H. C. OF A. 1934.

DONALDSON v. FREESON.

Appeal allowed. Order of Supreme Court of New South Wales in Full Court discharged. Order of Long Innes J. restored. Respondent to pay costs of this appeal and of appeal to Supreme Court of New South Wales in Full Court.

Solicitor for the appellants, *E. R. Stack*, Wingham, by *J. G. Nicholas.*

Solicitors for the respondent Freeson, *Smithers, Warren & Lyons.*

J. B.

[HIGH COURT OF AUSTRALIA.]

HOURIGAN . . . . . APPELLANT;
PLAINTIFF,

AND

THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED AND OTHERS . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1934.

MELBOURNE, *May* 11, 23.

SYDNEY, *Aug.* 3.

Rich, Starke and Dixon JJ.

Will—Trust—Gift to widow to educate and provide for children—Effect—Widow entitled to beneficial interest subject to educating and providing for children—Account—Whether donee liable to account.

Laches—Delay—Acquiescence—Statutes of Limitations—Property Law Act 1928 (*Vict.*) (*No.* 3754), *secs.* 276, 296-299—*Supreme Court Act* 1928 (*Vict.*) (*No.* 3783), *secs.* 62, 82 (1) (c) (iii.), (iv.), (v.)—*Trustee Act* 1928 (*Vict.*) (*No.* 3792), *sec.* 67.

By his will the testator devised and bequeathed all his real and personal estate to his wife "to be disposed of by her as follows A sum of five hundred pounds stg. to be paid to each one of my six daughters on the completion of the twentieth year of each one respectively . . . The residue of my property to be vested in . . . my wife to be used by her at "discretion" in educating and providing for my two sons."

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Held, by *Rich* and *Dixon* JJ. (*Starke* J. dissenting), that the will conferred upon the testator's wife a beneficial interest in the residue, subject to a trust or charge to educate and provide for her sons as in her discretion seemed proper.

Per Dixon J.: Prima facie in such circumstances the testator's wife took subject to no liability to account provided that she discharged the duty of educating, maintaining and supporting the children adequately.

The residue of the estate of the testator, who died in 1873, included two shops. In 1895 the appellant, who was a son of the testator and who had been admitted to practice as a solicitor, prepared a conveyance from his father's executor to his mother of the two shops, the conveyance reciting the devise in the testator's will to his wife. The testator's widow died in 1917. In 1932 an originating summons was issued on which it was declared that the testator's widow took the residue of her husband's property as trustee upon trust to use the same at her discretion in educating and providing for the two sons named in her husband's will. Subsequently, in 1932, the appellant commenced an action in the Supreme Court of Victoria claiming an account of the testator's estate and a declaration that, as the survivor of the two sons, he was beneficially entitled under the testator's will to the two shops.

Held, by the whole Court, that the appellant's claim was not barred by any statute of limitations, but, by *Rich* and *Dixon* JJ. (*Starke* J. dissenting), that, having regard to the lapse of time, the circumstances of the case and the nature of the relief claimed and the necessity of taking an account, the appellant's rights, if any such had existed, were barred by laches, acquiescence and delay.

Order of the Supreme Court of Victoria (*Mann* J.) discharged.

Decision of the Supreme Court of Victoria (*Macfarlan* J.): *Hourigan* v. *Trustees Executors and Agency Co. Ltd.*, (1933) V.L.R. 470, reversed.

APPEAL from the Supreme Court of Victoria.

On 28th December 1873, Denis Hourigan of Moorabool Street, Geelong, grocer, died leaving a will in the following terms:— "I Denis Hourigan do hereby will and bequeath all my property real and personal to my wife Honora Hourigan to be disposed by her as follows A sum of five hundred pounds stg. to be paid to each one of my six daughters on the completion of the twentieth year of each one respectively namely Winnifred (1) Maria (2) Anastasia (3) Cecily (4) Honora (5) Catherine (6). The residue of my property to be vested in the said Honora Hourigan my wife to be used by her at discression [*sic*] in educating and providing for my two sons

namely Richard and Patrick. I hereby appoint the Vnble. Archdeacon Slattery of Saint Mary's Geelong executor of this my last will." Probate of the will was granted to the executor named therein.

The testator left him surviving a widow, six daughters whose ages ranged from sixteen years to three years, and two sons, the plaintiff appellant, Richard Edward Hourigan, then aged four years, and Patrick James Hourigan, then aged one year.

Honora Hourigan, the widow of Denis Hourigan, died on 31st October 1917 leaving a will and codicil, whereby she appointed James Ernest Piper, Edward Lawrence Gleeson and the Trustees Executors and Agency Co. Ltd. as her trustees and executors. In 1932 the trustees of Honora Hourigan's will issued an originating summons to have a number of questions determined arising in the administration of her estate. One of the questions asked by such summons was the following :—" 15. On the proper construction of the will of Denis Hourigan, the husband of the testatrix, did the testatrix take the residue of the testator's property under the said will beneficially or as a trustee, and, if as a trustee on what trusts ? " The originating summons was heard by *Mann* J. who answered the question as follows :—" 15. On the proper construction of the will of Denis Hourigan, the husband of the testatrix, the testatrix took the residue of his property as a trustee upon trust to use the same at her discretion in educating and providing for the two sons named in the will." On the hearing of this originating summons neither the estate of Denis Hourigan, nor that of Patrick James Hourigan, who was then dead, was represented and one of the executors of Honora Hourigan was not a party.

Subsequently, on 1st October 1932, the appellant, Richard Edward Hourigan, issued a writ in the Supreme Court of Victoria against the Trustees Executors and Agency Co. Ltd. and James Ernest Piper, the surviving executors of Honora Mary Hourigan, and Sir John Grice, as a trustee appointed in place of James Ernest Piper, who had been discharged as a trustee. Mary Teresa Forbes was added at the trial as a defendant to represent the next of kin of Patrick James Hourigan deceased. The plaintiff claimed two shops situate at 170 and 188 Moorabool Street, Geelong, which formed part of his

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

father's estate, and also a shop situate at 176 Moorabool Street, Geelong, bought by his mother in 1890 allegedly out of moneys forming part of the residue of his father's estate, and also the Queen's Head Hotel, situate in Ryrie Street, Geelong, purchased in 1894 by his mother allegedly out of moneys forming part of the residue of his father's estate. The plaintiff claimed administration of the trusts of the estate of Denis Hourigan deceased, an account of the said estate, a declaration that the plaintiff was beneficially entitled to the above-mentioned properties, a transfer of the properties to the plaintiff, and such further and other relief as to the Court might seem proper.

The action was heard by *Macfarlan* J. who decided (1) that the plaintiff took an undivided half share in the two shops as tenant in common with his deceased brother, Patrick James Hourigan; (2) that he must recoup the amount of a mortgage given in 1930 over the property at 170 Moorabool Street and raised for the purpose of partially rebuilding the premises in circumstances amounting to salvage and any further sum reasonably expended in the repair and reinstatement of the building and certain other minor expenditure; (3) that he was entitled to an account of rents for six years only; (4) that he had not established that the additional shop or the hotel was bought out of the moneys forming part of the residue of the estate of Denis Hourigan; (5) that the trustees must refund commission charged on the rents of the two shops during the preceding six years; (6) and that the plaintiff was not entitled to any other relief: *Hourigan* v. *Trustees Executors and Agency Co. Ltd.* (1).

From the decree embodying and working out this decision the plaintiff now appealed to the High Court and the trustees of Honora Hourigan cross-appealed.

Further facts appear in the judgments hereunder.

Hogan (with him *Fazio*), for the appellant. The appellant and Patrick James Hourigan took joint interests under the will of Denis Hourigan, and the appellant is entitled to the residue of his father's estate. He is entitled to an account from the estate of Honora Hourigan of such residue which Honora Hourigan used for her own

(1) (1933) V.L.R. 470.

benefit. The onus of proof lay on the trustee to show that the Queen's Head Hotel and No. 176 Moorabool Street, Geelong, were bought out of moneys belonging to Honora Hourigan and not to Denis Hourigan's estate. Nos. 170 and 188 Moorabool Street are properties still retained by the trustee of Denis Hourigan's estate, and 176 Moorabool Street is either property still retained by the trustee or represents proceeds of the sale of trust property received by the trustee and converted to her own use. The action was commenced on 1st October 1932, namely, less than fifteen years from the death of Mrs. Hourigan, and, therefore, the claim is not barred by statute of limitations. Laches did not operate against Richard Hourigan, because he did not have any knowledge of his rights. The appellant is entitled to the benefit of the improvements effected to No. 170 Moorabool Street. If A expends money on the land of B believing that it is A's own land, B also believing that it is A's own land, and it afterwards turns out that the land belongs to B, B is entitled to the land with the improvements thereon. The account of the rents and profits should go back at least to the death of Mrs. Hourigan, and not only for six years. The judgment of *Mann* J. is binding, because it is a decision given in a matter in which the estate of Honora Hourigan on the one side, and Richard Hourigan on the other was represented (*Roscoe's Evidence in Civil Actions*, 19th ed. (1922), p. 169). On the death of Patrick James Hourigan, he ceased to have any interest in the property, because the interest of Patrick and the appellant was joint and not in common. *Macfarlan* J. was wrong in holding that the interest was held in common (*Young* v. *Holloway* (1)).

Sholl, for Mary T. Forbes. The interest of Patrick is the same as that of Richard. The order of *Mann* J. is correct, and they take as tenants in common as was held by *Macfarlan* J.

Fullagar K.C. (with him *Ellis*), for the Trustees Executors and Agency Co. Ltd. and John Ernest Piper and Sir John Grice. Mrs. Hourigan took the residue of the testator's estate as trustee on trust to use it at her discretion to educate and provide for her two sons.

(1) (1895) P. 87.

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Having properly provided for them she held beneficially for herself, without any obligation to account (*Hamley* v. *Gilbert* (1); *Hadow* v. *Hadow* (2); *Gilbert* v. *Bennett* (3); *Leach* v. *Leach* (4); *Browne* v. *Paull* (5); *Manning* v. *Federal Commissioner of Taxation* (6)).

[DIXON J. referred to *Countess of Bective* v. *Federal Commissioner of Taxation* (7).]

The trust is not for a person but for a purpose and so long as that purpose is fulfilled, there is no further obligation in spite of the word "trust" having been used. In such cases the Court contemplates that the donee and the children will reside together. A gift subject to annuities requires but little to establish a beneficial interest in the primary donee, a description of the party's relationship as wife or sister being sufficient (*King* v. *Denison* (8); *In re Foord*; *Foord* v. *Conder* (9)). The judgment of *Mann* J. creates no estoppel. In the originating summons the estates of Denis Hourigan and Patrick James Hourigan were not represented, nor was J. E. Piper, who resigned in 1926, represented.

Hogan, in reply. The declaration of *Mann* J. excludes any beneficial interest in Mrs. Hourigan. A gift to provide for children out of a fund is to be distinguished from a gift to use the whole fund for that purpose (*In re Coleman*; *Henry* v. *Strong* (10)). The discretion imposed upon Mrs. Hourigan required her to bestow the whole property upon her surviving son (*In re Johnston*; *Mills* v. *Johnston* (11)).

Fullagar K.C., in reply on cross-appeal. Mrs. Hourigan was entitled absolutely after complying with the trust to educate and provide for her two sons (*Mackett* v. *Mackett* (12); *Pilcher* v. *Rawlins* (13)). The very fact that the question arises whether the tenancy is joint or in common shows that a charge and not a trust was intended. The testator is really putting his widow in the same place that he would

(1) (1821) Jac. 354; 37 E.R. 885.
(2) (1838) 9 Sim. 438; 59 E.R. 426.
(3) (1839) 10 Sim. 371; 59 E.R. 658.
(4) (1843) 13 Sim. 304; 60 E.R. 118.
(5) (1850) 1 Sim. (N.S.) 92; 61 E.R. 36.
(6) (1928) 40 C.L.R. 506.
(7) (1932) 47 C.L.R. 417, at pp. 418, 420.
(8) (1813) 1 V. & B. 260, at p. 272; 35 E.R. 102, at p. 106.
(9) (1922) 2 Ch. 519.
(10) (1888) 39 Ch. D. 443.
(11) (1894) 3 Ch. 204.
(12) (1872) L.R. 14 Eq. 49.
(13) (1872) 7 Ch. App. 259.

have occupied had he lived. It would not be equitable to grant the plaintiff the relief he seeks, for if an account had been taken in 1890 when he attained twenty-one it would be found that the amount spent on his education and support would have equalled or exceeded the amount of the value of his share (*In re Evans*; *Welch* v. *Channell* (1)). The plaintiff's claim is also barred by statute of limitations (*Property Law Act* 1928, secs. 276, 296). And even if the plaintiff's claim is not barred by statute, it would in the circumstances of this case be barred in equity owing to the plaintiff's standing by and delay (*Bright* v. *Legerton* (2) ; *McDonnel* v. *White* (3)). The considerations which apply are not only the length of time that has elapsed, but also the alteration in circumstances, and the plaintiff's state of knowledge (*Lindsay Petroleum Co.* v. *Hurd* (4) ; *Erlanger* v. *New Sombrero Phosphate Co.* (5) ; *Stafford* v. *Stafford* (6) ; *Pullen* v. *Ready* (7) ; *Stone* v. *Godfrey* (8)). A Court of equity would regard this case in the light in which it would regard a family arrangement (*Clifton* v. *Cockburn* (9) ; *Gregory* v. *Gregory* (10)). This is a tenancy in common (*In re Dunn* ; *Carter* v. *Barrett* (11)).

Cur. adv. vult.

Aug. 3.

The following written judgments were delivered :—

RICH J. In this matter we are called upon to construe a non-technical will which is as follows :—" I Denis Hourigan do hereby will and bequeath all my property real and personal to my wife Honora Hourigan to be disposed by her as follows A sum of Five hundred pounds stg. to be paid to each one of my six daughters on the completion of the twentieth year of each one respectively namely Winnifred (1) Maria (2) Anastasia (3) Cecily (4) Honora (5) Catherine

(1) (1884) 26 Ch. D. 58.
(2) (1860) 2 DeG. F. & J. 606, at pp. 616, 617 ; 45 E.R. 755, at pp. 759, 760.
(3) (1865) 11 H.L.C. 570, at pp. 578, 579 ; 11 E.R. 1454, at pp. 1458.
(4) (1874) L.R. 5 P.C. 221, at p. 239.
(5) (1878) 3 App. Cas. 1218, at pp. 1278, 1279.
(6) (1857) 1 DeG. G. & J. 193, at p. 202 ; 44 E.R. 697, at p. 701.
(7) (1743) 2 Atk. 587, at p. 591. 26 E.R. 751, at p. 753.
(8) (1854) 5 DeG. M. & G. 76, at p. 90 ; 43 E.R. 798, at p. 804.
(9) (1834) 3 My. & K. 76, at pp. 97, 100, 101 ; 40 E.R. 30, at pp. 37 and 39.
(10) (1815) Coop. G. 201 ; 35 E.R. 530.
(11) (1916) 1 Ch. 97.

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Rich J.

(6). The residue of my property to be vested in the said Honora Hourigan my wife to be used by her at discression [*sic*] in educating and providing for my two sons namely Richard and Patrick. I hereby appoint the Vnble. Archdeacon Slattery of Saint Mary's Geelong executor of this my last will."

Some time after the death of testator's widow this will was the subject of a question in an originating summons filed in connection with the administration of her estate. This summons was defective for want of parties and the answer to the question is incomplete and inconclusive. At a later date the plaintiff brought an action for the administration of the estate of the testator, Denis Hourigan. In that action the primary Judge, founding on the answer to the question in the originating summons, decided that the plaintiff took an undivided half share in certain real estate as tenant in common with his brother Patrick James Hourigan deceased and made other declarations and orders which are the subject of the appeal and cross-appeal in this case. In order that this Court might deal more effectually with the matter special leave was given to appeal from the declaration made in the originating summons and an order was made adding the administrator of the estate of Patrick James Hourigan as a party to the action. This appeal and the original appeal and cross-appeal were then heard together.

The contending claims of the parties are, for the plaintiff, that he took the residue under testator's will as a joint tenant with his deceased brother, for the trustees, that the widow took the residue subject to a charge for the education and maintenance of testator's sons. The whole tenour of the will indicates an intention on the part of the testator that his widow should take beneficially. In dealing with cases of this character " the Court is prepared to hold that there is a beneficial gift to the first taker on slight expressions and indications of intention " (*In re Foord*; *Foord* v. *Conder* (1)). The bequest is to the wife in the first place and if it stopped there it would be absolute to her (cf. *Robinson* v. *Tickell* (2)); but the will goes on to direct the payment of definite sums to testator's daughters at a definite time. The residuary clause is expressed in different language. The residue is to be vested in his wife. The

(1) (1922) 2 Ch. 519, at pp. 521, 522. (2) (1803) 8 Ves. Jun. 142; 32 E.R. 307.

word " vested " is not used in any technical sense. It means that the widow was to take and hold the residue not as in the case of the daughters subject to precise pecuniary obligations but the testator desired her to use it at her discretion in educating and providing for his sons. Testator intended his widow to take the residue beneficially and to impose on her the burden of maintaining and educating the sons out of it (*Gilbert* v. *Bennett* (1)). It was a gift to her subject to a charge (*Countess of Bective* v. *Federal Commissioner of Taxation* (2), where the authorities are collected).

In the Supreme Court of Victoria a different interpretation was placed upon the will. But, whatever rights the plaintiff upon that construction might in due time have established, he has long slept over them. He was fully acquainted with all the facts, and his delay and acquiescence are fatal to him. The plaintiff was born in 1869. His father died on 28th December 1873. His will was proved and duly administered. Prior to 10th April 1895 the plaintiff's mother had paid to her daughters the legacies bequeathed to them by their father's will. The plaintiff was educated and provided for by his mother. Apparently after completing his school education in Victoria he went to Adelaide where he served his articles to a solicitor. In 1893 he took a degree at the Adelaide University and in the same year was admitted to practice in South Australia. He was also admitted to practice in Victoria, and, in 1895 at the date of the conveyance presently to be mentioned, he was acting as clerk in the office of the executor's solicitor in Geelong, Victoria. He also practised in Western Australia, where he was made bankrupt in 1913. In 1895 in his capacity as solicitor's clerk he prepared a conveyance to his mother by the executor in whom the real estate devised by his father's will was vested. The conveyance, after reciting the devise to his widow of all testator's real and personal estate subject to the payment of certain legacies to each of his six daughters and that his widow had paid to each of the legatees the amount so bequeathed, proceeds to convey to the widow in consideration of such devise the real estate in question. The effect of the conveyance was to convey to the plaintiff's mother the beneficial

(1) (1839) 10 Sim. 371; 59 E.R. 658.

(2) (1932) 47 C.L.R. 417, at pp. 419, 420.

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Rich J.

as well as the legal interest in the real estate. When the plaintiff submitted this conveyance to the executor for execution the plaintiff's evidence is that the executor at "first refused to sign stating that it was father's intention in his will that those properties should belong to me and my brother; that was his intention. I said to him: 'That may have been father's intention but you did not so express it in the will.' He said: 'Your mother knew well that those properties were to be yours and your brother's.'" "I thought," said the plaintiff," on reading the will that may have been father's intention but that Archdeacon Slattery when he wrote out the will did not express it properly." The plaintiff, in answer to the question, "Were you satisfied then, once and for all, that no claim could be made on your behalf under the will?," answered: "I was, at the time I had that conversation, and before it too. Everything was devised to my mother subject to certain payments to my sisters. That was how I read the will." Upon this testimony the then state of the plaintiff's mind as to the question which he now seeks to raise can admit of no doubt. Although acting as a clerk (conveyancer) he was a fully qualified solicitor. He had his father's will in his possession —a document brief enough to attract his study. His mother had given it a construction in which others had concurred, the executor, an educated man, had given it another. The terms of the document are susceptible of each construction although I reject them both. It was the plaintiff's duty as a conveyancer, and this duty he did not omit, to consider the meaning of the will for the purposes of the conveyance. The terms in which he recited the will show that he adopted his mother's construction—a construction which he stated to the executor. No one could have supposed the effect of the will to be beyond dispute. Having the problem it raised distinctly put before him, at a time when the distribution of the estate fell to be made in terms of the will, he resolved to raise no question and to concede without dispute the correctness of his mother's position. By so doing he encouraged her to conduct her affairs, including the making of her testamentary dispositions, on the footing that the property was hers. Without the slightest doubt or misgiving as to her ownership she derived and spent the income and treated the property itself as the subject of the specific devises by which she

intended to provide for two of her daughters and their families. There can be no doubt that if she had had reason to suspect that these devises would be ineffectual she would have made in her will some other provision for these beneficiaries. During her life she furnished the plaintiff with sums of money the amount of which, however, he disputes. If he had asserted the rights he now sets up, it may be doubted whether her attitude to him in this respect would have been the same. After her death her executors administered her estate on the footing that the property was hers, and upon this footing the life-tenants mortgaged one of the properties to raise the means for its restoration and repair. The subject matter of the disputed provision is not specific property alleged to have been specifically devised or bequeathed. It is a residue. To ascertain its extent accounts would have been necessary. In these accounts the mother would have been entitled to charge all sums of money expended upon the plaintiff for his maintenance, education, support and provision in life. What she so spent is now impossible of ascertainment. In her will, which is not admissible evidence to prove the fact, she says it amounted to £7,000. Further, the net residue as at testator's death would consist of the balance after deducting legacies, and the expenditure on the deceased son is chargeable against that balance. At this date an account is hopeless. The transaction might be considered past and closed when the conveyance was made. Upon that footing his mother proceeded in arranging her affairs. After 37 years have elapsed from his decision to concede that the property was his mother's he now seeks to subvert all these arrangements. To do this he resorts to a Court of equity. This inequitable claim he supports upon the ground that no laches and acquiescence can answer an express trust and although he did not so think himself, he says he has now discovered that his mother is an express trustee. His contention overlooks some important qualifications of the generality upon which he relies. If a party in a position to claim an equitable right which is not undisputed lies by and acts in such a way as to lead to the belief that he has no such claim, or will not set it up, and thus encourages the party in possession to so deal with his own affairs that it would be unfair to him and to others claiming under him to tear up the

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Rich J.

transactions and go back to the position which might originally have obtained, the Court of equity will not, even where the claim is that an express trust is created, disregard the election of the party not to institute his claim and treat as unimportant the length of time during which he has slept upon his rights and induced the common assumption that he does not possess any. In *Blake* v. *Gale* (1), *Bowen* L.J. said :—" When we find that a long time has elapsed during which the right has never been insisted upon, and when neither the Statute of Limitations applies, nor can the analogy of the statute be invoked according to the well known way in which Courts of equity occasionally invoke it, what have we to do ? We have to look at the delay which has taken place, coupled with the circumstances under which it has taken place, in order to see whether or not the true inference to be drawn from such delay under such circumstances is that the party claiming the right either agreed to abandon or release his right, or else has so acted as to induce the other parties to alter their position on the reasonable faith that he has done so. If that is the inference to be drawn, the claim will, for the purpose of quieting possession, be treated as abandoned." (See also *Clarke and Chapman* v. *Hart* (2), a case of partnership; *Archbold* v. *Scully* (3) ; *Brooks* v. *Muckleston* (4) ; *Rochefoucauld* v. *Boustead* (5) ; *Kent* v. *Jackson* (6)).

The appeal from the declaration on the originating summons and from the judgment in the action should be allowed and the action dismissed. Owing to the general confusion throughout this litigation, all parties should be allowed their costs out of the estate of Mrs. Hourigan.

STARKE J. Denis Hourigan, who died in 1873, made a will in the following terms : " I Denis Hourigan do hereby will and bequeath all my property real and personal to my wife Honora Hourigan to be disposed by her as follows A sum of Five hundred pounds stg. to be paid to each one of my six daughters. . . . The residue

(1) (1886) 32 Ch. D. 571, at p. 581.
(2) (1858) 6 H.L.C. 633, particularly at p. 670 ; 10 E.R. 1443, at p. 1458.
(3) (1861) 9 H.L.C. 360, particularly at pp. 371, 383 ; 11 E.R. 769, at pp. 773, 778.
(4) (1909) 2 Ch. 519, at p. 523.
(5) (1897) 1 Ch. 196, at p. 210.
(6) (1851) 14 Beav. 367, at p. 384 ; 51 E.R. 328, at p. 334.

of my property to be vested in the said Honora Hourigan to be used by her at discression [*sic*] in educating and providing for my two sons namely Richard and Patrick." Probate of this will was granted in 1874 to the executor named therein, Archdeacon Slattery. The testator died seised or possessed of certain real and personal property sworn not to exceed £4,812. The real estate owned by the testator at his death included certain properties known as No. 170 and No. 188 Moorabool Street, Geelong, and also another property in Geelong upon which an hotel was erected.

It is not disputed that the daughters were paid the legacies given to them by the will. The two sons were but a few years old when their father died. Patrick died about 1889, an infant and unmarried. It is not disputed that the mother, Honora Hourigan, maintained, educated and provided for Patrick Hourigan during his life. Richard Hourigan was also maintained and educated by his mother; he became a solicitor. In her will, the mother declared that she had disbursed, in and about his scholastic and professional education and career and in payment of his debts, upwards of £7,000, and Richard himself admits that she disbursed on his account some £1,400 or £1,500. It would seem that the mother used the rents of the properties already mentioned, which formed part of the estate of her husband, in educating and providing for her sons, and also means of her own which she possessed. The hotel property was sold about 1890, apparently, by Honora Hourigan, but how and in what manner she acquired and made title does not appear from the evidence. In 1895 the executor, Archdeacon Slattery, conveyed the properties known as No. 170 and No. 188 Moorabool Street, Geelong, to Honora Hourigan "in consideration of the devise under the will of the said Denis Hourigan to the said Honora Hourigan." She died in 1917, and probate of her will and of a codicil thereto was granted to the executors named therein—the Trustees Executors and Agency Co. Ltd., Edward L. Gleeson, and James Ernest Piper. Gleeson died in 1919. Piper retired from his position as trustee in 1926 and Sir John Grice was appointed in his place. The properties known as No. 170 and No. 188 Moorabool Street, Geelong, were still vested in Honora Hourigan at the time of her death; they were devised by her will as if she were the absolute owner thereof,

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Starke J.

and her executors dealt with them for many years as if she were the absolute owner. But in 1932, the then executors and trustees of her will, the Trustees, Executors and Agency Co. Ltd., and Sir John Grice, issued an originating summons out of the Supreme Court of Victoria, seeking the determination, without administration, of certain questions and matters which had arisen in the administration of her estate. One of these questions related to the properties in Moorabool Street, Geelong, and, as finally amended, was: "15. On the proper construction of the will of Denis Hourigan the husband of the testatrix, did the testatrix take the residue of the testator's property under the said will beneficially or as a trustee and if as a trustee on what trusts?" *Mann* J. determined the question as follows: "15. On the proper construction of the will of Denis Hourigan, the husband of the testatrix, the testatrix took the residue of his property as a trustee upon trust to use the same at her discretion in educating and providing for the two sons named in the will." Following upon this decision, Richard Hourigan, the son of Denis Hourigan, commenced an action against the executors and trustees of her will: the Trustees, Executors and Agency Co. Ltd., James E. Piper, and Sir John Grice. One of the daughters of Denis and Honora Hourigan, Mary Teresa Forbes, was added as a party defendant at the trial to represent the next of kin of Patrick the deceased son of Denis. No claim was made in the action against the executors and trustees of the will of Honora Hourigan personally. The plaintiff claimed:—1. Administration of the trusts of the estate of Denis Hourigan deceased. 2. An account of the said estate. 3. A declaration that the plaintiff was beneficially entitled to various properties including those known as No. 170 and No. 188 Moorabool Street, Geelong. 4. Transfer of the properties to the plaintiff. 5. Such further relief as to the Court seemed proper. *Macfarlan* J., who heard the action, declared that Honora Hourigan held the properties known as No. 170 and No. 188 Moorabool Street, Geelong, upon trust for her sons, the plaintiff and Patrick Hourigan deceased, as tenants in common in equal shares in fee simple. A conveyance was directed upon the adjustment of certain accounts relating to a mortgage over the property known as No. 170 Moorabool Street, and to rents received by the defendants in respect of the

properties No. 170 and No. 188 Moorabool Street after 24th March 1926, and expenditure thereon. Both parties appealed to this Court against this judgment.

On the appeal, it appeared to this Court that the judgment of *Macfarlan* J. was founded upon the order of *Mann* J., against which an appeal to the Supreme Court was lodged, but had been abandoned or withdrawn. The summons before *Mann* J. sought the determination of questions that had arisen in the estate of Honora Hourigan, but the answer to the fifteenth question actually decided the construction of the will of Denis Hourigan. The summons must have been dealt with on the footing that the substantive question was whether on the true construction of the will of Denis the residue thereby bequeathed for educating and providing for his sons formed portion of his estate, or portion of Honora's estate. (Cf. *In re Delahunty*; *O'Connor* v. *Butler* (1).) No objection was taken to the learned Judge determining the question, but it may be doubted whether the question as framed did not constitute a claim adverse to the estate of Honora which should not have been decided on the originating summons. (Cf. *In re Royle*; *Royle* v. *Hayes* (2); *In re Hargreaves*; *Midgley* v. *Tatley* (3).) However that may be, the proceedings seem to have been defective in parties: the estates of Denis and Patrick Hourigan deceased were not represented, and James E. Piper, the executor of Honora's will who had retired but was a defendant in the action before *Macfarlan* J., was not a party nor was he bound by the order. Further, the order of *Mann* J. left undefined the precise interests taken by the sons of Denis under his will. It was difficult, in these circumstances, to deal satisfactorily with the appeals from the judgment of *Macfarlan* J., and on the application of the executors and trustees of Honora's will, this Court granted to them special leave to appeal against the order, and they accordingly appealed. Leave was also given to add all parties necessary and proper for the determination of all matters raised in the appeals now before us.

The first question is: What is the proper construction of Denis Hourigan's will? Is the gift of the residue of his property an

(1) (1907) 1 I.R. 507. (2) (1889) 43 Ch. D. 18.
(3) (1890) 43 Ch. D. 401.

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Starke J.

unfettered gift to his widow, or is it a power, in the nature of a trust for the benefit of his sons ? And what is the duty, if any, imposed upon the widow ? Learned counsel referred us to numerous cases, and to classifications and discussions of the cases. But they do not assist one much, for in the end the Court must gather the meaning of the testator from the words he has used (*In re Adams and the Kensington Vestry* (1)). The family of the testator living at the date of his will were all comparatively young children. There were six daughters and two sons. His wife had apparently been provided for, or else had separate estate of her own. All his property is given to his wife. The obligation imposed on the wife to pay each of his daughters £500 is clear and explicit—in other words, a trust was created in their favour, and it has been duly executed by the widow. The residue of the property was vested in his wife, to be used by her, at discretion, in educating and providing for the two sons. The purpose of the gift is co-extensive with the gift itself and the discretion is not general but only in connection with the purpose for which the gift is made. The property is not to be applied generally for the benefit of testator's wife and sons, but in educating and providing for his sons. No beneficial interest is given to her. There was nothing easier than to give his wife the property absolutely, and leave it to her to attend to the education and upbringing of his children, but that he did not see fit to do. In my opinion, a power or duty was imposed by the testator upon his widow in the nature of a trust for the benefit of his sons. If one must cite authorities, *Blakeney* v. *Blakeney* (2) ; *Wetherell* v. *Wilson* (3) ; *In re Roper's Trusts* (4) ; *In re Haly's Trusts* (5) ; *In re Delahunty* ; *O'Connor* v. *Butler* (6), are apposite to the case in hand. A discretion is certainly reposed in the widow as to the manner and method of using the residue of the testator's property for the education and provision of the two sons, but it does not confer upon her any beneficial interest, or entitle her to use the property or any part of it for her own benefit. The discretion reposed in her is not an arbitrary and uncontrolled discretion, but one, I apprehend, that a Court of equity might control if it were not exercised in a bona fide and proper

(1) (1884) 27 Ch. D. 394, at p. 410.
(2) (1833) 6 Sim. 52 ; 58 E.R. 515.
(3) (1836) 1 Keen 80 ; 48 E.R. 237
(4) (1879) 11 Ch. D. 272.
(5) (1889) 23 L.R. Ir. 130.
(6) (1907) 1 I.R. 507.

manner. (See *In re Brittlebank*; *Coates* v. *Brittlebank* (1); *In re Roper's Trusts* (2).) The Court would not, I apprehend, require from the widow detailed and precise accounts of the application of the property, and it would assume that the widow had properly used it unless the contrary were established. (Cf. *In re Evans*; *Welch* v. *Channell* (3).) Moreover, the trust or interest created or conferred by the will in favour of the sons does not fail by reason of the death of the widow (see *In re Haly's Trusts* (4))

But what interest did the sons take under the gift? It is clear enough that a gift to a person for a particular purpose is good though the purpose fails or becomes incapable of execution. Where, however, a gift is to the testator's widow, to use, at her discretion, in educating and providing for the testator's sons, she might apply it unequally, and it is possible, I think, that she might altogether exclude one son, if, for example, other means were available for his education and provision, or he no longer required education or provision. In the present case, Patrick died in infancy, and the purpose of the gift, so far as he was concerned, failed or became incapable of further execution. The sons' interests in the gift are not segregated. It is implicit in the gift that what is not required for one son is available for the benefit of the other. An intestacy did not, I think, arise on the death of Patrick, nor did anything pass to his next of kin. The whole fund or property on the right construction of the will itself accrued and became available, on the death of Patrick, for the education and provision of Richard—the plaintiff in this action. The arguments submitted at the Bar for and against a joint tenancy and a tenancy in common are all, as it seems to me, immaterial, once the true meaning of the will is thus established.

The next question is whether the plaintiff's right of action is barred by any statute of limitations, or by reason of his laches or delay. The learned counsel for Richard objected that the pleadings do not raise such a case, but this Court regarded the matter as open, or at all events allowed the parties to rely upon it. The lands known as No. 170 and No. 188 Moorabool Street formed part of the residue of Denis Hourigan's property, the subject of the trust already

(1) (1881) 30 W.R. 99.
(2) (1879) 11 Ch. D. 272.
(3) (1884) 26 Ch. D. 58.
(4) (1889) 23 L.R. Ir. 130.

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Starke J.

mentioned, but they were never converted into money, nor, so far as I follow the evidence, was the amount of the residue ever actually ascertained. But I do not doubt that these lands were subject to that trust, and that it was an express trust, because the trust is expressly declared by and made out from the will of Denis Hourigan (*Petre* v. *Petre* (1); *Soar* v. *Ashwell* (2)). The lands were conveyed to Honora, as we have seen, "in consideration of the devise under the will of . . . Denis Hourigan to . . . Honora Hourigan." In my opinion, she took the lands, and they were vested in her, subject to and upon the express trust declared in the will for the benefit of the two sons. On her death in 1917, the grant of probate to her executors vested in them all the hereditaments of Honora, whether held by her beneficially or in trust, for all the estate therein of Honora and as joint tenants (*Administration and Probate Act* 1928, sec. 8). An executor, *qua* executor, is not, however, an express trustee (*In re Jane Davis*; *In re T. H. Davis*; *Evans* v. *Moore* (3); *In re Mackay*; *Mackay* v. *Gould* (4); *In re Lacy*; *Royal General Theatrical Fund Association* v. *Kydd* (5)). But it is not necessary to consider whether an executor upon whom a trust estate devolves by force of the statute is thus constituted an express trustee. It is enough, in the present case, to say that the claim is based upon the express trust created by the will of Denis Hourigan and imposed upon Honora his widow, and is to enforce that trust through her personal representatives. The fact that Honora by her will devised the property the subject of this trust to her executors and trustees upon other trusts is unimportant, except so far as it establishes a breach or an attempted breach of her duty towards the sons. The *Supreme Court Act* 1928, sec. 62, enacts that, except as provided by the *Trustee Act* 1928, no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any statute of limitations. Now that section, in my opinion, renders unnecessary the consideration of various sections relied upon to defeat the plaintiff, e.g., the *Property Law Act* 1928, secs. 276, 296, 297-299,

(1) (1853) 1 Drew. 371, at p. 397; 61 E.R. 493, at p. 503.
(2) (1893) 2 Q.B. 390.
(3) (1891) 3 Ch. 119.
(4) (1906) 1 Ch. 25.
(5) (1899) 2 Ch. 149, at 159-60.

and the *Supreme Court Act* 1928, sec. 82 (1) (c) (III.), (IV.). But it still leaves open for consideration the provisions of the *Trustee Act* 1928, sec. 67. That section, however, excepts from its operation cases in which the claim is " to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use." The properties known as No. 170 and No. 188 Moorabool Street, Geelong, were subject to the trust in favour of the sons already mentioned. They were vested in, and therefore still retained by, Honora Hourigan, at the time of her death. She purported to deal with them by her will as if she owned the property beneficially, but the trust in favour of the sons was not thereby defeated or in any way affected. The properties passed to Honora's executors for all her estate therein. But she held the properties upon trust, and the executors took them subject to that trust, and still retain them. In my opinion, the provisions of the *Trustee Act* do not, therefore, operate in bar of the plaintiff's right to recover the properties, which are impressed with a trust in his favour. The question of delay and laches, apart from the statute of limitations, must now be considered.

Richard Hourigan attained the age of twenty-one years about the year 1890. He was aware of the terms of his father's will as early as 1895. A conveyance of the Moorabool Street properties from Archdeacon Slattery to Honora was prepared by him about that year, when he was a clerk in a solicitor's office. He took it for execution to the Archdeacon, who at first refused to sign it, because, he said, Denis Hourigan, the father, intended those properties for his two sons. But the plaintiff answered that that may have been his father's intention, but he did not so express it in his will. In 1917 his mother Honora died. But the plaintiff did nothing, though he was then a qualified solicitor. His mother's executors collected the rents of the properties and applied them as if the properties had been beneficially owned by her. About 1930, a sum of £1,650 was raised upon mortgage of No. 170 Moorabool Street. It was raised by two of the plaintiff's sisters, Cecilia and Mary, relying upon the trusts of Honora's will and the provisions of the *Settled Land Act*, and was paid to and used by the executors and trustees of her will for reconditioning the premises, which had been condemned by the

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Starke J.

local government authorities. But the plaintiff knew nothing of this transaction at the time, and possibly only heard of the matter after the commencement of his action. In 1932, the executors and trustees of Honora's will took out the originating summons and obtained the decision of *Mann* J. already referred to. Soon afterwards the plaintiff commenced his action : nearly sixty years after the death of his father, more than forty years after he attained his majority, and some fifteen years since his mother's death. But mere lapse of time, in the case of an express trust, will not induce the Court to refuse relief unless coupled with other circumstances which render it unjust to grant it (*Rochefoucauld* v. *Boustead* (1)). The plaintiff in the present case has done nothing actively to lead anyone to suppose that he had abandoned any claim he might have under his father's will ; indeed, as *Macfarlan* J. observed, he was unaware of his rights under his father's will though he knew its terms. It would not be just to deprive him of his interests under his father's will because he mistook his rights—as well did others until the decision of *Mann* J. was given. Nor would it be just to deprive him of his interests because his mother regarded herself as the absolute owner of the residue of his father's estate, or because the enforcement of his rights will disappoint his sisters Cecilia and Mary of benefits given to them under their mother's will. But the Court, in granting relief to the plaintiff, has, I apprehend, some discretion—not an arbitrary discretion, but a discretion depending upon a balance of justice or injustice in the circumstances of the case. And it is to the relief that should be given to the plaintiff that I now turn.

A general administration order is as unnecessary as it would be undesirable. But in my opinion, a declaration should be made that the plaintiff is, in the events which have happened, entitled to the properties known as Nos. 170 and 188 Moorabool Street, Geelong, under the gift of the residue in Denis Hourigan's will. But he also claims certain properties known respectively as No. 176 Moorabool Street, and the Queen's Head Hotel in Ryrie Street, Geelong, on the ground that these properties were purchased with the proceeds of assets forming part of the residue of Denis Hourigan's estate, or

(1) (1897) 1 Ch., at pp. 210-212.

from rents and profits derived therefrom. *Macfarlan* J. was not satisfied that the allegation was proved, nor am I. The evidence is weak, and the bank accounts lend little if any support to the allegation. The plaintiff has claimed, too, the rents and profits received by Honora and by her executors and trustees from the properties known as Nos. 170 and 188 Moorabool Street. *Macfarlan* J. has made the executors and trustees accountable for those rents and profits since 24th March 1926, less certain expenditure. No account should be directed of the amounts received by Honora from the rents and profits of these premises or of how she applied them; it is not established that she dealt with them contrary to the direction contained in the will of Denis. The executors and trustees of Honora applied the rents and profits received by them from these properties since her death until about 26th July 1932—the date of the order of *Mann* J.—in the upkeep of the properties, and the balance was paid over to the plaintiff's sisters Cecilia and Mary under the terms of his mother's will. The *Trustee Act* 1928, sec. 67 (1) (*b*), operates as a bar, I think, to the plaintiff recovering or having an account of these rents and profits for more than six years. But apart from the statutory bar the Court, owing to the long delay and the difficulty of adjusting the accounts equitably and justly, should refuse the plaintiff any relief or remedy in respect of any rents and profits received before 26th July 1932. An account should be directed of the rents and profits of the properties known as Nos. 170 and 188 Moorabool Street, Geelong, in the hands of the executors and trustees of Honora Hourigan on 26th July 1932, or since received by them or by any other person by their order or for their use, and of all sums of money paid in respect of rates, taxes and insurance or laid out by such executors and trustees in necessary repairs, or expenditure upon or in connection with the said properties. And a declaration should follow that the plaintiff is entitled to the balance of any rents and profits appearing upon such accounts to be in the hands of the executors or of any other persons, by their order or for their use.

Another question arises in connection with the moneys raised by the plaintiff's sisters Cecilia and Mary on mortgage of the property known as No. 170 Moorabool Street. The premises had been condemned by local government authorities as unfit for habitation.

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Starke J.

The executors and trustees of Honora's will had no authority under her will or otherwise to recondition or restore the premises. So the sisters, about August 1930, believing themselves entitled to the property under Honora's will and the beneficial owners thereof for the purposes of the *Settled Land Act*, raised, with the approval and consent of the executors and trustees of the will, the sum of £1,650 by means of a mortgage of the property. The money was handed to the executors and trustees, who expended it on the property. *Macfarlan* J. treated the expenditure as by way of salvage (*Godefroi* on *Trusts and Trustees*, 5th ed. (1927), p. 240 ; 4th ed. (1915), p. 253) and conditioned the conveyance of the properties known as No. 170 and No. 188 Moorabool Street to the plaintiff and the legal representatives of the deceased brother, Patrick, upon payment of the principal, interest, and other moneys due or payable under or by reason of such mortgage. It is an extreme application of the doctrine of salvage, and has some technical difficulties of its own arising from the position of the executors and trustees of Honora's will and the fact that the sisters and not the executors and trustees raised the money. But I think it within the authority and discretion of the Court to refuse the plaintiff relief unless he does what the Court considers just and right in relation to the mortgage and to moneys reasonably expended in restoring and reconditioning the premises. The mistake of all parties as to the rights of the plaintiff and the long delay and inaction of the plaintiff himself created a position which warrants the Court imposing terms as a condition of relief. It is not as if the plaintiff is improved out of his property ; some expenditure was necessary, if the premises were to be preserved in a tenantable state. An inquiry should be directed whether the sum of £1,650 mentioned in the mortgage of the premises dated 25th August 1930 was in fact raised, and whether that sum or any and what part thereof was expended in putting the premises in such a state as to be tenantable or saleable. And it should be declared that the mortgagors named in the mortgage, and the executors and trustees of Honora's will, are entitled to be indemnified by the plaintiff out of the property in respect of moneys raised by the said mortgage and found to have been expended in putting the premises in such state, and interest thereon as provided by the said mortgage,

and all costs, charges and expenses properly incurred in procuring the mortgage and discharging the same. But a conveyance to the plaintiff cannot be directed until these liabilities have been discharged or arranged, nor indeed until a bankruptcy order made in Western Australia in 1913 against the plaintiff is cleared up. General liberty to apply should therefore be reserved.

The result, in my opinion, should be that the order of *Mann* J. upon the fifteenth question in the originating summons be discharged, the judgment of *Macfarlan* J. discharged, and an order substituted upon the lines above suggested but requiring settlement in detail in the office, and providing for the costs of all parties in the proceedings before *Macfarlan* J. and on these appeals, out of the estate of Honora Hourigan, those of her executors and trustees as between solicitor and client.

DIXON J. On 28th December 1873, Denis Hourigan of Moorabool Street, Geelong, grocer, died leaving him surviving a widow, six daughters, whose ages ranged from 16 to 3 years, and two sons, Richard Edward, aged 4, and Patrick James, aged 1. His property real and personal was put down at a gross value of £4,180. It included two shops and a hotel. Shortly before his death he had bought another hotel at a price of £2,000, which he had settled upon his wife, as he had done two or three years before with another piece of land in Geelong costing £625.

Three days before his death he executed a home-made will, the material parts of which are as follows :—" I Denis Hourigan do hereby will and bequeath all my property real and personal to my wife Honora Hourigan to be disposed by her as follows A sum of Five hundred pounds stg. to be paid to each one of my six daughters on the completion of the twentieth year of each one respectively. . . . The residue of my property to be vested in the said Honora Hourigan my wife to be used by her at discression [*sic*] in educating and providing for my two sons namely Richard and Patrick. I hereby appoint the Vnble. Archdeacon Slattery of Saint Mary's Geelong executor of this my last will."

Probate of this will was granted to Archdeacon Slattery, who, after discharging the debts and liabilities, appears to have allowed

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Dixon J.

the widow the management and enjoyment of the deceased's property. She continued the grocer's business and maintained the family and sent the two boys to boarding school. The younger, Patrick James, died at the age of sixteen, but the elder, Richard Edward, survived. He is the plaintiff in the action. After leaving school, he was articled to a solicitor in Adelaide, and, in December 1893, he was admitted in South Australia to practise as a solicitor. He appears to have returned to Geelong and entered the employment of a solicitor there practising. In 1895, while so employed, he prepared a conveyance of the two houses included in his father's estate from Archdeacon Slattery to his mother. The final payment in respect of his sisters' legacies had been made by his mother in 1893. She had sold the testator's hotel a few years earlier and she had bought another shop or house, but whether out of the proceeds of the hotel, or not, does not appear. The plaintiff evidently considered that the time had come when his mother should assume complete beneficial ownership of what was comprised in the residue of his father's estate and accordingly should obtain the legal estate in the land. He had read his father's will and indeed must have had it before him when he prepared the conveyance. He said, in the course of his evidence, that his mother had told him that his father had left nothing to his brother and himself, but had expressed a sort of pious wish that she should give them a good education and had left everything to her. He accepted this view of the meaning of the will, and, according to himself, until it was questioned in 1932, he thought that as the will was drawn up it gave him no interest notwithstanding that Archdeacon Slattery demurred to the request to convey on the ground that he and his brother were meant to have the land. The conveyance from Archdeacon Slattery to Honora Hourigan was executed as on 10th June 1895. It contained a recital that by the will of Denis Hourigan the whole of his real and personal estate was devised to his wife, subject to the payment of certain legacies to each of his six daughters, and that she had paid to each of the legatees the amount bequeathed to them, and it witnessed that Archdeacon Slattery, in consideration of the devise, conveyed to her the two parcels of land. The widow retained these premises and also the hotel and the shop she had bought until her

death, which occurred on 31st October 1917. She appears to have supplied the plaintiff with sums of money from time to time, but, at this date, how much cannot be ascertained. About 1906 he incurred her displeasure by marrying against her wishes. He practised his profession in Western Australia for some years, but, in 1913, he was there made bankrupt. His mother's will, which was made in 1916, contained the following passage: "In regard to my son Richard Edward Hourigan I wish it to be understood that as he disobeyed me in his marriage I have not made such provision for him in this my will as I would otherwise have made but at the same time as I have disbursed in and about his scholastic and professional education and career and in the payment of his debts upwards of seven thousand pounds I consider he is not entitled to share in my estate." By this will and a codicil to it, she appointed the defendant company and two individuals executors and trustees and she made dispositions of her property in favour of children and grandchildren. The trustees administered her estate for many years and distributed, according to the terms of her will, the income of the estate, including that obtained from the two shops conveyed to her in 1895 by her husband's executor. One of these shops fell into an objectionable condition, and, in 1930, it was condemned by the municipal council as unfit for habitation. As a result the tenants for life under the widow's will raised £1,650 on mortgage of the premises, which the trustees expended in rebuilding and the like.

In 1932, the trustees of Honora Hourigan's will found it necessary to issue an originating summons to have a number of questions determined arising in the administration of her estate. Eventually, there was included in this summons the question whether, upon the proper construction of her husband's will, she took the residue of his property under that will beneficially or as a trustee, and, if as a trustee, on what trusts. The summons came before *Mann* J., who, on 26th July 1932, declared in answer to the question that she took the residue of his property as a trustee upon trust to use the same at her discretion in educating and providing for the two sons named in Denis Hourigan's will. Unfortunately neither the estate of Denis Hourigan nor that of the deceased son Patrick James was represented upon this proceeding and one of the executors of Honora Hourigan

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Dixon J.

was not a party. Moreover, the statement in the order of the trusts leaves it quite uncertain whether, in the absence of an exercise of the widow's discretion, or after her death had terminated the discretion, the residue of Denis Hourigan's estate devolved as upon an intestacy, or vested in the two sons absolutely, and, if the latter, whether as joint tenants or tenants in common. Indeed it was contended that the declaration did not exclude a construction by which the widow would take subject to a discretionary trust in favour of the sons so that any surplus would be hers beneficially. But, with this declaration as the foundation for his claim, the plaintiff, on 1st October 1932, issued a writ claiming the two shops which formed part of his father's estate, and also, as property acquired out of moneys forming part of the residue of his father's estate, the shop bought by his mother in 1890 and the hotel bought by her later, and seeking administration of the estate of Denis Hourigan and consequential relief. The action came on before *Macfarlan* J., who decided: (*a*) that the plaintiff took an undivided half share in the two shops as tenant in common with his deceased brother Patrick James; (*b*) that he must recoup the amount of the mortgage of 1930 and any further sum reasonably expended in the repair and reinstatement of the building and certain other minor expenditure; (*c*) that he was entitled to an account of rents for six years only; (*d*) that he had not established that the additional shop or the hotel was bought out of the moneys forming part of the residue of the estate of Denis Hourigan; (*e*) that the trustees must refund commission charged on the rents of the two shops during the preceding six years; (*f*) that the plaintiff was not entitled to any other relief. From the decree embodying and working out this decision the plaintiff now appeals and the executors and trustees of Honora Hourigan cross-appeal.

The plaintiff's primary contention is that he took under his father's will the residue as a joint tenant with his brother. He further contends that he is entitled to an account from the date of his mother's death and not for six years only, that it should be inferred that the third shop was bought out of the proceeds of the sale of his father's hotel and that he should not be charged with the moneys raised upon mortgage and expended upon the shop

properties. The respondents, the trustees of Honora Hourigan's estate, attack his whole claim at the foundation. They contend that, under his father's will, his mother took the residue subject only to a trust or charge for the education and provision of the sons. They also say that the claims were completely barred under the statutes of limitations or by laches. Further, they contend, in any case, that in minor respects, the order was too unfavourable to them.

At an early stage in the argument it clearly appeared that much difficulty and embarrassment arose from the declaration made by *Mann* J., both because of the manner in which the proceeding before him was constituted, and because of the uncertainty as to the effect of the declaration itself. We, accordingly, granted an application on the part of the respondents for special leave to appeal from that declaration, reserving all questions of costs. The appeal was at once instituted and heard with the original appeal. We intimated that we should discharge the declaration made upon the originating summons and decide the effect of the will of Denis Hourigan in the action, and to that end we directed that the administrator of Patrick James' estate should be added as a defendant.

The first question to be determined is the extent of the interest, which, upon the proper interpretation of his father's will, the plaintiff took in the residue of his estate. The critical words, " to be used by her at discression in educating and providing for my two sons," express a purpose for which the testator desired his wife to use the residue. It is, perhaps, possible to treat the purpose as one which, in any case, would be incumbent upon her and the gift as made simply to enable her to fulfil it according to her own discretion. So treating the matter, the gift of residue might be construed as made to her altogether beneficially. But this construction does not appear to me to give proper effect to the words " to be used," which naturally express a direction of an obligatory character. They impose upon her, and upon the residue vested in her, the necessity of fulfilling the purpose notwithstanding that, in carrying it out, she possesses a discretion. To this extent, at any rate, she was a trustee of the residue. But it does not follow that she obtained no beneficial interest in the residuary estate of her husband. If it appeared that the sole object of the gift to

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Dixon J.

her was that she might use it in educating and providing for her sons, she would in no event take a benefit under it. In that case either the expression of the purpose would be understood as implying a gift of the entire fund to the sons as joint tenants or as tenants in common, or, unless fulfilment of the purpose exhausted the fund, the surplus would be held upon trust for the testator's next of kin. On the other hand, an interpretation of a gift to one person to fulfil a purpose in favour of another may be adopted by which it is treated as a beneficial disposition to the first person, subject, however, to performance of the particular purpose (*King* v. *Denison* (1); *Croome* v. *Croome* (2); *In re West*; *George* v. *Grose* (3); *In re Foord*; *Foord* v. *Conder* (4)). This interpretation has often been given to bequests to parents for the purpose of maintaining, educating and supporting children (*Hammond* v. *Neame* (5); *Hamley* v. *Gilbert* (6); *Camden* v. *Benson* (7); *Hadow* v. *Hadow* (8); *Gilbert* v. *Bennett* (9); *Leach* v. *Leach* (10); *Biddles* v. *Biddles* (11); *Leigh* v. *Leigh* (12)).

In such a case the parent is bound to apply a competent sum in the maintenance of the children. However difficult it may be to decide what is the amount to be applied, it is treated as an obligation capable of measurement, or ascertainment, and enforcement. Prima facie, the parent takes subject to no account, provided that he discharges the duty of educating, maintaining and supporting the children adequately (*Browne* v. *Paull* (13), per Lord *Cranworth*; *Thorp* v. *Owen* (14), per *Wigram* V.C.; *Countess of Bective* v. *Federal Commissioner of Taxation* (15)).

In the present case, the testator begins by devising and bequeathing all his real and personal property to his wife "to be disposed of by her as follows." She is nowhere described as a trustee, although, of course, the words quoted are appropriate enough to the creation

(1) (1813) 1 V. & B. 260; 35 E.R. 102.
(2) (1889) 59 L.T. 582; 61 L.T. 814.
(3) (1900) 1 Ch. 84.
(4) (1922) 2 Ch. 519.
(5) (1818) 1 Swan. 35; 36 E.R. 287.
(6) (1821) Jac. 354; 37 E.R. 885.
(7) (1835) 4 L.J. Ch. 256.
(8) (1838) 9 Sim. 438; 59 E.R. 426.
(9) (1839) 10 Sim. 371; 59 E.R. 658.
(10) (1843) 13 Sim. 304; 60 E.R. 118.
(11) (1847) 16 Sim. 1; 60 E.R. 772.
(12) (1848) 12 Jur. 907.
(13) (1850) 1 Sim. (N.S.) 92, at p. 103; 61 E.R. 36, at p. 41.
(14) (1843) 2 Hare 607, at pp. 615, 616; 67 E.R. 250, at pp. 253, 254.
(15) (1932) 47 C.L.R., at pp. 419, 420.

of the obligations of a trust. Then follow the directions to pay the six legacies of £500 to each of the daughters on attaining twenty. The testator does not contemplate the exhaustion of his estate by these payments; he proceeds to a disposition of the residue. It is to be "vested" in his wife. The expression "vested" does not, to my mind, carry with it any suggestion that the widow is to take no benefit. Probably it was intended simply to mean that the widow and not the executor should have the ownership and control of the assets comprised in the residue. Then follow the words, "to be used by her at discression in educating and providing for my two sons." The discretion given relates to the use of the fund or property and appears to me to extend to manner, occasion and amount. The purpose, education of and provision for the sons, suggests that the testator desired that his sons should receive greater advantages in education and upbringing than his daughters. But it is a purpose which looks rather to their preparation for manhood than their ownership and enjoyment of property, although, no doubt, the purpose is not confined to infancy. It is a purpose the fulfilment of which requires more or less capital expenditure according to the needs and course of development of the objects. It does not necessarily, or even naturally, exhaust the property burdened with it. An intention to give the surplus is one which, if formed by a testator, he might well be expected to express. The mother, a usual object of a husband's testamentary dispositions, is the only person to whom the property is given and the expressed purpose of the gift is one in which her natural motives may be considered as strong as a father's.

In all these circumstances, I think the proper construction of the provision is one by which the mother took the beneficial interest in the residue, subject to a trust or charge to educate and provide for her sons as in her discretion seemed proper. The fact that some property had been settled upon his widow may weaken an argument that a provision for her might be looked for in the will, but, otherwise, it does not appear to me to be of much importance. In my opinion the residuary devise and bequest is one which falls within the statement in *Spence's Equitable Jurisdiction* (1849), vol. II., p. 466: "Where a fund is bequeathed to a parent, subject to a

H.C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Dixon J.

trust to maintain, or to maintain and educate, his children, the surplus will belong to the parent; it is a gift subject to a charge." The consequence of this view is that the plaintiff's claim fails at its foundation. For his case is not that his mother's estate is liable for a failure on her part adequately to educate and provide for him, but that he is the beneficial owner of the property which formed part of the residue of his father's estate, or at least an undivided half share therein.

But I am also of opinion that the suit ought to be dismissed upon the ground that it is brought to establish a very stale demand depending upon a question which, although the plaintiff's attention was directed to it, he did not think worth raising when it ought to have been determined, with the result that dispositions have been made upon the assumption he was then content to adopt, and the information has been lost which would be necessary to ascertain his exact rights upon the footing of his present contention. The claim he makes is that he was entitled to his father's residuary estate as surviving joint tenant. As the testator died after 1st January 1873, both his real and personal property vested in the executor, but, after payment of debts and liabilities, it became the duty of the executor, upon the terms of the will, to convey and assign the property to the widow, leaving her to pay the legacies. The ascertainment of the interest claimed by the plaintiff would require therefore the deduction of debts and liabilities payable by the executors and of legacies payable by the widow and in each case of administration expenses. Except from the amount of the probate duty paid, the net value of the testator's estate, after deducting debts and liabilities, does not appear, but, of the gross value of £4,180, the legacies to the daughters account for £3,000. Probate duty seems to have been paid on a net value of £2,737 10s. It is evident that, if a proper account had been taken during his mother's lifetime, including the expenditure upon the plaintiff and his brother which she was entitled to throw upon the residue, she might have been able to establish a charge in her own favour upon the assets forming residue still retained which would have extinguished the interest claimed by the plaintiff. When the legacies had all been paid, the land was conveyed to his mother upon the footing that

she took it beneficially. That it was a conveyance to her beneficially appears from the conveyance itself, not only because it contains nothing to impose a trust upon the grantee, but because it recites a devise to her subject to payment of legacies and the payment of such legacies and then conveys in consideration of the devise. When he prepared this conveyance, the plaintiff knew the terms of the will, and for the purpose of drawing it he must have considered that instrument. He knew, according to his evidence, that his mother claimed that she was entitled absolutely to the residue and that the provision in favour of himself and his brother imposed upon her no trust. He knew that the executor took the contrary view. In preparing and procuring the execution of such a conveyance in her favour, he may have been actuated by a belief, as I understand him now to say, that there could be no doubt of the correctness of his mother's view, or by a belief that his mother had expended enough upon him and his brother to discharge herself to the full value of the residue, or he may have wished, in any case, that she should own the land. It is difficult to believe that a solicitor should have regarded it as beyond question that the language of the will imposed no obligation upon the mother in favour of her sons. But whatever his reason, the plaintiff appears definitely to have decided that his mother should then obtain the beneficial ownership of the property and should continue to enjoy it. Upon this footing she proceeded in her dealings with the plaintiff and in the arrangement of her testamentary dispositions. She kept no account of her expenditure upon or dealings with the plaintiff, at any rate none which her executors were able to produce. The statement in her will that she had disbursed on his account £7,000 he denies. One of the pieces of land forming part of her husband's residue she devised to one daughter for life with remainder to her children. Another piece she devised, subject to a trust to accumulate a specified sum of income for a charitable purpose, to two other daughters for life with remainder to their children. As the plaintiff takes nothing under the will, these devises raise no case of election. But it is apparent that, but for his mother's belief that she was beneficially entitled to these pieces of land, some other provision would have been

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Dixon J.

made by the testatrix for these families. Her executors and trustees administered her estate in the same belief. The sum of £1,650 was raised and expended upon repairs by life tenants, who, upon the same assumption, incurred a personal responsibility in that amount to mortgagees who believed that they obtained an unimpeachable security. Finally, the writ was not issued by the plaintiff until fifteen years all but a month after his mother's death, thirty-seven years after the conveyance of the land to his mother and forty-two years after he reached full age. If his writ had been issued a month later, the plaintiff's action would have been open to the defence that his right to bring it against the present defendants had accrued more than fifteen years ago within the meaning of sec. 296 of the *Property Law Act* 1928, and that whatever may have been the position of his mother, her executors are not express trustees for him within the meaning of sec. 297. But perhaps her executors could not rely upon lapse of time under these provisions if she could not. (See *Black* v. *Cox* (1).) It was contended that even if the will of Denis Hourigan did intend that his wife should be a trustee, so that under a proper conveyance she would have been an express trustee, yet, inasmuch as the executor conveyed to her beneficially and she intended to take the land as beneficial owner, her trust was not in fact express but constructive. This contention was supported on the ground that in the inception her title was given and received adversely to the alleged beneficiary; that she did not obtain the property on his behalf, or by assuming a fiduciary character. (Cp. *Taylor* v. *Davies* (2).) But, however this may be, I think the principles of equity operate to preclude the plaintiff from asserting his claim at this date. "The doctrine, that where there is an express trust delay in seeking relief in respect of a breach of it is not material, does not apply to a case in which there has been acquiescence or gross laches on the part of the *cestui que trust*" (per *Baggallay* L.J., *In re Cross*; *Harston* v. *Tenison* (3)). Although the pieces of land which formed part of the estate of Denis Hourigan remain in specie in the hands of his widow's executors, the case is not one in which it is sought to bar an ascertained equitable interest

(1) (1901) 27 V.L.R. 609; 23 A.L.T. 116.

(2) (1920) A.C. 636, at pp. 650-652.

(3) (1882) 20 Ch. D. 109, at p. 121.

in specific property. The question whether the plaintiff, assuming a construction of the will in his favour, possessed or retained an interest in these pieces of land rested in account. First, an account was needed to define the residue; second, an account was needed to discover whether his mother was entitled to throw against it more than would extinguish his prima facie interest. "Calling for accounts is always much discouraged after the death of the accounting party, if he lived long enough to have accounted in his lifetime" (per *Plumer* M.R., *Chalmer* v. *Bradley* (1)). The transaction may be said to have been closed by the plaintiff himself in 1895 when he procured the conveyance to his mother. What the plaintiff did in accepting and confirming her belief that she was beneficial owner and in allowing her to proceed in all her affairs upon that belief may "fairly be regarded as equivalent to a waiver" of his remedy and his right (*Lindsay Petroleum Co.* v. *Hurd* (2)). It is true that he did not "know" his rights in the sense that he knew what interpretation would be judicially given to the will. But "generally, when the facts are known from which a right arises, the right is presumed to be known" (per *Knight Bruce* L.J., *Stafford* v. *Stafford* (3)). He knew as much as was required in order to form a decision as to what he should do. The subsequent lapse of time and delay have materially affected the situation both by making a just ascertainment of the rights which would have arisen between himself and his mother almost impossible and by inducing testamentary dispositions which it would be most inequitable to disturb. The encumbering of one piece of land has rendered it still more inequitable to overthrow them.

For these reasons I think the cross-appeal should be allowed. The judgment of the Supreme Court should be discharged and the action dismissed.

In view of the course taken in granting special leave to appeal from the declaration made by *Mann* J., the plaintiff and all other parties should receive their costs out of the estate of Honora Hourigan the trustees and representative parties, as between solicitor and client.

(1) (1819) 1 Jac. & W. 51, at p. 62; 37 E.R. 294, at p. 298.
(2) (1874) L.R. 5 P.C., at p. 240.
(3) (1857) 1 DeG. G. & J., at p. 202; 44 E.R. 697, at p. 701.

H. C. OF A. 1934.

HOURIGAN v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Appeal allowed from so much of the order of Mann J. dated 26th July 1932 made on originating summons as declared that Honora Mary Hourigan deceased took the residue of the property of Denis Hourigan deceased as a trustee upon trust to use the same at her discretion in educating and providing for the two sons named in Denis Hourigan's will. Such declaration discharged. Cross-appeal allowed from the judgment of Macfarlan J. in the action. Such judgment discharged. In lieu thereof order that the action be dismissed. Costs of all parties including the plaintiff appellant both of this appeal and of the action in the Supreme Court to be paid out of the estate of Honora Mary Hourigan deceased, the costs of the trustees and of the representative parties as between solicitor and client. Costs to include interrogatories, discovery and shorthand notes.

Solicitors for the appellant, *Walter Briggs & Son.*
Solicitor for the respondent Forbes, *G. J. Wise.*
Solicitors for the other respondents, *Davies, Campbell & Piesse.*

H. D. W.

[NOTE.—Leave to appeal from this decision was refused by the Privy Council on 29th March, 1935.—ED.]