H. C. OF A. 1925.

FEDERAL COMMISSIONER OF TAXATION v. ROONEY.

Appeal allowed. Judgment appealed from discharged and judgment entered for the plaintiff for £3 7s. 1d. with costs of action. Appellant to pay the costs of this appeal in accordance with his undertaking.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Fisher, Ward, Powers & Jeffries.*

Solicitor for the respondent, *J. L. Travers.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FISHER AND OTHERS . . . . . APPELLANTS; DEFENDANTS,

AND

WENTWORTH AND OTHERS . . . . RESPONDENTS. PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H C. OF A. 1925.

SYDNEY, *Aug.* 21, 24, 27.

Knox C.J., Isaacs and Higgins JJ.

Will—Construction—Absolute gift of residue—Trusts engrafted on gift—Failure of trust—Absolute gift taking effect—Intestacy.

A testator by his will directed his trustees to raise a fund of £10,000 and to hold it upon trust for his son A for life and after his death for his children; and he directed that, if there should be no child or issue of A who should become entitled to a vested interest in the fund, it should sink into and form part of the residue and be applied accordingly. He also directed that the residue of his estate should be divided equally between his five daughters and two sons (who all survived him), and that the share of A in the residue should be held upon such trusts as were declared concerning the fund of £10,000. He further directed that, upon failure of the trusts of the share of any of his five daughters and A in the residue, the share in respect of which there was a failure should go to the survivor or survivors of the testator's children living

at the date of such failure, and that any share to which A should become entitled by survivorship should go to him absolutely. A having survived all the other children of the testator and having died without leaving any issue,

Held, that A's share of the residue became absolutely vested in his personal representatives.

Hancock v. *Watson*, (1902) A.C. 14, applied.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) affirmed.

APPEAL from the Supreme Court of New South Wales.

William Charles Wentworth, who died on 20th March 1872, made a will dated 19th October 1870 the material provisions of which were as follows :—" I direct my trustees with all convenient speed after my decease to raise from and out of my residuary estates or the proceeds thereof the sum of ten thousand pounds sterling . . . and to stand possessed of the said sum of ten thousand pounds and of the securities whereon the same shall or may be invested and the dividends interest and yearly income thereof respectively Upon trust during the life of my . . . son D'Arcy to pay to him so much of the same dividends interest and yearly income as would not (although the same were payable to him) be by his act or default or by operation of law so disposed of as to prevent his personal enjoyment thereof and to apply so much thereof as would if the same were payable to him be disposed of last aforesaid for the benefit of his wife children and other issue for the time being in existence or some one or more of those objects if any and whilst there shall not be any one of such objects in existence then the same dividends interest and yearly income shall form part of my residuary personal estate until any such object shall exist when the trust or power in favour of such object and all future objects as aforesaid shall apply and come into operation and as to the capital of the said sum of ten thousand pounds and the investments thereof from and after the decease of my said son D'Arcy and the interest dividends and yearly income thereof thereafter to accrue due I direct the trustees or trustee for the time being of my will to stand and be possessed thereof and interested therein In trust for all and every or any such one or more (exclusively of the one or other) of the child children or more remote

H. C. OF A. 1925. FISHER v. WENTWORTH.

issue of him my said son D'Arcy (such remoter issue to be born in his lifetime) and if more than one in such shares and proportions for such estates or interests and at such ages days or times and with and subject to such conditions charges powers and provisions over for the benefit of any one or more of the objects aforesaid as the trustees or trustee for the time being of this my will (or the majority in number of them when there shall be more than two living) shall in their his or her absolute discretion from time to time by any deed or deeds with or without power of revocation or new appointment direct or appoint and in default of and until any such appointment and so far as no such appointment shall extend In trust for all and every the children or child of my said son D'Arcy Wentworth who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be previously married and if more than one in equal shares . . . And I further will and declare that if there shall be no child or issue of my said son D'Arcy who shall become entitled to an absolutely vested interest in the said trust premises then and in such case subject and without prejudice to the trusts hereinbefore declared and to any appointment which may be made in pursuance thereof the said sum of ten thousand pounds and the stock funds and securities in or upon which the same shall or may be laid out or invested . . . shall sink into and form part of my residuary personal estate and be paid and applied accordingly . . . And as to the net residue or surplus of the moneys which shall come to the hands of my said trustees by the sale of my said residuary real estates and by collecting getting in and receiving my personal estate and of the securities wherein the same or any part thereof may be invested as hereinbefore directed and which shall remain after answering and satisfying the trusts and purposes hereinbefore declared of and concerning the same and raising the said portions or fortunes of my three unmarried daughters as hereinbefore mentioned I direct and declare that the same ultimate residue or surplus shall be divided between such of my present children (namely) Thomasine Cox the wife of the said Thomas John Fisher Fanny Catherine the wife of the said John Reeve Fitzwilliam Wentworth Eliza Sophia Wentworth Laura Wentworth Edith

Wentworth and D'Arcy Wentworth as shall be living at the time of my decease in equal proportions and share and share alike as tenants in common . . . And I also direct that the share of my said son D'Arcy Wentworth shall be invested and held by my trustees upon such trusts in favour of my same son and his child children or issue and otherwise during his life and after his decease upon such trusts in favour of his child children or issue as are hereinbefore declared of or concerning the said sum of ten thousand pounds hereinbefore directed to be raised as aforesaid And I further direct that on failure of the trusts hereinbefore declared by reference of any of the said shares of my said five daughters and my said son D'Arcy of or in my said residuary estates or such ultimate or net residue or surplus as aforesaid the share or shares the trusts whereof shall so fail with all accretions thereto (if any) under this clause shall go and be divided to and amongst the survivors or survivor of them my said five daughters and my said sons Fitzwilliam and D'Arcy living at the time or respective times of the failure or respective failures of the trusts of any such share or shares as aforesaid so that upon the failure of the aforesaid trusts of each share such share shall go and accrue to such of them my said five daughters and my said sons Fitzwilliam and D'Arcy as shall be living at the time when the trusts of such share shall so fail And I direct that all such share and interest (if any) as my said son D'Arcy may become entitled to under this clause of accruer or survivorship shall go to him absolutely and shall not be subject to the trusts hereinbefore directed concerning his original share in my residuary estate " &c.

The five children of the testator all survived him, and D'Arcy Bland Wentworth (called in the will D'Arcy Wentworth) survived the other four children and died on 8th November 1922, leaving no issue him surviving.

An originating summons was taken out by William Charles Wentworth and Francis William Hixon, the trustees of the testator's estate, for the determination of the following question (*inter alia*) :—

> Whether, upon the true construction of the said will and in the events which have happened, the original one-seventh share of the above-named testator's son D'Arcy Bland

H. C. OF A 1925.

FISHER v. WENTWORTH.

Wentworth in the ultimate residue or surplus of the said testator's estate (exclusive of any additions thereto under the accruer clause) on the death of the said son (a) passed as on the intestacy of the said testator, or (b) passed to the estate of the said son, or (c) passed in any other and if so what manner.

The summons was heard by *Harvey* C.J. in Eq., who made a decretal order whereby it was declared that upon the true construction of the will and in the events which had happened the personal representatives of D'Arcy Bland Wentworth were entitled to receive the corpus of his original one-seventh share in the ultimate residue or surplus of the testator's estate (exclusive of any additions thereto under the accruer clause) and all income and accumulations of income arising from such share. From that decision Arthur Donnelly Fisher, Andrew Walter Irby Macansh, Henrietta Talbot Keays Young, Archibald Edward Young and Walter Whitley Webb, who represented various beneficiaries under the testator's will, appealed to the High Court. The respondents to the appeal were the trustees of the testator's estate and Robert Wilberforce Hartley and Robert Stevens Fraser, the executors of D'Arcy Bland Wentworth.

Leverrier K.C. (with him *D. Williams*), for the appellants. There is, in the events that have happened, an intestacy as to D'Arcy Wentworth's original one-seventh share in the residue. The contingency upon which the gift over of that share was to take effect was the death of D'Arcy Wentworth without issue, and although the gift over could not take effect by reason of there being no other children of the testator living, the prior gift to D'Arcy Wentworth was divested (*Doe d. Blomfield* v. *Eyre* (1); *Robinson* v. *Wood* (2); *O'Mahoney* v. *Burdett* (3); *Hurst* v. *Hurst* (4); *Jarman on Wills*, 6th ed., p. 1436). In *Jones* v. *Davies* (5) the Court came to the conclusion that the prior gift was not divested upon what *Jessel* M.R. thought from the whole will was the intention of the testator.

[ISAACS J. referred to *Chia Khwee Eng* v. *Chia Poh Choon* (6).]

(1) (1848) 5 C.B. 713.
(2) (1858) 4 Jur. (N.S.) 625.
(3) (1874) L.R. 7 H.L. 388, at p. 399.
(4) (1882) 21 Ch. D. 278, at pp. 290, 293.
(5) (1880) 28 W.R. 455.
(6) (1923) A.C. 424.

Weston, for the respondents the executors of D'Arcy Bland Wentworth. Where there is an absolute gift to A followed by a provision that if A dies leaving issue there shall be a gift over, then if A dies leaving no issue the absolute gift to A remains. Although *Harvey* C.J. in Eq. held that *Hancock* v. *Watson* (1) did not apply, there is nothing to take this case out of the principle there stated.

[HIGGINS J. referred to *In re Palmer*; *Palmer* v. *Answorth* (2).

[KNOX C.J. referred to *Frazer* v. *Frazer* (3).]

The cases relied on by the appellants lay down no rule or canon of construction which applies to this case, but each was a decision upon a particular will.

Leverrier K.C., in reply.

Cur. adv. vult.

Aug. 27.

The following written judgments were delivered :—

KNOX C.J. In my opinion the Chief Judge in Equity was right in holding that D'Arcy Wentworth's share of residue under the will of William Charles Wentworth was, in the events which happened, vested in him absolutely at his death. I think the ultimate gift of this share to the survivor or survivors of the testator's children should be regarded as one of the trusts upon which D'Arcy Wentworth's share of residue was settled by the will. That gift failed owing to the fact that D'Arcy Wentworth survived his brother and all his sisters, and, as the share was in the first instance given absolutely to D'Arcy Wentworth as a separate share severed from the rest of the estate and the trusts engrafted on the share have failed, the absolute gift to him remains. In *Hancock* v. *Watson* (4) Lord *Davey* said :—"In my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next-of-kin as the case may be.

(1) (1902) A.C. 14.
(2) (1893) 3 Ch. 369.
(3) (1901) 1 S.R. (N.S.W.) (Eq.) 247, at p. 277.
(4) (1902) A.C., at p. 22.

H. C. OF A. 1925. FISHER v. WENTWORTH. Knox C.J.

Of course, as Lord *Cottenham* pointed out in *Lassence* v. *Tierney* (1), if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next-of-kin are excluded in any event." I think these observations apply to the provisions of the will now under discussion and that the appeal should be dismissed.

ISAACS J. I agree with the conclusion that *Harvey* J. has arrived at. I reach that conclusion by a somewhat more direct route. Reading the will as a whole, I find so clear an intention to make a complete disposition that there is no need to resort to the disinclination of a Court to find intestacy. The testator's directions with respect to the sum of £10,000 in favour of D'Arcy and his children include a provision, both as to income and to capital, that, failing the particular trusts specified, the fund shall sink into and form part of the residuary estate. Similarly, with respect to the sum of £25,000 in favour of Eliza. Having made it plain that on failure of the desired objects these funds shall be disposed of by the will, the testator proceeds to divide the ultimate residue or surplus of his estate between such of his seven children as survive him, in equal shares. As to his daughters he repeats referentially the trusts attached to the £25,000 of Eliza, with an unimportant modification. As to D'Arcy he repeats referentially the trusts attaching to the £10,000. But, as he is now dealing with the ultimate residue, he could not repeat the former direction in case the trusts failed. The time having come to provide expressly for that case, he does so by the survivorship clause. It is, of course, true that after the death of the sixth legatee that clause had no further operation. It could not operate on D'Arcy's share on his death. But while it operated, its effect was to give the accrued shares absolutely, showing the testator's intention to make his disposition complete. Had D'Arcy died before any of the others, his share would have vested absolutely in the survivor or survivors. Therefore, having

(1) (1849) 1 Mac. & G. 551.

regard to the unqualified gift of residue to Fitzwilliam, to the directions that unappropriated prior interests should fall into residue, to the complete absorption of the ultimate residue in the distribution of residue, to the substitution of the gift over to survivors, to the prior direction to sweep all interests that failed into residue, I find a general intention to include next-of-kin. The expression " so that upon the failure of the aforesaid trusts of each share such share shall go and accrue," &c., confirms the implication. The final direction in favour of D'Arcy, respecting any shares accruing to him, as contrasted with the trusts concerning his original residual share, adds further strength to the implication, because it shows that even grandchildren were thought to be sufficiently provided for without those accrued shares. The exhaustion of the survivorship clause, therefore, upon the implication of the will, left the original share of D'Arcy in the residue after the failure of the trusts declared absolute. I feel able to reach this conclusion on the language of the will alone, because I find no authority which prevents me from construing its words in their natural sense, according to what is expressed and implied.

But I wish to say a word as to *Hancock* v. *Watson* (1). I regard that case as merely formulating an inescapable implication. Lord *Davey's* observations (2) make it necessary, in the first place, to construe the will in order to determine whether the first gift is absolute, and it is pointed out that that must be done upon consideration of the whole will including the engrafted trusts. The case does not prescribe the method of determining that primary question, which must be solved in accordance with recognized methods *dehors Hancock* v. *Watson*. But, once it is found that the gift is absolute to begin with, " then," says Lord *Davey*, " if it is a share of residue (as in the present case) the next-of-kin are excluded in any event." The legal result of that position is stated in two sentences. Having referred to the fact that the legatee was to have, during her life, only the income of her share for her separate use without power of anticipation, Lord *Davey* says: —" But that is quite consistent with a power to dispose of the capital after her death so far as it should not be exhausted by the

(1) (1902) A.C. 14.

(2) (1902) A.C., at p. 22.

H. C. OF A. 1925.

FISHER v. WENTWORTH.

Isaacs J.

trusts declared of it and with the right of her representatives to claim it. In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts she takes for life only." That is exactly the case here; the words quoted constituting not a rule or doctrine controlling the construction of the will, but rather a statement of the legal result of the construction already reached and establishing its consistency when applied to the period before and the period after the legatee's death.

The judgment of *Harvey* J. should, therefore, be affirmed.

HIGGINS J. The only question on this appeal is as to the destination of the share of D'Arcy Wentworth, a son of the testator, in the residue of the estate. This son, the last of the testator's children to survive, died on 8th November 1922. The appellants, next-of-kin of the testator, seek to have it determined that the testator died intestate as to this share; whereas the learned Judge of first instance has decided, on originating summons, (in effect) that the share has passed to the executors of the son.

It is all a question as to the true construction of this particular will. But similar problems arise from time to time, and under many wills; and it is often illuminating to find how other Judges have dealt with a similar problem, and what principles have been adopted as applicable. Steady adherence to the principles and the decisions of the Courts tends, to a degree not always recognized, to certainty in the law, and to the confidence of counsel and solicitors in settling wills and in advising clients; and it tends to reduce litigation.

The testator directs that the ultimate residue of his estate, when sold, converted and collected, "shall be divided between" such of his seven children as should be living at the time of his decease, equally. The seven children were all living at his death—two sons and five daughters. The will directed, however, that the share of each of the two married daughters and of each of the three daughters as yet unmarried should be invested and held upon such trusts in favour of the daughter and any husband and

her children as he had already declared in favour of his daughter Eliza concerning a sum of £25,000 directed in a previous part of the will to be set apart: "And I also direct that the share of my said son D'Arcy . . . shall be invested and held . . . upon such trusts in favour of my same son and his child children or issue and otherwise during his life and after his decease upon such trusts in favour of his child children or issue as are hereinbefore declared of or concerning the said sum of ten thousand pounds hereinbefore directed to be raised." The directions as to this sum of £10,000 appear in a previous part of this will. The son D'Arcy took a strictly protected interest in the £10,000 during his life. He was to get all the income that he could personally enjoy, and the balance of the income was to go for the benefit of his wife, children and other issue. As for the capital, after the son's death it was to go to D'Arcy's children or issue as the trustees might appoint; and, subject to any such appointment, to the children who attained twenty-one &c.; but if there should be no such child (and there was none) the capital was to "sink into and form part" of the testator's residuary personal estate.

Both parties here take the view that this provision as to D'Arcy's share incorporates only such of the provisions as to the £10,000 as confer benefits on the child, children or issue of D'Arcy—that the provision for the £10,000 "sinking into" the residue is not incorporated in the direction as to D'Arcy's one-seventh share in the residue. I shall assume that view to be correct. Following this provision as to D'Arcy's share is a direction for survivorship —that "on failure of the trusts hereinbefore declared by reference" of any of the shares of the daughters and D'Arcy, the shares, the trusts whereof shall so fail, shall (with accretions, if any) be divided amongst the survivors or survivor of the seven children (including Fitzwilliam) living at the time of the failure of the trusts of any share. In my opinion, this survivorship clause is obviously inapplicable to D'Arcy's original share; for when the trusts of D'Arcy's share failed by his death without children, there were no children of the testator that survived him. The testator also provided that any share that came to D'Arcy by accruer, as survivor of his brothers and sisters, should go to him absolutely and not

H. C. OF A. 1925.

FISHER v. WENTWORTH.

Higgins J.

be subject to the trusts of his original share. The question is, what is to be done with D'Arcy's original share. The trusts for his children and issue have failed; the provision for survivorship does not apply under the circumstances. Mr. *Leverrier* therefore argues that the testator has died intestate with regard to this share, saying that there is no direction in the will with regard to it.

But at this point there comes from previous cases illumination of the kind to which I have referred. A principle of interpretation has been long accepted, and it has been expressed, with the concurrence of the House of Lords, by Lord *Davey* (*Hancock* v. *Watson* (1)), as follows: "If you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next-of-kin as the case may be. . . . When the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next-of-kin are excluded in any event." Looking back, now, to see whether there is an absolute gift of the share in the residue to D'Arcy in the first instance, we find a direction "that the . . . ultimate residue . . . shall be divided between" such of the seven children as should be living at the decease of the testator, equally, as tenants in common. If the direction stopped there, it would be clear that each child who survived the testator took the share absolutely; but the direction does not stop there. It is followed by "Nevertheless I direct" the protection of the share for each daughter for life and for her husband and children afterwards; and by a further direction as to protection of D'Arcy's share (as I have described), and by a further direction as to survivorship on failure of the trusts "declared by reference." It is clear that the mere words as to division of the ultimate residue, if looked at alone, are *sufficient* to give an absolute interest; for it is by these words, and none other, that the son Fitzwilliam Wentworth (whose share is the only share not protected), takes his absolute interest. The principle, as expressed by Lord *Davey*, is open to the criticism that it lays too

(1) (1902) A.C., at p. 22.

much stress on the opening words of the gift as if they could be conclusive as to there being an absolute gift instead of being merely words which may be corrected or modified by the whole tenor of the will. In other words, it might be urged that the true effect of the will, as to the protected shares in the residue, is that the testator merely earmarks each seventh share by the name of a child, and explains that, although the share is so earmarked, "nevertheless" the child is to have it for life only, remainder to his or her issue. The real answer to such a criticism seems to be that where the words of the will are equally consistent with two interpretations, the Court leans against that which involves an intestacy—especially as to a residue. The testator, it is to be presumed, when he sits down to make a will, means to deal with all his property.

In my opinion, therefore, the decision of the learned Judge, *Harvey* J., was right, and the appeal should be dismissed. But I prefer to rest my opinion on the principle laid down in *Hancock* v. *Watson* (1) as being simpler rather than on the principle laid down in *Jones* v. *Davies* (2) and *In re Deacon's Trusts*; *Deacon* v. *Deacon* (3). In applying the latter principle, the learned Judge seems to take into consideration only the survivorship clause, and treats the gift in that clause as being in defeasance of the original gift; and it becomes necessary to enter on a close and ingenious examination of the contingencies contemplated. *Both* principles rest on the assumption that there is a "prior absolute estate"; and, this being once established, the rest is easy.

Appeal dismissed with costs.

Solicitor for the appellants, *H. R. Andrews.*

Solicitors for the respondents, *Allen, Allen & Hemsley*; *E. S. Dunhill.*

B. L.

(1) (1902) A.C., at p. 32. (2) (1880) 28 W.R. 455
(3) (1906) 95 L.T. 701.