manner as she likes; and such a gift is always treated as being in effect a gift to the widow absolutely. As *Turner* V.C. said in *Cowman* v. *Harrison* (2), "the right of a donee to spend the subject matter of the gift is inconsistent with the nature of a trust." But there are no such words in this will; and there are, indeed, no words of the precatory

(1) (1882) 7 App. Cas., 321. (2) (1852) 10 Ha., 234, at p. 239.

class. The expression "trusting to her to divide" are unusual, but literally they mean no more than the ordinary "in trust to divide." They convey precisely the idea of the trusts originally enforced in English law. The Chancellor compelled the person trusted to carry out that which was his duty in conscience—as when ecclesiastics endeavoured to evade the mortmain law by putting land in the name of a trusted person, or a freeholder endeavoured to evade the obligations of his tenure or forfeiture for felony or a debtor to withdraw his property out of the reach of his creditors. But, although this is the literal meaning of the language, yet the expression seems somewhat looser and more flexible than the regular "in trust to divide"; and if there were any words elsewhere in the will to the effect that the widow was to be free to give or do what she liked with the residue, there would be strong grounds for the contention that there is no trust. But there are no such words elsewhere.

The testator had already given all his property to his wife as trustee—or, to use his own terms, "subject to conditions"—obligatory conditions; and I take the opening words of the second "condition" as merely referring to the residue after deduction of Alexander's portion. The testator does not use the word "residue," but that is the short expression for "all and every portion of my real and personal estate with the exception of" the £1,300. In my opinion, condition second relates all throughout to the residue only; and when the will proceeds to say what is to be divided—"all such part and portion of my estate as she may be in the use and enjoyment of"—he uses the words with the same meaning as "*my* real and personal *estate*," with the exception of the £1,300, just mentioned in the same sentence. But lest there should be any misapprehension as to the meaning of "my estate," he limits the thing to be divided to "all such part of my estate as she may be in the use and enjoyment of." The thing to be divided is that part of the estate which the widow can merely use and enjoy as distinguished from that part of the estate which may belong to her absolutely (Alexander's portion). The words "as she may be in the use and enjoyment of" are the only words in the will which indicate that the widow is to have any beneficial interest at all in the residue; but I

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think that they are sufficient to raise, at the least, a life estate for the widow by implication. Then, as the property is mainly farming property, including stock and implements, the testator in these words may have had regard to the fact that stock die, that implements wear out, &c., and he may mean that the property as it stands at the time of division is to be divided. There is no indication that the testator wants the land to be at the absolute disposal of the widow; and, though consumable articles such as food and stores are treated as belonging to the tenant for life absolutely, farming stock and implements are never so treated (*Groves* v. *Wright* (1)). To say that the testator meant by these words to allow the widow to sell the land, &c., and to spend any of the proceeds that she chose to spend, and to divide anything that remained over, is to substitute violent conjecture for sound interpretation.

Then follows a "stipulation" to which the directions as to division are subject—"but with this stipulation." The stipulation is that the daughters shall not marry without consent of their guardians and that their portions shall be secured by settlement. There are difficulties in applying practically the stipulation to the facts of this position; but we need not concern ourselves with these difficulties. The important point is that the will imposes a stipulation on the directions as to dividing; and the word "stipulation" implies something obligatory. It is difficult to see how there can be an obligatory stipulation as to a non-obligatory suggestion. To say the least, the use of the word "stipulation" favours the view that the directions to which it is attached are obligatory.

But the words relating to the sons William and Hanken seem to me to remove all doubt as to the obligatory character of the directions for division: "My other two surviving sons William Dean and Hanken Dean having been already provided for by me are to have no part nor share in my estate and are by this my will excluded from all participation in the same." If the widow was to have the land and chattels absolutely, as her own property, these directions that William and Hanken are to have no share in them, and that they are by the will excluded from participation, are idle and unmeaning. These words are words of will, of direction, as befitting

(1) (1856) 2 Kay & J., 347.

a will. The words used are not "have no part or share" (as in a narrative), but "*are* to have no part or share." Moreover, the testator treats, by implication, his will as having made a provision for the other five children—he had "*already provided for*" William and Hanken; but there is no provision for four of the seven except in the directions for division; and, unless the directions for division are obligatory, there is no provision for the four at all. It seems to me absurd to treat such strong words as these as being merely apologetic, as suggested by counsel in argument; though they may imply an apology too. The *will* excludes William and Hanken from all participation—"are by this my will excluded"; they "are to have no share"—a clear prohibition. The testator evidently wanted to make the exclusion doubly sure. If the widow had, nevertheless, given to William or Hanken the residue or part of it, who can doubt that the gift would be invalid? If it would be invalid, the property is not hers.

The main argument for the appellants is based on the theory that the words "my estate" in the phrase "all such part and portion of my estate as she may be in the use and enjoyment of" includes all that which had been the estate of the testator, even Alexander's portion; and that, as that portion had been given absolutely to the widow (in the events which occurred), it follows that the will means merely a wish on the part of the testator that the widow should divide among the four children whatever property left by the testator she had not spent to the time of the division. This theory assumes that the widow could sell the land and spend the proceeds as she chose. I can find nothing in the words of the will to justify such a theory or such an assumption. The words "as she may be in the use and enjoyment of" do not point to absolute property, but merely to use and enjoyment—a life or limited interest; and they do not involve the proposition that the widow may spend all the corpus of the residuary estate as she chooses. In my view, the words "my estate" in that phrase mentioned refer merely to the estate as just mentioned in the same sentence—"all and every portion of my real and personal estate" "with the exception of" the two sums which were Alexander's portion. The whole of condition "second" relates to this estate, and to this estate only; and the gift

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of this estate—the residue—to the widow is controlled by the words "trusting her," &c. There are no such words in this will as in *Mussoorie Bank* v. *Raynor* (1), to the effect that the testator gives to the children merely what the widow does not require.

For these reasons, I am of opinion that the learned Judge was right in declaring that the widow "was not absolutely entitled for her own use and benefit" to the residuary property; and that she was under a trust to divide it, either during her life or by will. The widow had what is called a power in the nature of a trust; and, as the power to divide was not executed by the widow, the Court will execute it for her. As Lord *Eldon* said, in *Brown* v. *Higgs* (2), after stating that the Court cannot execute a mere power, "but there is also known to this Court a power, which the party, to whom it is given, is entrusted and required to execute; and with regard to that species of power the Court consider it as partaking so much of the nature and qualities of a trust, that if the person, who has that duty imposed upon him, does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place." The trust is to divide among the four children, or the survivors, "in fair just and equal shares"; and in such a case the Court, following the maxim that "Equality is equity," usually makes an equal distribution (*In re Douglas*; *Obert* v. *Barrow* (3)).

STARKE J. I concur in the opinion of my brother *Higgins*. I have had the advantage of considering his opinion, and, finding there all the reasons which have led me to the same conclusion, it is unnecessary to add anything to what he has said.

Order of Harvey J. set aside so far as it declares that according to the true construction of the said will Sarah Dean the widow of the testator was not absolutely entitled for her own use and benefit to the residuary real and personal estate of the testator remaining after payment of the debts funeral and testamentary expenses

(1) (1882) 7 App. Cas., 321. (2) (1803) 8 Ves., at pp. 570-571.
(3) (1887) 35 Ch. D., 472, at p. 485.

and the costs of administration of his estate and the two several sums of one thousand pounds and three hundred pounds and the bonus additions in the will mentioned and so far as the order contains other declarations and orders up to but not including the order as to costs Declare that according to the true construction of the said will Sarah Dean the widow of the testator was absolutely entitled for her own use and benefit to the residuary real and personal estate of the testator remaining after payment of the debts and funeral and testamentary expenses and of the two several sums of one thousand pounds and three hundred pounds and the bonus additions in the will mentioned Costs of all parties of and incidental to the appeal as between solicitor and client to be paid out of the residuary estate.

Solicitors for the appellants, *Chas. D. Meares & Daniel*, Mudgee, by *Harry W. Baum.*

Solicitors for the respondent Jane Cole, *W. A. Gilder, McMaster & Co.*

B. L.