[HIGH COURT OF AUSTRALIA.]

AUSTIN AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED AND OTHERS . } RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 20, 21.

SYDNEY, *Aug.* 10.

Gavan Duffy C.J., Rich and McTiernan JJ.

*Will—Construction—Annuity—Charge on testator's estate—Appropriation of fund for payment of annuity—Extent and duration of charge—Income of fund reduced by legislation—Reduced income insufficient to meet annuity—Liability of trustee—Deficiency—Annuitant's right of recourse against other parts of testator's estate—Surplus income.*

A testator by his will declared that notwithstanding any of the provisions of the will, or the legacies, gifts and bequests therein made, or anything in the will expressed or implied, the annuity granted in favour of his wife was at all times to be a first charge and was thereby charged on the whole estate, but subject to the payment of debts, funeral and testamentary expenses, and duties payable out of the estate. He then directed his trustee to establish a fund sufficient to meet the annuity, and further directed that, if after the establishment of the fund there was any deficiency of assets for the gifts, legacies and bequests, the same were all to abate proportionately subject, however, to the provision that when the annuity fund was established, the balance due by the estate in respect of such gifts, legacies and bequests was to be paid with interest before any part of the residue of the estate left for educational purposes was dealt with. He then devised and bequeathed the residue of the estate to his trustee upon trust to appropriate a sum sufficient when invested at the period of appropriation to answer the annuity. He declared that from and after such appropriation the remaining trust moneys were to be liberated from the trust for payment of the annuity. The testator then bequeathed the

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residue of the trust fund, subject to the express provisions of the will, to the trustees of a certain school. That part of the residuary trust fund remaining undistributed after provision was made for the annuities, legacies, gifts and bequests was to be paid over to the trustees of the school as soon as practicable. The trustee under the will paid all bequests and legacies except one, and allocated certain securities, the income from which was then sufficient to pay the widow's annuity. As a result of financial emergency legislation, these securities subsequently failed to return sufficient income to pay the annuity in full.

*Held*, that the annuity was chargeable upon and payable out of the whole estate in priority to any other beneficial disposition until such time as a fund should be appropriated, but that after such appropriation the annuity was to be satisfied out of the appropriated fund, and the residue of the estate was liberated from the payment of the annuity.

Decision of the Supreme Court of Queensland (Full Court): *Re Whittingham*; *Union Trustee Co. of Australia Ltd.* v. *Whittingham*, (1933) Q.S.R. 267, reversed.

APPEAL from the Supreme Court of Queensland.

An action was commenced in the Supreme Court of Queensland for the determination of certain questions arising under the will of Arthur Herbert Whittingham deceased. The trustee under the will, the Union Trustee Co. of Australia Ltd., was the plaintiff in the action. The defendants were Cecile Viva Condamine Whittingham the testator's widow, the beneficiaries and legatees under the will, and the trustees and Board of Control of the Geelong Church of England Grammar School, Corio, Victoria. The parties concurred in stating a special case for the opinion of the Full Court. The facts and the relevant portions of the will appear in the judgment of the Court *infra*. The questions raised by the special case were as follows:—

1. (*a*) Was the annuity given by the said will to the defendant Cecile Viva Condamine Whittingham charged upon the whole of the real and personal estate of the testator? (*b*) Does the same remain charged upon the whole of the said real and personal estate or upon any part, and if so, which part thereof? (*c*) When, if at all, was the said real and personal estate or any and which part thereof liberated from the charge in question?
2. (*a*) Has the plaintiff validly established the annuity fund directed by the said will to be established? (*b*) If so was

the remainder of the testator's estate liberated from the charge if any in respect of the said annuity ?

3. (*a*) If the said annuity fund has not been validly established how should the same be established ? (*b*) On the establishment of the said annuity fund will the remainder of the testator's estate be liberated from the charge (if any) in respect of the said annuity ?

4. If the said annuity fund has already been validly established or be hereafter validly established will the plaintiff be discharged from personal liability in the event of the income from the said annuity fund proving insufficient to answer the annuity in full ?

5. If the annuity fund has already been validly established or be hereafter validly established (*a*) Will the defendant Cecile Viva Condamine Whittingham have any right of recourse against any and what part or parts of the testator's estate or against any and what person or persons or class of persons in respect of any deficiency which has occurred or may occur in respect of her annuity ? (*b*) If the said Cecile Viva Condamine Whittingham has any such right of recourse how should such deficiency be borne as between the respective beneficiaries under the will of the testator and as between capital and income ? (*c*) May the defendant Cecile Viva Condamine Whittingham demand that the surplus income and/or the capital of the said annuity fund be applied to make good any such deficiency ? (*d*) If the defendant Cecile Viva Condamine Whittingham has any such right of recourse against the capital of the testator's estate or any part thereof may the residuary beneficiaries at their option require any such deficiency to be made good out of any and if so what income ? (*e*) How should the trustees have applied or apply any surplus income yielded in any year by such annuity fund ?

6. If the annuity fund has already been validly established or be hereafter validly established (*a*) May the plaintiff distribute the remainder of the testator's estate without incurring personal liability ? (*b*) Will it be the duty of

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the plaintiff without an order of the Court thereafter to distribute the remainder of the testator's estate as and when the same is realized ?

7. Should the plaintiff have debited and should it debit its commission on income from the said annuity fund against such income or should the same have been debited and be debited against the general income of the testator's estate exclusive of the income from the said annuity fund ?

8. By whom and out of what estate or fund should the costs of and incidental to this special case be borne and paid ?

The Full Court decided that the widow's annuity was charged upon the whole of the estate, and that the establishment of a fund to satisfy the annuity did not liberate the residue of the estate from the charge of the annuity: *Re Whittingham*; *Union Trustee Co. of Australia Ltd.* v. *Whittingham* (1).

From this decision the trustees and Board of Control of the Geelong Church of England Grammar School now appealed to the High Court.

*Macgregor* K.C. and *Fahey*, for the appellants. On the establishment of the fund to satisfy the widow's annuity the residue of the estate is liberated from the charge (*Harbin* v. *Masterman* (2) ).

[RICH J. referred to *Re Evans and Bettell's Contract* (3).]

In that case there was no direction in the will for the establishment of a fund, and a distribution had been made. Here the estate is freed of the charge by virtue of the direction in the will (*Re Street*; *Vevers* v. *Holman* (4) ). *Wallace* v. *Love* (5) is distinguishable, as there was no provision in the will to release the charge. A fund was validly established. This fund at the time of its establishment was sufficient to produce an income to satisfy the annuity. The intention of the testator was to release the charge on the establishment of such fund. Clause 8 of the will shows that the intention of the testator was to charge the annuity on the estate until a fund was set apart. The testator was apprehensive that at his death there might not be sufficient moneys on hand to pay all legacies and bequests and provide for the annuity.

(1) (1933) Q.S.R. 267.
(2) (1896) 1 Ch. 351, at pp. 359, 360.
(3) (1910) 2 Ch. 438.
(4) (1922) W.N. 291.
(5) (1922) 31 C.L.R. 156.

There is no real or substantial inconsistency in the will. The words used in clause 12 are strong and clear. After provision was made for the annuity the force of the charge was spent. The Full Court paid too much attention to the opening words of clause 8, and did not give sufficient attention to the whole of the clause. The intention of the testator is borne out by the words used in clauses 10 and 11. In these clauses there is an express direction to set aside sufficient for the annuity. The testator then deals with the rest of the estate, which is then liberated from the trusts. When a fund is liberated from a charge it is for ever exonerated from the charge. In clause 11 there is a direction to pay over to the trustees of the Grammar School unconditionally. The words are clear and unambiguous. The moneys to be paid over are separated from the fund set apart for the annuity. Clauses 10 and 11 prevail. Where an annuity is charged on corpus and income any surplus income should become part of the fund (*Re Street*; *Vevers* v. *Holman* (1) ). In *Wallace* v. *Love* (2), *Harbin* v. *Masterman* (3) was not applied, because there was an express provision not to hand over until the charge was satisfied. Here there is an express direction, and the Court will order a distribution as in *Wallace* v. *Love*.

*McGill* K.C. (with him *G. L. Hart*), for the respondent Cecile Viva Condamine Whittingham. The words of clause 8 " Notwithstanding any of the provisions of my will as hereinbefore or hereinafter contained " are wide enough to make that clause prevail over the later clauses of the will. The charge was on the whole estate, and was to continue until remarriage of the widow. The charge was to continue at all times. The liberation of the fund on the death of the widow is a liberation of portion of the moneys in the fund from the fund, and not from the charge. If the trustees of the Grammar School dissipate the trust fund, the annuitant would have a right against them for any deficiency in the annuity. The liberation from the trust is not inconsistent with the continuance of the charge. If clause 10 terminates the existence of the charge, it is inconsistent with clause 8, and clause 8 prevails. This clause cannot be cut down

(1) (1922) W.N. 291.
(2) (1922) 31 C.L.R. 156.
(3) (1896) 1 Ch. 351.

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by subsequent provisions. The words of this clause are wide, comprehensive and plain, and cannot be limited to a charge continuing only until the creation of a fund for the annuity (*Re Parry*; *Scott* v. *Leak* (1) ). The testator wanted to make a distribution, secure the annuity by a charge, and preserve that charge (*Re Evans and Bettell's Contract* (2) ). Legacies may be followed if there is any deficiency. The testator by clause 8 intended to obviate any application to the Court to establish a fund and follow the legacies. The trustee should distribute the estate only under an order of the Court. Moneys payable to persons outside the jurisdiction and subject to a charge should not be paid out except subject to terms.

*Macrossan*, for the respondent The Union Trustee Co. of Australia Ltd. In clause 8 the testator was directing his mind to the establishment of a fund for the annuity. Clause 8 is paramount. There is nothing inconsistent with the release of a fund and the continuance of a charge. Clause 11 shows that the testator contemplated a continuance of the charge. There is no reason why the trustee should not pay over to the trustees of the school, who are out of the jurisdiction, because the charge could be enforced in the High Court or in the Courts of the State of Victoria.

*Fahey*, in reply. If the clauses of the will are ambiguous, the will must be taken as a whole. Effect must be given to clauses 10 and 11, which are important provisions. The testator said that the residue of the trust moneys was to be liberated from the trust. The charge is a trust. The testator meant to release more than a fund from the trust. The moneys if paid over will be in Australia, and within the jurisdiction of the High Court and Australian Courts.

*Cur. adv. vult.*

Aug. 10. THE COURT delivered the following written judgment:—

This is an appeal from a judgment of the Full Court of the Supreme Court of Queensland, which was given upon the hearing of a special case stated for the opinion of that Court with regard to the will of the late A. H. Whittingham. The question is whether deficiencies

(1) (1889) 42 Ch. D. 570. (2) (1910) 2 Ch. 438.

in an annuity arising from a fall in the income of the fund appropriated to answer it are to be made good at the expense of other dispositions. After providing for certain legacies, gifts and bequests not necessary to be stated at length, the relevant parts of the will are as follows :—" 8. Notwithstanding any of the provisions of my will as hereinbefore or hereinafter contained or the legacies gifts and bequests hereinbefore made the gift contained in paragraph (*b*) of clause 10 hereinafter contained or anything in my will expressed or implied I declare that the annuity of two thousand pounds hereinafter granted in favour of my said wife and in the event of her second marriage the reduced annuity of five hundred pounds shall, at all times irrespective of the said legacies gifts and bequests but subject to the payment of my just debts funeral and testamentary expenses and the duties payable out of my estate be a first charge and is hereby charged by me on the whole of my estate. I direct my trustees to provide in the manner indicated by clause 10 of this my will for the establishment of a fund to meet the said annuity of two thousand pounds. If after the establishment of the said fund there is any deficiency of assets for the purpose of the said gifts legacies and bequests the same shall all abate proportionately subject however that when the fund is liberated by the second marriage or death of my widow—and it is a condition hereby made by me—then any balance due by my said estate in respect of the said gifts legacies or bequests shall, with interest at the rate of six per cent computed from a period of one year after the date of my death, be paid to the beneficiaries or other persons bodies corporate or associations entitled under this my will to such gifts or bequests before any part of the residue of my estate is dealt with under the provisions of clause 11 of this my will. 9. I devise all my real estate and I bequeath all the residue of my personal estate as follows :—(*a*) As to any real estate unto and to the use of my trustees upon trust but subject to the conditions and directions hereinafter declared of and concerning the same. (*b*) As to the personal estate unto my trustees absolutely subject to the trusts conditions and directions also hereinafter declared of and concerning the same. And I direct my trustees to sell call in and convert into money all my said real and personal estate. 10. Subject to the payments of my said debts funeral and

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testamentary expenses and duties I direct that my trustees shall stand possessed of the proceeds of the said sale calling in and conversion (hereinafter called 'my trust fund') upon the following trusts: —(*a*) Upon trust thereout in the first place to pay to my wife an annuity of two thousand pounds during her life by equal quarterly payments the first of such payments to be made at the expiration of three calendar months from my decease I direct however that in the event of my wife marrying again such annuity of two thousand pounds shall be reduced to five hundred pounds such reduced annuity to be payable quarterly and the first reduced payment to be made on the first quarterly day of payment which shall happen next after the marriage of my widow In the event of my said wife after such remarriage again becoming a widow the annuity of five hundred pounds shall not be increased I direct my trustees out of the same trust moneys to appropriate a sum sufficient at the period of appropriation as a fund for answering the said annuity to my wife by investing the same in any one or more forms of investment prescribed by clause 13 of this my will I declare that from and after such appropriation the residue of the same trust moneys shall be liberated from the trust for payment of the said annuity but the appropriated fund shall (without prejudice to the said annuity) be subject to the trusts hereinafter declared concerning the same trust moneys. (*b*) Upon further trust to pay to the trustees or board of control of the Geelong Church of England Grammar School at Corio in the State of Victoria a sum of money (hereinafter called 'the school fund') sufficient at the time of payment to return by the purchase as an investment of the stocks or funds of the Commonwealth of Australia or of any of the States of that Commonwealth an income approximately of two hundred pounds a year. . . . 11. Subject to the express provisions of clauses 8 and 10 of this my will and the further provisions in this clause contained I give and bequeath the residue of my trust fund (hereinafter called 'my residuary trust fund') to the trustees or board of control of the said Geelong Church of England Grammar School at Corio aforesaid (hereinafter called 'the trustees of the Grammar School') upon the trusts and with and subject to the powers and provisions hereinafter appearing that is to say." These trusts, powers and provisions are

set out, and the will then provides :—" I declare that the following provisions with regard to the distribution of the residue of the trust fund shall apply, that is to say :—(*a*) That part (if any) of my residuary trust fund remaining undistributed after my trustees have satisfied or have made due provision (within the true intent and meaning of this my will) for the annuities legacies gifts and bequests made under this my will shall as soon as my trustees are in a position so to do be paid over to the trustees of the Grammar School. (*b*) Should my wife remarry then (subject to the provisions of article 8 of this my will) so much of my residuary trust fund then remaining available for that purpose under the provisions hereof shall as soon as convenient after the remarriage of my wife be paid over to the trustees of the Grammar School. (*c*) Upon the death of my wife (subject also to the provisions of article 8 hereof) my trustees as soon as it is convenient to do so shall pay over the final balance of my residuary trust fund to the trustees of the Grammar School."

The material facts and the conflicting contentions of the parties are set out in the judgment under consideration as follows :— " All legacies bequeathed by the will have been paid in full except the legacy of £2,000 bequeathed to the Queensland Turf Club. The trustees have transferred to the trustees of the Geelong Church of England Grammar School Commonwealth Treasury Bonds to the face value of £4,000 carrying interest at 5 per cent per annum for the purpose of establishing the school fund mentioned in par. 10 (*b*) of the will. Pursuant to a request from the defendant, Cecile Viva Condamine Whittingham, the widow of the deceased, contained in a letter from her solicitors of the 15th February 1930, the trustees on or about the 20th March 1930, without any direction from the Court, allocated Commonwealth Government securities by the will authorized for the investment of the testator's trust funds to the face value of £46,170, the annual income from which then amounted to £2,527 9s. to provide for the establishment of the annuity fund, and thereupon opened a fresh ledger account in its books entitled ' A. H. Whittingham deceased Annuity Fund account.' In or about the month of July 1931 the said securities were converted under the *Commonwealth Debt Conversion Act* 1931, the *Debt Conversion Agreement Act* 1931,

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and the *Debt Conversion Agreement Acts* 1931, and new Commonwealth Government securities were issued in lieu thereof. Owing to the reduction in interest effected by such legislation and conversion the annual income which will be usually yielded by such securities will amount to the sum of £1,962 12s. 11d. After such allocation and after making provision for the legacy of £2,000 to the Queensland Turf Club and any debts or other liabilities on the testator's estate and exclusive of commission on unrealized assets there remains a surplus of assets over liabilities based on valuations as at the date of the testator's death of the sum of about £92,839. The trustees have proposed conversion of the estate and the residue consists mainly of a pastoral leasehold from the Crown situated in Queensland. Under the provisions of sec. 22 of *The Union Trustee Company of Australia Limited Acts Amendment Act* of 1930 and sec. 19 of such company's Acts of 1890 and 1892 the plaintiff claims that it is entitled to commission at the rate of 5 per cent on all income collected by it in the estate including the income of the fund allocated by it to provide for the annuity. Mrs. Whittingham, the widow of the deceased, has been paid the full amount of the annuity of £2,000 given to her by the will. The difference between the sum actually received from the allocated fund and the sum paid by way of annuity has been paid out of surplus income yielded by the securities allocated to such fund. The plaintiff has also in each year deducted its commission from such surplus income. The balance of such surplus income remaining in the plaintiff's hands amounts to £644 9s. The defendant, Mrs. Whittingham, claims that the annuity given to her by the will is charged upon the whole of the real and personal estate of the testator. The trustees and Board of Control of the Geelong Church of England Grammar School at Corio claim that upon an appropriation of a sum sufficient at the time of the appropriation to answer the annuity of the widow the residue of the estate is released from the charge in respect of such annuity."

In support of the widow's contention that, notwithstanding the appropriation of a trust fund to answer her annuity, the residue of the testator's estate remains charged with the annuity, reliance was

placed on the words in clause 8, " Notwithstanding . . . estate." And it was contended that these words were unlimited in their application, and were apt words to charge the annuity on the whole of the estate including the residue. This construction was fortified, it was said, by the words of clause 11 : " Subject to the express provisions of clauses 8 and 10 of this my will and the further provisions in this clause contained I give and bequeath the residue of my trust fund."

The Supreme Court decided the question in favour of the widow, and answered the questions in the special case in accordance with that opinion. We are unable to agree with this opinion. The question is one of the construction of the precise words of the will under consideration.

Dealing with the relevant clauses of the will, we think that the declaration in clause 8 that the annuity to the widow shall be a first charge on the whole estate means that it is to be a prior charge. The words " at all times irrespective of the said legacies gifts and bequests " are directed to the continuance of the priority, notwithstanding the effect the expression may have in deferring full payment of the pecuniary legacies and specific bequests. Particular directions for securing the annuity really do no more than define the character of the charge, and prescribe the mode of giving effect to the priority. This priority is to be worked out by such annuity being chargeable upon and payable out of the whole estate in priority to any other beneficial disposition, until such time as a fund should be appropriated, and by providing that upon such appropriation the annuity is to be satisfied out of the appropriated fund, and the residue of the estate is thereafter liberated from the payment of the annuity. The words do not mean that the balance is to remain charged in the hands of legatees and devisees when the fund has been appropriated. The sentence " if after the establishment of the said fund there is any deficiency," &c., is not referring to time, but to priority. " After " does not mean " at any time subsequently," but " after deducting," i.e., by reason of deducting.

The declaration at the end of clause 10 (*a*) as to the liberation of the residue of the trust moneys refers to their liberation from the trust for the payment of the annuity directed by clause 10 (*a*) which,

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by virtue of clause 8, continues to charge every item of the estate at all times up to the constitution of the annuity fund.

We agree with the following statement contained in the judgment under appeal. " The trustees did appropriate under the will a fund for answering the annuity, and consequently the residue of the trust moneys has been liberated from the trust for payment of the annuity." But we cannot agree in either of the two grounds upon which the Court considered it was not a necessary consequence of the view so stated that recourse could no longer be had to the liberated fund. As we understand the first of these grounds, the Court distinguished between liberation from payment of the annuity and liberation from all liability as a security to make good the annuity. We think this distinction cannot be supported, and is not contemplated by the clauses of the will. The second ground—an alternative—was that the words " notwithstanding any of the provisions of my will as hereinbefore or hereinafter contained," by which clause 8 is introduced, operate to override the express provisions of clause 10 which otherwise accomplished the liberation. The effect of this view is, in our opinion, completely to nullify the material words in clause 10 and to deny them all effect. They are particular and, as we think, unambiguous, and to give such an annihilating force to the overriding words introducing clause 8 is a strong thing. The true reconciliation between the two clauses lies, we think, in understanding clause 10 as explaining and specifying the kind of charge meant by clause 8, and as supplying the machinery calculated, in the testator's opinion, sufficiently to effectuate it.

For these reasons we think that the appeal should be allowed, and the order of the Supreme Court varied by answering the questions in the special case as follows :—1. (*a*) At first only. (*b*) No. (*c*) On the appropriation of the fund to answer the annuity. 2. (*a*) Yes. (*b*) Yes. 3. (*a*) See answer to 2. 4. Yes. 5. (*a*) Except in respect of the capital and income of the annuity fund, No. (*b*) Does not arise. (*c*) The deficiency is payable first out of the arrears of surplus income and next out of the capital of the fund. (*d*) Subject to the answer to (*c*), No. (*e*) Accumulated it and paid thereout any deficiency in the subsequent income to answer the annuity. 6. (*a*) Yes. (*b*) No order of the Court is required so far as the interests

of the respondent Cecile Viva Condamine Whittingham under clauses 8 and 10 (*a*) are concerned. 7. Was not pressed. 8. Out of the residuary estate.

*Appeal allowed. Order of the Supreme Court varied by answering the questions in the special case in the manner above stated. Costs of all parties as between solicitor and client out of the residuary estate.*

Solicitors for the appellants, *Thynne & Macartney.*

Solicitors for the respondent Cecile Viva Condamine Whittingham, *Flower & Hart.*

Solicitors for the respondent The Union Trustee Co. of Australia Ltd., *Morris, Fletcher & Cross.*

B. J. J.