The appeals fail, in my opinion, and must be dismissed with costs.

Appeals dismissed.

Solicitors for the appellant, *Moule, Hamilton & Derham.*

Solicitor for the respondent, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

H. D. W.

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COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD. *v.* FEDERAL COMMISSIONER OF TAXATION.

[HIGH COURT OF AUSTRALIA.]

AUSTIN . . . . . APPELLANT;
DEFENDANT,

AND

ABIGAIL AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS AND PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 2, 11.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Will—Construction—Gift to three life tenants in equal shares—Gift to one life tenant revoked by codicil—Gift over—Testacy as to income and corpus of share—"Realize the whole estate"—Infant remaindermen—Intermediate income from share—Maintenance, education or benefit—Accumulations—Acceleration of future interests—Conveyancing Act 1919-1930 (*N.S.W.*) (*No.* 6 *of* 1919—*No.* 44 *of* 1930), *sec.* 36B (1)*—*Trustee Act* 1925 (*N.S.W.*) (*No.* 14 *of* 1925), *sec.* 43*.

In 1928 a testator made his will in which he gave devised and bequeathed "all my estate real and personal" upon trusts to divide the rents and profits of "my estate" equally between his wife, her sister, and his son during their lifetime, and "if either one of these three charges mortgages or assigns their

The *Conveyancing Act* 1919-1930 (N.S.W.), by sec. 36B (1), provides:—"A contingent or future specific or residuary devise or bequest of property, and a specific or residuary devise or bequest of property to trustees upon trust for a person whose interest is contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator except so far as such income, or any part thereof, may be otherwise expressly disposed of."

The *Trustee Act* 1925 (N.S.W.), by sec. 43, provides, so far as material, as

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interest or does any act with that intent" the interest of that one was "to go to the remaining one or two innocent parties." The will proceeded: "After the death of" the testator's wife and her sister "the interest so payable to each or either of them to be paid to the children of" the testator's son in certain specified proportions "until the younger of them arrives at the age of thirty years then to realize the whole estate and divide between those two children in the aforesaid" proportions. On 21st November 1930 the testator executed a codicil as follows: "I cancel and cut out completely any bequest or devise to my son . . . so that he does not benefit in my estate to the extent of one single shilling." The testator died on 28th September 1931, his grandchildren being then of the age of six years and eight years respectively.

Held:—

(1) The revocation of the gift of the share of income to the testator's son did not operate to augment the shares given to the testator's wife and her sister.

(2) In the circumstances such share of income did not at present pass as under an intestacy.

(3) The trust to "realize the whole estate" upon the attainment by the younger grandchild of the age of thirty years referred to the entire corpus or residuary corpus of the testator's estate.

(4) The grandchildren were entitled to the intermediate income of the estate not otherwise disposed of by the will: they were so entitled, whether or not their interests in the corpus were contingent, either under the general law or under sec. 36B (1) of the *Conveyancing Act* 1919-1930 (N.S.W.).

(5) During the infancy of the respective grandchildren the trustee might apply such intermediate income for their maintenance, education or benefit as provided by sec. 43 of the *Trustee Act* 1925 (N.S.W.).

Decretal order of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) affirmed as varied.

APPEAL from the Supreme Court of New South Wales.

Ernest Robert Abigail, a solicitor, died on 28th September 1931, having made his will on 19th July 1928 as follows:—"This is the last will and testament of me Ernest Robert Abigail of Sydney,

follows:—"(1) Where any property is held in trust for a person who is for the time being an infant for any interest whatsoever, whether vested or contingent, and whether absolute or liable to be divested, the trustee may at his sole discretion pay to the parent or guardian, if any, of the infant, or to the person with whom the infant is for the time being residing, or otherwise apply the whole or any part of the income of the property, for or towards the maintenance education or benefit of the infant. (2) The power conferred by sub-section one of this section may be exercised whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the maintenance or education of the infant, or not. (3) The power conferred by subsection one of this section shall not prejudice or affect any prior interest in or charge over the property: Provided that where the interest for which the property is held in trust for the infant is future or contingent, and the trust for the infant would not, apart from the provisions of this section, carry the

solicitor I nominate and appoint the Perpetual Trustee Company of New South Wales my executor and trustee And unto my trustee I give devise and bequeath all my estate real and personal upon the following trusts To divide the rents and profits of my estate equally between my wife Mabel Mary, her sister, Florence Kate Primrose and my son Ernest Robert Abigail during their lifetime and without in each case power of anticipation, if either one of these three charges, mortgages or assigns their interest or does any act with that intent the interest of that such one to cease and go to the remaining one or two innocent parties. After the death of Mabel Mary and Florence Kate Primrose the interest so payable to each or either of them to be paid to the children of my son Ernest Robert in the following ratios two-thirds to my grandson Ernest Robert Abigail Junior Secundus and one-third to his sister Gloria Abigail until the younger of them arrives at the age of thirty years then to realize the whole estate and divide between those two children in the aforesaid ratio two-thirds to Ernest Robert and one-third to Gloria." On 21st November 1930 the testator made the following codicil to his will :— "I cancel and cut out completely any bequest or devise to my son Ernest Robert Abigail so that he does not benefit in my estate to the extent of one single shilling." At the date of the death of the testator his grandchildren, Ernest Robert Abigail and Gloria Abigail, were of the age of six years and eight years respectively.

An originating summons was taken out by the Perpetual Trustee Co. Ltd., the executor and trustee named in the will and to which probate had been granted, for the determination of, *inter alia*, the following questions : (1) Were the testator's widow and her sister respectively entitled, in the circumstances, to one-third or one-half of the

intermediate income, and the same is not expressly or specifically disposed of but would pass to some other person in virtue only of an interest to which he is entitled under a residuary or a general gift in the instrument, if any, creating the trust, or in the absence of such a gift then as upon intestacy or as upon a resulting trust, the trust for the infant shall, during the infancy, if the interest of the infant so long continues, be deemed to carry the intermediate income, and the interest of such person shall not be deemed to be a prior interest within the meaning of this sub-section. (4) During the infancy, if the interest of the infant so long continues, the trustee shall accumulate all the residue of the income in the way of compound interest by investing the same, and the resulting income thereof from time to time . . . (5) During the infancy, if the interest of the infant so long continues, the trustee may at any time, if he thinks fit, apply the accumulations or any part thereof as if the same were income arising in the then current year."

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income of the testator's estate; (2) whether such payments of income were to be made during (*a*) the joint lives of the widow, her sister, and the testator's son; or (*b*) the joint lives of the widow and her sister, or (*c*) the joint lives of the widow and her sister, and the survivor of them; (3) should any income not payable to the widow and her sister during their joint lives (*a*) pass as on intestacy, or (*b*) be accumulated during such period as the law allowed for the benefit of the persons entitled to the residuary estate, or (*c*) how otherwise should such income be disposed of; (4) In the event of an affirmative answer to question 3 (*b*), who was entitled to the income earned by the accumulations; (6) were the respective interests in remainder bequeathed to the testator's grandson and granddaughter (*a*) absolutely vested, or (*b*) contingent on the attainment by the grandson of the age of thirty years, or (*c*) contingent on both the grandson and the granddaughter attaining the age of twenty-one years, or (*d*) contingent on any other event; (7) in the event of an affirmative answer to question 6 (*a*), were the grandson and granddaughter or either of them now entitled to such vested interests in remainder in the proportions respectively of two-thirds and one-third (*a*) to the corpus of the estate and the accumulations, if any, of income, or (*b*) to two-thirds of such corpus and accumulations, or (*c*) to any other and what portion thereof?

The defendants to the summons were the testator's widow, Mabel Mary Abigail, her sister, Florence Kate Primrose, Mary Ann Frances Austin, a sister of the testator, representing the next-of-kin of the testator other than the parties to the suit, the testator's grandchildren, Ernest Robert Abigail and Gloria Abigail, and, by amendment, Emily Cooper and Eliza Bates, sisters of the testator.

In an affidavit made in support of the summons by the managing director of the plaintiff company it was stated that the testator's son had intimated that he did not intend to claim as one of the next-of-kin of the testator in the event of it being determined that the testator died intestate as to the whole or any portion of the income or corpus of his estate, and that he did not desire to be joined as a defendant to the summons.

The summons was heard by *Harvey* C.J. in Eq., who held that the testator's widow and her sister were each entitled to one-third

of the income of the estate. His Honor declared that the trust "to realize the whole estate" upon the attainment by the grandson of the age of thirty years applied to the whole of the testator's estate and not to two-thirds only of such estate, and he held that the income that was payable under the will to the testator's son did not at present pass as under an intestacy. His Honor further declared that the trustee might apply that income for the maintenance, education or benefit of the grandson and granddaughter "in the proportion of two-thirds and one-third respectively until the death of" the testator's son or the expiration of a period of twenty-one years from the date of the testator's death, whichever first happened. It was further ordered that "until either of such events shall happen the balance of the said . . . income not applied as aforesaid for the maintenance education and benefit of" the grandchildren should be accumulated with the right to the trustee to resort in any year to the accumulations of past years for the purpose of such maintenance, education or benefit, but this was to be without prejudice to the question as to the destination of such income and the accumulations thereof on the death of the testator's son or the expiration of the said period of twenty-one years. His Honor ordered that, so far as they were not answered, the other questions should stand over generally.

From that decision Mary Ann Frances Austin now appealed to the High Court, the respondents being the other defendants to the summons and the plaintiff.

Ham K.C. (with him *Isaacs*), for the appellant. The only question is whether there is or is not an intestacy as to one-third of the testator's estate, either as to corpus or as to the income. The answer depends upon the construction of the will and is unaffected by the codicil. The will fails to provide for a number of different possibilities which, if they eventuate, will result in intestacies; e.g., the will makes no provision against the event of all the life tenants charging their respective shares; and also the will is silent as to what shall become of the income of the share of a deceased female life tenant in the event of the younger child not attaining the age of thirty years. There is no gift in remainder after the son's life

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interest. Where in his will the testator referred to the whole of his assets he used the words " all my estate real and personal " or " my estate." The words " the whole estate " as appearing in the will have a limited meaning. " The whole estate," which under the will is to be realized upon the attainment by the younger child of the age of thirty years, refers only to the shares of the female life tenants. That this is so is shown by the fact that reference to such shares, and to such shares only, appears in the same clause and immediately precedes the words " the whole estate." Any other construction of the will would lead to the absurd result that upon the death of the female life tenants and the attainment by the younger child of the age of thirty years the testator's son's interest under the will would cease and he would be dependent upon the bounty of his children. In their collocation the words " the whole estate " do not show a sufficiently clear intention on the part of the testator to cut down the life estate clearly and definitely given to the son by the terms of the will. The testator inadvertently omitted to dispose of the interest in remainder after the termination of his son's life interest, thus creating an intestacy as to one-third of the testator's estate. The presumption as to intermediate income applies only in cases where there is an intention of pecuniary devise or specific bequest. Sec. 36B of the *Conveyancing Act* 1919-1930 which deals with intermediate income was enacted in 1930, and therefore the testator could not have had its provisions in mind when he made his will in 1928. That section had the effect of altering the law relating to intermediate income (*Thompson and Uther's Conveyancing Act* 1919, 2nd ed. (1931), pp. 46, 47 ; *Theobald* on *Wills,* 8th ed. (1927), p. 198). In any event the section does not apply because the bequest here is a universal bequest, and not a residuary bequest as dealt with by the section, nor is it a specific devise or bequest within the meaning of the section (*In re Raine* (1)). As the testator has expressly provided a fund out of which the infants are to be maintained he expressly provides a fund into which income is to be paid after the death of the two female life tenants. In its effort to avoid an intestacy the Court should not, in effect, make a new will (*In re Hobson* (2)).

(1) (1929) 1 Ch. 716.

(2) (1912) 1 Ch. 626, at pp. 633, 634.

[EVATT J. referred to sec. 43 of the *Trustee Act* 1925 (N.S.W.).]

Loxton K.C. (with him *Sturt*), for the respondents Mabel Mary Abigail, Florence Kate Primrose, Ernest Robert Abigail and Gloria Abigail. In construing the will the Court should approach the matter along the lines firstly that the testator knew what he was doing and secondly that he was dealing with the whole of his estate. The testator clearly indicated his intention that the two infants should take vested interests in the two-thirds of his estate in respect of which his wife and sister-in-law took life interests. The infants become absolutely entitled to such two-thirds upon the death of the life tenants, and in connection with that part of the testator's estate the requirement as to the attainment by the younger infant of the age of thirty years may be disregarded (*Gosling* v. *Gosling* (1); *Smidmore* v. *Makinson* (2); see also *Saunders* v. *Vautier* (3)). The word " estate " should be given the same meaning throughout the will. In the earlier part of the will the word " estate " clearly refers to the whole of the testator's estate, and to suggest that in the later part of the will the word refers only to two-thirds of such estate is to give it a strained construction. It is obvious that the words " the whole estate " refer to more than two-thirds of such estate. The intention of the testator was that upon the determination of the life interests the whole of his estate should be realized and divided between the two infants and the words as used by the testator give adequate expression to such intention. There is no break in the successive interests because the infants' interests are vested. The fact that the life interest of the testator's son was destroyed by the testator's own act only operates to accelerate the interests in remainder (*Jull* v. *Jacobs* (4); *Lainson* v. *Lainson* (5); and *Theobald* on *Wills*, 8th ed. (1927), p. 886).

[EVATT J. referred to *Tompkins* v. *Simmons* (6).]

Sec. 36B of the *Conveyancing Act* 1919-1930 was enacted prior to the date of the testator's death and doubtless the Legislature

(1) (1859) John. 265; 70 E.R. 423.
(2) (1908) 6 C.L.R. 243.
(3) (1841) 4 Beav. 115; 41 E.R. 482.
(4) (1876) 3 Ch. D. 703, at pp. 710-712.
(5) (1853) 18 Beav. 1; 52 E.R. 1; on appeal, (1854) 5 DeG.M. & G. 754; 43 E.R. 1063.
(6) (1931) 44 C.L.R. 546.

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intended that its provisions should be applied to all wills coming into operation after the enactment. Even if the infants' interests were contingent the infants would, by virtue of sec. 43 of the *Trustee Act* 1925, be entitled to be maintained out of the property although ultimately they did not take such property.

Hutchinson, for the respondents Emily Cooper and Eliza Bates. The argument addressed to the Court on behalf of the appellant is correct. In the interpretation of a will it is for the Court to say what the testator meant at the time the will was made (*Abbott* v. *Middleton* (1)). A life estate created by ambiguous words can be cut down by subsequent ambiguous words.

David Wilson, for the trustee of the will.

Ham K.C., in reply. As to the effect of the revocation of the share of one person in a gift by will to tenants in common, see *In re Forrest*; *Carr* v. *Forrest* (2). The argument as to acceleration wrongly presupposes that there is a gift in remainder in favour of the infants of the one-third outstanding share of the testator's estate. The meaning of the word "estate" depends on how it is qualified wherever it occurs in the will. As used in the will the words "the whole estate" refer only to the combined life estates of the two ladies or, in other words, the whole estate from which the ladies enjoyed the income.

Cur. adv. vult.

May 11. The following written judgments were delivered:—

RICH, DIXON, EVATT AND MCTIERNAN JJ. The appellant represents the next-of-kin of the testator. The appeal is against a decretal order made by *Harvey* C.J. in Eq. which, in effect, determines that at present, in the events that so far have happened, no part of the estate of the testator, capital or income, passes as on an intestacy. The question so determined arises out of the operation of a revocation provision of a codicil upon the obscure dispositions of a short

(1) (1858) 7 H.L.C. 68; 11 E.R. 28. (2) (1931) 1 Ch. 162.

but carelessly drawn will. The first disposition contained in the will is a trust to divide the rents and profits of the testator's real and personal estate equally between his wife, his wife's sister and his son during their lifetime. The codicil revokes the disposition in favour of the testator's son, but makes no provision in its place. When the will comes to the dispositions in succession to the life interests, it refers to the deaths of the testator's wife and of her sister only. It provides that after their deaths "the interest so payable to each or either of them" shall be paid to the two named children of his son in certain proportions, "until the younger of them arrives at the age of thirty years then to realize the whole estate and divide between those two children in the aforesaid ratio." The contention for the appellant is that this provision is confined to the two individual shares in which life interests are given to the testator's wife and her sister. The consequence of this construction would be that the share in which a life interest is given by the will to the testator's son would be undisposed of as to corpus and, the gift of the life interest having been revoked by the codicil, would pass altogether as on an intestacy. In support of the contention that the will should be so construed it was suggested that, otherwise, when the testator's wife and sister-in-law died and his two grandchildren attained thirty, the life interest given by the will to his son, if it had been unrevoked, would necessarily have been defeated before the death of the life tenant, the testator's son, in order that the two grandchildren should take. It is not impossible, however, to treat the disposition expressed in the words "then to realize the whole estate and divide between those two children" as subject in the will to the due determination of all the prior interests given by that instrument and not as operating in defeasance of any of them. But, whether this be so or not, the expression "realize the whole estate" is too clear and unambiguous to be controlled and restrained by the uncertain inferences which may be drawn from the unlikelihood of the testator's intending such a consequence and from the proximity of the reference to the deaths of the two female life tenants. *Harvey* C.J. in Eq. construed the words as extending to the entire corpus or residuary corpus of the estate and it is difficult to see how any other construction could be given to them. It follows that the share

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Rich J. Dixon J. Evatt J. McTiernan J.

is not undisposed of in which under the will, if the provision stood unrevoked, the testator's son would take a life interest. Unless one of the two grandchildren die before the younger attains the age of thirty the question will be unimportant whether the remainders or executory interests limited to them are contingent. Whether the limitation is contingent or not, the fate of intermediate income not otherwise disposed of by the will would follow the fate of the corpus. Apart from statute, the intermediate income would have followed the destination of the corpus because, although the expressions "residue" or "residuary" are not used, the limitation is a general devise and bequest of the blended real and personal property of the testator after prior interests given by the will have been satisfied and, necessarily, after payment of debts, testamentary expenses and charges of administration. But, in any case, sec. 36B of the *Conveyancing Act* 1919-1930, which commenced before the will came into operation, appears to bring about the same result. If that construction of the will is adopted which results in the share given for life to the testator's son being limited to his two children as a vested or contingent remainder expectant upon his life interest, the remainder would be accelerated by the revocation of the limitation of the interest for life. For the revocation of the gift of the share of income to the testator's son does not operate to augment the shares given to his wife and her sister. (See *Tompkins* v. *Simmons* (1).) On the other hand, if the will is construed so that the two grandchildren might under it have taken in defeasance of their father's share if he survived the other life tenants, yet, on that construction, if he died before them, then the intermediate income after the cesser of his life interest would have followed the fate of the corpus. There appears to be no reason why, when the life interest is taken out of the way by revocation, the same result should not follow. The decretal order appealed from is accordingly right in declaring that the share of income directed by the will to be paid during his lifetime to the testator's son does not at present in the events which have happened pass as under an intestacy.

Acting, presumably, under sec. 43 of the *Trustee Act* 1925, *Harvey* C.J. in Eq. declared that the trustee might apply the income of the

(1) (1931) 44 C.L.R., at pp. 552, 556-559.

share to the maintenance of the grandchildren, who are infants aged nine and seven years. He also directed an accumulation of the balance of the intermediate income with power to resort to the accumulations for maintenance. The declaration and the direction are expressly confined in their operation to a period of twenty-one years from the testator's death, or to the death of the testator's son, whichever shall first happen. The first limitation observes the statutory restriction upon accumulation of income. The second was probably introduced by way of precaution because among questions contained in the originating summons which his Honor had refused then to decide was one enquiring whether the testator's widow and her sister took the income given them for the joint lives of themselves and his son or the survivor of them. Perhaps, in spite of the fact that the revocation of the testator's son's share did not augment the other shares, as in effect the decretal order declared, it may have been considered not impossible to find on the death of the son a limitation over of his share of income to the widow and her sister or the survivor. Whatever may be its reason, the restriction affects only the period during which this part of the order operates and does not prejudice rights. But there appears to be in the declaration dealing with maintenance an accidental omission of a provision restricting its operation to the infancy of the grandchildren. It seems desirable, if this restriction is inserted, to limit the direction to accumulate until further order, because if this is not done, it will or may operate on the whole income after the operation of the maintenance provision ends. Otherwise, the decretal order appealed from should for these reasons be affirmed.

STARKE J. The appeal should be dismissed. The will, though that of a solicitor, is badly expressed, but there is not much doubt, I think, that the words " then to realise the whole estate " apply to the whole estate of the testator, as *Harvey* C.J. in Eq. has declared, and not merely, as was argued, to the estate in respect of which E. R. Abigail Junior Secundus and Gloria Abigail were receiving interest.

Little was said at the Bar as to the other declarations of the learned Judge. The decretal order leaves open for further consideration the interest taken by these individuals, and whether that

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interest is absolute, defeasible or contingent. (See *In re Buckley's Trusts* (1).) But the declarations dealing with the income are nevertheless authorized by the provisions of the *Conveyancing Act* 1919-1930, sec. 36B, and the *Trustee Act* 1925, No. 14, sec. 43, except in so far as accumulation is directed beyond the infancy of E. R. Abigail Junior Secundus and Gloria Abigail, for it seems, under the *Trustee Act* 1925, sec. 43 (4)—though we heard no argument on the subject—that accumulation should take place only during infancy. It is advisable, perhaps, to make this limitation clear, though the learned Judge was no doubt cognizant of it and indeed it may be implicit in the order itself.

Decretal order varied by inserting in the further declaration with respect to maintenance after the words "one-third respectively" and before the words "until the death," and in the further order with respect to the accumulation of unapplied income after the words "further order that" and before the words "until either of such events" the words "during the respective minorities of the said infant defendants." Subject to such variation decretal order affirmed and appeal dismissed with costs. Respondents Bates and Cooper to abide their own costs. Trustee to be at liberty to retain its costs as between solicitor and client out of the estate so far as not recovered.

Solicitors for the appellant, *A. S. Boulton & Co.*

Solicitors for the respondents, *P. J. Clines, G. A. Asher, W. Parker.*

J. B.

(1) (1883) 22 Ch. D. 583.