are satisfied, I agree, as the learned trial Judge found, that it was not established that the appellant on the faith of the representation relied upon to prove the estoppel failed to take action against Clegg, or that such inaction on her part was to her detriment.

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Decree appealed from varied by striking out the order that the defendant do within fourteen days after service on her of the decree pay to the plaintiff the sums of £600 *with interest. Otherwise decree affirmed and appeal dismissed. Appellant to pay respondent's costs.*

Solicitors for the appellant, *H. Hamilton Moore & Co.*

Solicitors for the respondent, *Piggott, Stinson, Macgregor & Palmer.*

J. B.

[HIGH COURT OF AUSTRALIA.]

BACKHOUSE AND ANOTHER . . . APPELLANTS;
DEFENDANTS,

AND

LLOYD AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1933. MELBOURNE, *Sept.* 19; *Nov.* 6. Rich, Starke, Dixon, Evatt and McTiernan JJ.

Will—Construction—Distinction between residuary gift and gift of distinct fund—Effect of enumeration of particular things in a residuary gift.

The testatrix made the following provisions with regard to the residue of her estate:—"7. I direct my trustees to set aside the sum of £10,000 upon trust to pay the income thereof to my husband . . . during his life . . . and from and after the death of my husband I direct that my trustees shall hold the said sum of £10,000 or until the said sum of £10,000 shall be

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set aside as hereinbefore provided the annual payment of £500 representing the same upon the trusts hereinafter declared by clause nine of my will as altered by this codicil . . . 8. Subject as hereinafter provided I direct my trustees out of the residue of the trust fund to set aside a sum of £8,000 upon trust to pay the income thereof to " G " during her life. And I further direct that until . . . it shall be convenient . . . to set aside the said sum of £8,000 . . . my trustees shall out of the residue of the income of the trust fund pay to the said " G " the sum of £400 a year. 9. Subject to the trusts hereinbefore declared I direct that the said two funds of £10,000 and £8,000 or the annual payments representing the same respectively and the residue of the trust fund and the income thereof shall be held by my trustees upon trust to pay the income thereof to my two sisters . . . in equal shares during their lives." The husband of the testatrix died in 1932 and the income from the whole estate was only sufficient to pay to the husband of the testatrix the sum of £500 a year from November 1930 to the date of his death, and thenceforth was insufficient to pay the sums of £500 and £400 a year respectively.

An originating summons having been taken out to determine whether G. was entitled to be paid in priority to the two sisters of the testatrix or whether the annual sums of £500 and £400 should abate,

Held, that clause 9 constituted a residuary gift to the sisters of the testatrix, whose claims were postponed to those of G.

Decision of the Supreme Court of South Australia (*Napier* J.), affirmed.

APPEAL from the Supreme Court of South Australia.

By her will as altered by a codicil the testatrix, after giving certain legacies, devised and bequeathed all the residue of her real and personal estate to her trustees upon trust to sell and convert into money. The will as altered by the codicil continued :—

" 7. I direct that my trustees shall out of the proceeds of such sale calling in and conversion and out of my ready money pay my debts and funeral and testamentary expenses and the legacies bequeathed by this my will or any codicil thereto . . . and out of the residue of the said moneys and the investments for the time being representing the same and the parts (if any) of my estate retained by my trustees in the forms in which they were at my decease as hereinbefore provided (hereinafter called ' the trust fund ') I direct my trustees to set aside the sum of ten thousand pounds upon trust to pay the income thereof to my husband William John Dowling during his life by equal monthly payments the first of such payments

to be made at the expiration of one calendar month from the date of my death and I direct that until in the progress of such sale calling in and conversion as aforesaid it shall be convenient and advantageous to the trust fund to set aside the said sum of ten thousand pounds as hereinbefore directed my trustees shall out of the income of the trust fund pay to my said husband the sum of five hundred pounds a year by equal monthly payments the first of such payments to be made at the expiration of one calendar month from the date of my death and from and after the death of my husband I direct that my trustees shall hold the said sum of ten thousand pounds or until the said sum of ten thousand pounds shall be set aside as hereinbefore provided the annual payment of five hundred pounds representing the same upon the trusts hereinafter declared by clause 9 (nine) of my will as altered by this codicil." Provided that in the event of voluntary or involuntary alienation by the husband of his life interest the trustees should pay all or any part of the income of the sum of £10,000 or all or any part of the annual payment of £500 for the maintenance or benefit of the husband " and so much of the said income or of the said annual payment of £500 as shall not be applied or disposed of by my trustees under the discretionary power lastly hereinbefore contained shall sink into and be applied as part of the income of the residue of the trust fund."

" 8. Subject as hereinafter provided I direct my trustees out of the residue of the trust fund to set aside a sum of eight thousand pounds upon trust to pay the income thereof to Moira Kathleen Byron of Glenelg . . . married woman during her life by equal monthly payments the first of such payments to be made at the expiration of one calendar month from the date of my death and I further direct that until in the progress of such sale calling in and conversion as aforesaid it shall be convenient and advantageous to the trust fund to set aside the said sum of eight thousand pounds as hereinbefore provided my trustees shall out of the residue of the income of the trust fund pay to the said Moira Kathleen Byron the sum of four hundred pounds a year by equal monthly payments the first of such payments to be made at the expiration of one calendar month from the date of my death and from and after the death of the said Moira Kathleen Byron I direct that my trustees shall hold the said sum of

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eight thousand pounds or until the said sum of eight thousand pounds shall be set aside as hereinbefore provided the annual payment of four hundred pounds for the time being representing the same as hereinbefore provided upon the trusts hereinafter declared in favour of my two sisters my nephew Ernest Charles Phillipson and the University of Adelaide and in the event of the residue of the trust fund not being sufficient to permit my trustees to set apart a sum of eight thousand pounds as aforesaid or in the event of the residue of the income of the trust fund not being sufficient to permit my trustees to make the annual payment of four hundred pounds as aforesaid then my trustees shall hold the residue of the trust fund or the residue of the income of the trust fund upon the same trusts as are hereinbefore declared concerning the said sum of eight thousand pounds or the annual payment of four hundred pounds."

"9. Subject to the trusts hereinbefore declared I direct that the said two funds of ten thousand pounds and eight thousand pounds or the annual payments representing the same respectively and the said residue of the trust fund and the income thereof shall be held by my trustees upon trust to pay the income thereof to my two sisters in equal shares during their lives and upon the death of one of them then for the survivor and after the death of the survivor of them upon trust to pay the sum of ten thousand pounds to my nephew Ernest Charles Phillipson if he shall survive me for a period of five (5) years or attain the age of twenty-five years whichever shall first happen provided always that if the said Ernest Charles Phillipson shall die in my lifetime or after my death and before attaining the age of twenty-five years leaving a child or children who shall survive me or be born after my death such child or children shall take and if more than one equally between them the interest which the said Ernest Charles Phillipson would have taken of and in the said sum of ten thousand pounds if he had lived to attain a vested interest therein and if the said Ernest Charles Phillipson shall die in my lifetime or within five years after my death or before attaining the age of twenty-five years and there shall be no such children then upon trust to pay the same to the University of Adelaide upon and subject to the trusts powers and conditions hereinafter declared and as to the whole of the residue of my

estate including therein the two funds mentioned in this clause of my will upon trust to pay the same to the University of Adelaide upon and subject to the following trusts powers and conditions" which were then set out. "Provided always that in case the Council shall not accept the conditions hereinbefore contained my trustees shall stand possessed of all my estate which otherwise would have passed to the University of Adelaide upon trust for my next of kin."

Moira Kathleen Byron married Mr. Gordon on 6th June 1931, and William John Dowling, the husband of the testatrix, died on 24th December 1932. The income received from the whole of the estate of the testatrix was only sufficient to pay to William John Dowling deceased the sum of £500 a year from 29th November 1930 to 24th December 1932 as provided by clause 7 of the will and after that date the income from the estate of the testator was not sufficient to pay the sums of £500 and £400 a year respectively. Katherine Backhouse and Ellen Constance Campbell applied to the trustee for payment to them of the income of £500 a year in priority to the sum of £400 a year payable to Moira Kathleen Gordon from 24th December 1932, the date of the death of William John Dowling deceased. During the life-time of the testatrix her income was approximately £1,000 a year, but since her death the net income of her estate did not exceed £500 per annum. The principal assets consisted of undivided interests in real estate, which the trustee had not been able to convert, and it was impossible to set aside either of the two sums mentioned in the will.

In these circumstances an originating summons was taken out by Mrs. Gordon to determine:—1. Whether according to the true construction of the will and codicil Mrs. Gordon was entitled to be paid the sum of £400 a year in priority to the sum of £500 a year which on the death of William John Dowling, the husband of the testatrix, was directed by the will and codicil to be held in trust to be paid to Katherine Backhouse and Ellen Constance Campbell? 2. Whether according to the true construction of the will and codicil and in view of the insufficiency of the income of the residuary estate to provide for both of the said annual sums of £400 and £500, the said annual sums should abate?

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An originating summons was also taken out by Katherine Backhouse and Ellen Constance Campbell raising substantially the same questions. Both summonses were heard together by *Napier* J. who held that Mrs. Gordon was entitled to be paid in priority to Katherine Backhouse and Ellen Constance Campbell.

From this decision Katherine Backhouse and Ellen Constance Campbell now appealed to the High Court.

Cleland K.C. (with him *Campbell*), for the appellants. Clause 9 should be read distributively. It deals with two funds of £10,000 and £8,000. Clause 7 gives the income after the death of the husband and after the death of Mrs. Gordon there is quite an independent gift of the residue of the trust fund. This is merely a question of the construction of the words used. Mrs. Gordon takes nothing unless the residue of the income is available to her. The words "Subject as hereinafter provided" occurring in clause 8 mean as hereinafter provided in clause 9. Clauses 7 and 9 carry over the £10,000 until the death of the sisters. There is no gift to Mrs. Gordon except the annuity given in clause 9. Until there is a fund exceeding £10,000 Mrs. Gordon is not entitled to anything. *Napier* J. was wrong in holding that the two sisters were residuary legatees.

Ligertwood K.C. (with him *Harry*), for the respondents. The general scheme of the will is to give an annuity to the husband, secondly, to give an annuity to Mrs. Gordon and then there is a general residuary gift in the will, the two sisters taking life interests in residuary funds. The nephew then takes a sum of £10,000 out of the residuary funds and the University of Adelaide takes the final residue. The benefits given to Mrs. Gordon and the husband are pecuniary legacies and take precedence over the gifts to the two sisters. The two sisters take in the character of residuary legatees and not in the character of annuitants (*In re Richardson*; *Richardson* v. *Richardson* (1)). The expression "Subject as hereinafter provided" in clause 8 means "provided out of what is left after the husband has been provided for" (*Robertson* v. *Broadbent* (2)). The pecuniary gifts in clauses 7 and 8 are gifts of annuities of £500 to the husband and of £400 to Mrs. Gordon. The will makes a gift

(1) (1915) 1 Ch. 353, at p. 357.

(2) (1883) 8 App. Cas. 812.

of the two annuities and then a trust of what is left after those two annuities are provided for (*In re Tootal's Estate*; *Hankin* v. *Kilburn* (1)). The sisters have no right to have the £10,000 set aside for them. All they are entitled to is to receive an income. They are not interested in ear-marking part of the estate and making the income payable out of that (*In re Smith*; *Smith* v. *Smith* (2)). The testatrix intended Mrs. Gordon to get her £400 a year before the sisters take anything, and the sisters were to take what was left over. The judgment of *Napier* J. is correct.

Cleland K.C., in reply. The respondents' argument fails to give any effect to the words in clause 7. Clause 9 is not residuary but successive. There is nothing in the will which gives Mrs. Gordon anything except out of the residue of this trust fund.

Cur. adv. vult.

Nov. 6.

The following written judgments were delivered :—

RICH J. Much of the difficulty of this case arises from the failure to keep the true problem steadily in view. The testatrix made her will upon the assumption that her property would be adequate to make effective all the dispositions which it contained including the ultimate residuary bequest. To search in her will for some intention as to which gifts should be preferred in the case of deficiency is futile. Her mind was not directed to that question. The law settles the order, in the absence of express intention, in which legacies and dispositions shall abate but the order depends upon the character or description of the legacy or disposition. The question in the present case is whether the provision in favour of the appellants amounts to a residuary bequest only or contains a particular bequest or pecuniary legacy. The judgment of *Napier* J. correctly defines the question and his Honor addressed his mind exclusively to it. The appeal, to my mind, was founded to a great extent upon arguments which departed from this question and set out upon a search for some indications of the testatrix's mind upon the order of priority which she desired or intended. I find myself in complete agreement with the judgment of *Napier* J. which deals very

(1) (1876) 2 Ch. D. 628.

(2) (1899) 1 Ch. 365, at p. 370.

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thoroughly with all the considerations which affect the true question and there is nothing which I could usefully add to his reasons. In my opinion the appeal should be dismissed with costs.

STARKE J. This appeal should be dismissed. A residuary legatee is not, as a general rule, entitled to anything until the particular legacies given by the will are satisfied in full. Legacies, of course, include annuities. And a mere enumeration of some particulars in a residuary bequest is not of itself sufficient to make the bequest specific. Thus, if a fund be set aside to pay annuities, and the will directs that upon the death of the annuitants the fund shall fall into the residue, then if the fund is insufficient to pay the annuities, the residuary legatee is entitled to nothing until all the legacies and the annuities have been paid in full.

In the case under appeal, the testatrix created a trust fund out of which she directed her trustees to set aside two sums of £10,000 and £8,000 upon certain trusts. The precise words of the testatrix, so far as they are necessary for a determination of the case, are as follows :—

"7. . . . I direct my trustees to set aside the sum of £10,000 upon trust to pay the income thereof to my husband . . . during his life . . . and from and after the death of my husband I direct that my trustees shall hold the said sum of £10,000 or until the said sum of £10,000 shall be set aside as hereinbefore provided the annual payment of £500 representing the same upon the trusts hereinafter declared by Clause nine of my will as altered by this codicil . . .

"8. Subject as hereinafter provided I direct my trustees out of the residue of the trust fund to set aside a sum of £8,000 upon trust to pay the income thereof to Moira Kathleen Byron . . . during her life.

"9. Subject to the trusts hereinbefore declared I direct that the said two funds of £10,000 and £8,000 or the annual payments representing the same respectively and the said residue of the trust fund and the income thereof shall be held by my trustees upon trust to pay the income thereof to my two sisters . . . in equal shares during their lives."

The husband of the testatrix died in 1932. In 1931 Moira Kathleen Byron had married one G. P. C. Gordon. The income received from the whole estate was only sufficient to pay to the husband of the testatrix the sum of £500 a year from November 1930 to his death, and it will now be insufficient to pay the sums of £500 and £400 a year respectively. The question is whether on the true construction of the will and codicil of the testatrix the two sisters of the testatrix are entitled to be paid, in priority to the payment of any sum to Mrs. Gordon, the sum of £500 a year which on the death of the husband of the testatrix was payable to them, or whether Mrs. Gordon is entitled to priority over the two sisters.

Napier J. in the Court below said, and I agree with him, that the question depends upon the true view of clause 9, " that is to say, when the £10,000 or the £500 mentioned in clause 7 comes to be given under clause 9 does it still retain its character as a distinct fund, set apart and given as such, to the sisters *nominatim* or does it lose its identity and pass to them merely as an item of the residuary estate ? " The learned Judge held that clause 9 constituted a residuary gift, and he relied upon the following, among several, indications in the will and codicil, for that conclusion : 1. The function of clause 9 was to gather up and dispose of the residue remaining after the trusts of clauses 7 and 8 were fulfilled. 2. Clause 9 purports to declare a single trust in respect of the whole trust fund, and the income therefrom, in whatever form the fund may be from time to time, and no reason exists for the retention of the £10,000 as a distinct and separate fund after the death of the husband of the testatrix. 3. The opening words of clause 9 " subject to the trusts hereinbefore declared " impress everything that passes under that clause with the trusts declared in clause 8. These indications satisfy me, too, that clause 9 is a residuary gift, and that the decision below in favour of Mrs. Gordon was right and ought to be affirmed.

DIXON J. If a bequest is, according to the true intention of the will, residuary in its character, the donee is necessarily the first to suffer the consequences of a deficiency of assets and, unless there be a special direction to the contrary, no general pecuniary legacy is required to abate for the purpose of contributing to the residuary

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bequest. When, therefore, the testator's estate is at first insufficient to answer in full the general legacies but it is increased by an accession of assets, or relieved by the falling in of an interest or fund given by the will, the benefit enures, not to the donee of residue, but to general legatees including, of course, annuitants (compare *In re Richardson*; *Richardson* v. *Richardson* (1)). The consequence is not affected by the circumstance that a fund which so falls in is the subject of a particular direction contained in the will that it shall form part of, sink into, or be held upon the trusts of, residue. For, if the intention appears that the bequest shall be residuary, it is inherent in its character that it shall operate only upon what is left after all general legacies have been satisfied, and any provision of the will, which puts a fund or assets otherwise severed from the estate into the category of residue, has the effect of exposing it to the claims of the general legatees. Three cases illustrate this application of the principle. In *Farmer* v. *Mills* (2), a testator by his will gave annuities to be secured by the investment of amounts sufficient for the purpose, and directed that as the annuitants should die these amounts should sink into and become part of the residue bequeathed by the will. His estate proved insufficient to answer the annuities in full. The question was whether upon the death of any annuitant the amount released should be available to the other annuitants or pass to the residuary legatees. The actual decision of this question turned upon a codicil, but Sir *John Leach* M.R. said (3): "If the case had rested upon the will, the residuary legatees could have taken no benefit, until the annuities were fully provided for." In *Arnold* v. *Arnold* (4) the testator bequeathed to beneficiaries the income for life from sums of £800 "the principal to devolve eventually to my residuary legatees." His estate was insufficient to pay the pecuniary legacies in full. Upon the cesser of the life interest in one of the sums of £800, the general legatees and the residuary legatees claimed the corpus thus made available. The Master of the Rolls (Sir *Charles Pepys*) said (5): "The question is, whether the testator meant to give the principal sums of £800 which were to provide for

(1) (1915) 1 Ch. 353, at p. 357.
(2) (1827) 4 Russ. 86; 38 E.R. 737.
(3) (1827) 4 Russ., at pp. 86-87; 38 E.R., at p. 737.
(4) (1835) 2 My. & K. 374; 39 E.R. 987.
(5) (1835) 2 My & K., at p. 378; 39 E.R., at pp. 988-989.

the life-interest of the annuitants, to the petitioners in their individual character, by a particular description, or whether he intended that the capital sums, after the decease of the annuitants, should fall into the residue of his estate." He decided that the principal became part of the residue and must answer the general pecuniary legacies. In *In re Tootal's Estate*; *Hankin* v. *Kilburn* (1), the testatrix gave annuities, directed the appropriation of investments out of the income of which the annuities should be paid, and, subject to the annuities, directed that principal and income should form part of her residuary estate: she bequeathed the residue of her estate including the fund set apart to answer the annuities, when and so soon as such annuities should cease, to her brother. The estate was at first insufficient to meet in full legacies and annuities which accordingly abated *pari passu*. But one of the annuitants died. Thereupon the residuary legatee claimed the fund set apart to answer that annuity. The Court of Appeal rejected his claim. *James* L.J. said (2):—"A pecuniary legatee, or an annuitant, must be paid in preference to the residuary legatee, who can take nothing till all the legatees and annuitants have been paid in full. It is true that a gift may be so worded as to make the annuitant tenant for life of a fund, the corpus being given over on his decease; but it is impossible to put such a construction on a gift of the residue, 'including the fund set apart to answer the annuity.' To say that what is included in the residue is something else than residue is contradicting the plain terms of the will. The residuary legatee is entitled to nothing till the annuitants have been paid in full."

The present appeal is brought from a judgment, which has construed a gift as altogether residuary in its character, with the result that the appellants, who are the objects of the gift, are postponed to the respondent who, under the terms of the will, should if the estate were sufficient for the purpose, receive the income of a fund of £8,000 to be set aside for her benefit. The dispositions upon which the appeal turns are contained in a will as altered by a codicil which adopts the course of directing express textual amendments of the will. The composite provisions from the will and codicil establish a trust fund which consists of the proceeds of

(1) (1876) 2 Ch. D. 628.

(2) (1876) 2 Ch. D., at p. 633.

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the sale, calling in, and conversion of the real and personal property of the testatrix after payment of debts, funeral, and testamentary expenses, legacies and death duties. The trustees are directed out of the trust fund to set aside £10,000 and to pay the income thereof to the husband of the testatrix for life and pending compliance with this direction to pay him £500 per annum. From and after his death, which in the event took place two years after the death of the testatrix, the trustees are directed to "hold the said sum of £10,000 or until the said sum of £10,000 shall be set aside as hereinafter provided the annual payment of £500 representing the same upon the trusts hereinafter declared by clause 9." Clause 9 contains the disposition which, in the judgment under appeal, *Napier* J. has construed as altogether residuary. The disposition in favour of the respondent is contained in clause 8. It commences with the words "subject as hereinafter provided" and directs the trustees "out of the residue of the trust fund to set aside a sum of £8,000 upon trust to pay the income thereof to" the respondent during her life and until compliance to pay her £400 per annum out of the residue of the income of the trust fund. It provides that, if the residue should not suffice for the whole sum of £8,000 or the whole annual sum of £400, then the residue of the trust fund, or of the income thereof, shall be held upon the same trusts as the £8,000, or the annual payment of £400. After the death of the respondent the trustees are to hold "the said sum of £8,000 or until the said sum of £8,000 shall be set aside as hereinbefore provided the annual payment of £400 for the time being representing the same . . . upon the trusts hereinafter declared in favour of my two sisters" the appellants and "my nephew . . . and the University of Adelaide." This reference is in fact to the trusts declared in clause 9. The critical portion of clause 9 is as follows: "Subject to the trusts hereinbefore declared I direct that the said two funds of £10,000 and £8,000 or the annual payments representing the same respectively and the said residue of the trust fund and the income thereof shall be held by my trustees upon trust to pay the income thereof to my two sisters in equal shares during their lives and upon the death of one of them then for the survivor." The clause proceeds to direct that after the death of the survivor, the trustees shall pay £10,000 to

the nephew of the testatrix contingently upon his attaining twenty-five years or surviving the testatrix by five years; and to make a substantial gift to any child or children he might leave if he died before the period of vesting. This sum of £10,000 is not the same sum as the fund to be set aside in favour of the husband. In default of its so vesting, the trustees are directed to pay it and "the whole of the residue of my estate including therein the two funds mentioned in this clause" to the University of Adelaide upon certain conditions, and if these conditions are not accepted, the trustees are to hold "all my estate which otherwise would have passed to the University of Adelaide" in trust for the next of kin of the testatrix. Neither of the sums of £10,000 and £8,000 has been, or can at present be, set aside and the income of the estate is insufficient to produce more than £500 per annum.

Upon these facts it is clear that the appellants are not entitled to receive the income of the trust fund, which has been liberated by the death of the husband of the testatrix, if the provisions of the will, particularly clause 9, operate to give them no more than a life interest in residue. If, however, they are constituted life tenants of a separate fund of £10,000 and, until it is set aside, annuities in respect of £500 per annum, they have an interest in the trust fund which is prior to that of the respondent. The question of construction was well stated by *Napier* J.: "When the £10,000 or the £500 . . . comes to be given under clause 9 does it still retain its character as a distinct fund, set apart and given as such, to the sisters *nominatim*, or does it lose its identity and pass to them merely as an item of the residuary estate?"

The first construction, that which makes clause 9 contain a gift of a particular fund of £10,000, or an annuity of £500, obtains support from the direction to the trustees after the death of the husband to hold the sum of £10,000, or until that sum is set aside, the annual payment of £500 representing the same upon the trusts thereinafter declared by clause 9. For, in the first place, it is expressed as if the sum must be set aside although the husband first dies, and, in the second place, in terms it does not consign the fund to residue, but requires that it shall be held upon trusts later to be expressed. The reference in clause 9 to "the annual payments

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representing the same," no doubt, strengthens the first of these grounds. Both considerations are true also of the £8,000 in clause 8, although the form of expression is not identical. The direct reference, however, to the two funds in clause 9, before the " residue of the trust fund " is mentioned, is consistent with either interpretation. The enumeration of particular things in a residuary gift is not sufficient to make the gift of things enumerated specific. See *Fielding* v. *Preston* (1); *In re Green*; *Baldock* v. *Green* (2). To make a distinction between an enumeration of particular things ending with a reference to residue, and a gift of residue including things particularly referred to, Lord *Cranworth* thought " would be introducing refinements that are much to be avoided " (3). The considerations which support a construction making the clause include a particular gift of the £10,000, or the £500 per annum, are opposed by a number of countervailing considerations. In the first place, it seems undeniable that, after the death of the survivor of the appellants, clause 9 requires the property with which it deals to be treated as one entire fund and disposes of it as a residue. The sum of £10,000 must be raised from it to answer the contingent gift and, if that gift fails, is given to the Adelaide University together with " whole of the residue of my estate including therein the two funds mentioned in this clause " *i.e.*, the £10,000 and £8,000. If this gift fails, " all my estate which would otherwise have passed to the University " goes to the next of kin. That these are ultimate residuary gifts does not admit of doubt. Yet the subject matter of the dispositions after the death of the appellants is the same as that of the gift to them for life. Then the words introducing clause 9 " subject to the trusts hereinbefore declared " naturally suggest that all the preceding trusts take priority of clause 9. This interpretation of them gains much strength from the character of the gifts of corpus contained in clause 9, which include a gift to charity and an alternative gift to next of kin. No one would suppose that these were to take any priority to the fund of £8,000 devoted to securing the annuity to the respondent. The funds of £10,000 and £8,000 are primarily created to answer the claims of the husband and of

(1) (1857) 1 De G. & J. 438; 44 E.R. 793.

(2) (1888) 40 Ch. D. 610, at pp. 618-619.

(3) (1857) 1 De G. & J., at p. 445; 44 E.R., at p. 795.

the respondent and no substantial reason for preserving them as separate funds after the cesser of these annuities appears to exist. The expressions adopted by the will, when it becomes necessary to deal with either of these funds or the income thereof in connection with the residue, exhibit much variation and the variation seems to be accidental. The cesser clause by which the husband's interest is protected against voluntary or involuntary alienation directs that surplus income shall " sink into and be applied as part of the income of the residue of the trust fund." In the gift to the University the expression is " the whole of the residue of my estate including therein the two funds." It is difficult to suppose that the expression in the earlier part of clause 9 " the said two funds . . . or the annual payments representing the same respectively and the said residue of the trust fund " have any different meaning.

In my opinion, this expression operates to make a residuary disposition and nothing else. I agree with the judgment of *Napier* J.

I think the appeal should be dismissed with costs.

EVATT J. In this case I entirely agree with the judgment and reasons for judgment of *Napier* J., and think that the appeal should be dismissed.

MCTIERNAN J. The testatrix describing the residue of her estate remaining after payment of certain pecuniary legacies and debts as the " trust fund," by clause 7 of her will directed her trustees to set aside out of this fund the sum of £10,000 and to pay the income thereof to her husband for life. Until it was convenient or advantageous to the trust fund to set aside such sum, the trustees were directed to make an annual payment of the sum of £500 to him during his lifetime. After his death she directed that the sum of £10,000, or until it was set aside, the annual payment of £500 representing the same should be held upon the trusts declared by clause 9 of her will as altered by her codicil. The sequence of the provisions of the will will be observed by not going immediately to clause 9. The testatrix next wrote a defeasance clause affecting her husband's life interest. She directed that, in the event of her

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husband attempting to alienate his life interest or being bankrupt, the trustees were to hold the sum of £10,000 or the annual payment of £500 representing the same, upon trust to apply in their discretion the whole or part of the income of the said sum, or of the annual sum representing the same for the maintenance or benefit of the husband. What was not disposed of under this discretionary power, the testatrix directed should sink into and be applied as part of the income of the residue of the trust fund. Any income which was not disposed of by the trustees under that discretionary power became available, as will appear from a perusal of the direction in favour of the respondent, Mrs. Gordon, to satisfy her interest. The provision made for her is contained in clause 8 of the will. The measure of this provision is now in question. Clause 8, so far as it is material to be set out, is in these terms "Subject as hereinafter provided I direct my trustees out of the residue of the trust fund to set aside a sum of £8,000 upon trust to pay the income thereof to Moira Kathleen Byron of Glenelg aforesaid married woman during her life . . . and . . . until . . . it shall be convenient and advantageous to the trust fund to set aside the sum of £8,000 as hereinbefore provided, my trustees shall out of the residue of the income of the trust fund pay to the said Moira Kathleen Byron the sum of £400." The donee of this life interest is Mrs. Gordon, the respondent. After her death the trustees were directed to hold the sum of £8,000, or until it was set aside, the annual payment of £400 upon the trusts declared in favour of the appellants who are sisters of the testatrix, her nephew, and the University of Adelaide. These trusts are declared in clause 9 of the will. Before declaring these trusts, the testatrix provided against the contingency of the residue of the trust fund remaining after her husband's life interest was satisfied, not being sufficient to satisfy the trusts in favour of Mrs. Gordon. The testatrix declared that, in the event of this residue not being sufficient to permit the trustees to set apart a sum of £8,000 or the residue of the income of the trust fund not being sufficient to permit them to make the annual payment of £400, they should hold the residue of the trust fund or the residue of the income of the trust fund, as the case may be, upon the same trusts

as she had declared concerning the sum of £8,000 or the annual payment of £400. Those trusts, as already mentioned, provided for the payment of the income of the sum of £8,000 or an annual sum of £400 to Mrs. Gordon. The next clause of the will, as altered by the codicil, that is clause 9, declared the following trust in favour of the appellants. "Subject to the trusts hereinbefore declared I direct that the said two funds of £10,000 and £8,000, or the annual payments representing the same respectively and the said residue of the trust fund and the income thereof shall be held by my trustees upon trust to pay the income thereof to my two sisters in equal shares during their lives and upon the death of one of them for the survivor." After the death of the survivor the testatrix directed the trustees to hold that part of the estate described in clause 9 out of which the sisters' life interest was given upon trust to pay the sum of £10,000 to her nephew if he survived her for a period of five years or attained the age of twenty-five years, whichever first happened, and if neither event happened and subject to certain contingencies upon trust to the University of Adelaide. The testatrix concluded with a direction to her trustees to hold the whole of the residue of her estate including therein the two funds mentioned in clause 9 upon trust to pay the sum of £10,000 to the University of Adelaide subject to a number of conditions which are enumerated.

The testatrix died in November 1930 and since her death the annual income of the estate has not exceeded £500. Her husband died in December 1932. The income of the estate was adequate to satisfy the direction to pay the husband £500 out of the income of the trust fund. The appellants now claim that, under the trusts declared by clause 9, that is to say, the trusts upon which the testatrix declared that the sum of £10,000 or the annual payment of £500 representing the same should be held after her husband's death, they are entitled in succession to him to the income of the said sum of £10,000 or the annual payment of £500 representing the same. On the other hand it is contended on behalf of Mrs. Gordon that the provision in favour of the appellants is directed to be made out of the residue of the trust fund after setting aside the sum of £8,000,

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or if this sum is not set aside, out of the residue of the income of the trust fund after the annual payment of £400 has been made to her as directed by clause 8. In fact, neither the sum of £10,000 nor £8,000 was set aside. If this latter contention is right Mrs. Gordon is entitled to be paid in priority to the appellants. *Napier* J. held, that upon the true construction of the will, Mrs. Gordon is so entitled.

The scheme which the will discloses was a gift to the husband of a life interest out of the residue of the estate, called the trust fund, and a gift to the respondent, Mrs. Gordon, of a life interest out of the residue of the trust left after providing for the husband. Stopping there it may be noted that the testatrix expressly provided that, in the event of the residue of the trust fund being insufficient to permit the trustees to set aside a sum of £8,000, the income of which was directed to be paid to Mrs. Gordon, or to make the annual payment of £400 to her, the trustees were directed to hold the residue of the trust fund or the residue of the income thereof, as the case may be, on the same trusts as were disclosed concerning the sum of £8,000, or the annual payment of £400. Under these trusts Mrs. Gordon became entitled to a life interest out of the residue of the trust fund. Proceeding with the scheme of the will. After the trust fund was charged with the husband's life interest, and the residue of it with Mrs. Gordon's life interest, the will, as altered by the codicil, directs that the income of that part of the estate which was expressed to embrace the " said two funds of £10,000 and £8,000 or the annual payments representing the same respectively and the said residue of the trust fund and the income thereof " should be paid to the appellants, for life and after the death of one of them to the survivor for life.

Upon the true construction of the will and codicil, the appellants do not, in my opinion, take anything until both the husband's and Mrs. Gordon's interests respectively have been fully satisfied. Indeed it is necessary for the success of the appellants' submission, namely, that they are entitled to be paid out of the income of the estate in priority to Mrs. Gordon, that the intention of the testatrix should have been to give them the income of a specific sum of

£10,000 in succession to her husband's life interest. Their claim is in effect that they are entitled to the income of the specific sum directed to be set aside to satisfy the husband's life interest, or in the alternative to the annual payment of £500 which was directed to be made to them.

The will does not, in my opinion, exhibit an intention to give the appellants the income of a specific fund. The life interest in favour of them, or the survivor of them, is, in my opinion, charged upon whatever part of the estate remains after Mrs. Gordon's life interest is fully satisfied. I agree with *Napier* J. in the view that clause 9 "operates upon anything that is not required to satisfy the trusts in the preceding clauses." Continuing his judgment his Honor said "I think that the next thing is to examine in detail the language of clause 9, and the first observation I feel inclined to make on that clause is that it purports to declare a single trust in respect of the whole of the trust fund and the income therefrom in whatever form the fund may be from time to time, subject only to the trusts declared in the preceding clauses. I can find in clause 9 no reason for the retention of the £10,000 as a distinct and separate fund after the death of the husband. It is true that when the sisters die the sum of £10,000 is given to the nephew, but I see no justification for the view that the nephew is to receive either more or less than that exact sum. If a fund of £10,000 is set apart and held for a period of years, as the will contemplates, then at the end of that period the fund is likely to be worth either more or less than the exact sum that was invested. I see no reason to think that the nephew was intended to suffer by depreciation or to gain by appreciation of the fund set apart and held for the husband, and still less by depreciation or appreciation whilst the investments are retained during the lives of the sisters. Another point to be noticed is that in disposing of the final residue to the University of Adelaide the same or a similar form is used as in the opening passage of the clause containing the gift to the sisters. The expression used at the end of the clause is 'the whole of the residue of my estate including therein the two funds mentioned in this clause.' Now the £10,000 given to the nephew is the subject of a particular gift over. It follows that the necessary inference from the language of the final gift is that the

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nephew's £10,000 is not the same fund as the husband's £10,000, and I think that the fair inference is that the husband's £10,000 sinks into and passes as an item of the residue." That statement, in my opinion, correctly interprets the intention of the testatrix.

The judgment appealed from was, in my opinion, right, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *Gordon Cathcart Campbell.*

Solicitors for the respondents, *Baker, McEwin, Ligertwood & Millhouse.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

JOSEPH . . . . . APPELLANT;
PLAINTIFF,

AND

SWALLOW AND ARIELL PROPRIETARY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 11.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Negligence—Contributory negligence—Last opportunity—Young child running across road unattended—To what extent young child capable of negligence.

The plaintiff, a child five years and nine months old, was running across a street unattended when he was knocked down by a motor truck and injured. In an action against the owner of the truck for the negligence of his servant, the driver, the defendant pleaded contributory negligence on the part of the plaintiff, and the driver gave evidence that he first saw the plaintiff when the latter was about four yards away from the truck and it was too late to avoid