[HIGH COURT OF AUSTRALIA.]

DAWES . . . . . APPELLANT;
DEFENDANT,

AND

EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED AND OTHERS . . . } RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Will—Construction—Release of debt—Legacy.

A by his will gave to a nephew the amount owing by him to A under a mortgage and bill of sale, and in addition gave him a pecuniary legacy of £1,000, and a motor-car. To five other nephews and nieces he gave legacies of £2,000 each, and to another nephew £1,000. He directed his trustees to invest the surplus of his residuary estate, to accumulate and invest the income, and at the end of five years to convert those investments into money and hold the proceeds for such of the seven nephews and nieces who were pecuniary legatees as should then be living "in the same proportions as the legacies herein bequeathed to them bear to one another absolutely."

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MELBOURNE, *March* 5, 11.

Rich, Starke, and Dixon JJ.

Held that the gift of the amount of the debt to the debtor was a legacy, and that the amount of the appellant's indebtedness as well as the gift of £1,000 to him should be taken into account in calculating the share in the residuary estate to which the appellant was entitled.

Decision of the Supreme Court of South Australia (*Richards* J.) reversed.

APPEAL from the Supreme Court of South Australia.

This was an appeal from a decision of *Richards* J. given upon an originating summons taken out for the purpose of interpreting the will of the testator Willy Dawes. The testator, who died in 1929,

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appointed the Executor Trustee and Agency Co. of South Australia Ltd. and John Oswald McEwin as executors and trustees of his will. The originating summons was taken out by the plaintiffs, the Executor Trustee and Agency Company of South Australia Limited and John Oswald McEwin. Robert Lionel Dawes, the appellant, Stella Boynton, Vernon Keyworth Boynton, Richard Valjean Boynton, Evelyn Jean Jessie Ashton, Vera Mary Bulbeck and Beulah Enid Jones, who were the persons entitled to share in the residuary estate of the testator, were joined as defendants.

By his will the testator gave various specific bequests of articles to different legatees, including a motor-car which he gave to the appellant. The will then proceeded :—" I give to my nephew Robert Lionel Dawes aforesaid the amount owing by him to me at my death under mortgage No. 951460 and bill of sale and direct my trustees to discharge the said mortgage and bill of sale in satisfaction of such gift and if the amount owing by the said Robert Lionel Dawes at the date of my death shall be less than " £5,498 9s. 5d. " the present amount of his indebtedness I direct my trustees to pay to my said nephew a sum equal to the amount by which the said sum of " £5,498 9s. 5d. " shall have been reduced provided that if the whole of the said sum of " £5,498 9s. 5d. " shall have been repaid by the date of my death then I give to my said nephew the sum of " £3,000. " I give to my said nephew Robert Lionel Dawes the sum of " £1,000 " which shall be in addition to the gifts included in the previous paragraph." After clauses relating to legacies in favour of other relatives, including the gift of the amount of another debt owing by a legatee, the will proceeded to give what it described as pecuniary legacies. The pecuniary legacies were ten in number, and included legacies of £2,000 each to five nephews and nieces and £1,000 to a nephew. These nephews and nieces together with the appellant were the beneficiaries under the residuary disposition which contained the words which the Court was called upon to interpret. The residuary clause was as follows :—" My trustees shall hold the surplus of my residuary estate in trust for a period of five (5) years from the date of my death to invest same and to accumulate and invest the income from such investments and at the expiration of the said

period of five (5) years to call in and convert into money the investments representing the surplus of my residuary estate and the accumulated income therefrom and to hold the net proceeds thereof for such of the said Stella Boynton, Vernon Boynton, Valjean Boynton, Robert Lionel Dawes, Evelyn Jean Jessie Dawes, Vera Mary Dawes and Beulah Enid Jones as shall be living at the expiration of the said period of five (5) years in the same proportions as the legacies herein bequeathed to them bear to one another absolutely."

The question which this clause raised was whether, in ascertaining the amount or amounts upon which the calculation of the appellant's share was based, the legacy of £1,000 only was to be taken into account, or that legacy together with the amount of his debt to the testator given by the preceding clause, or those two amounts together with the value of the motor-car.

The originating summons was taken out to determine this question. Another similar question relating to a gift of glass, silver and cutlery to Vernon Keyworth Boynton was also raised on the summons, but was not brought on appeal to the High Court. *Richards* J., who heard the originating summons, held that neither the forgiveness to the appellant of the sum of £6,351 2s. 3d., owing by the appellant to the testator at the time of his death, and secured by the mortgage and bill of sale, nor the gift of the motor-car to him, nor the gift of glass, silver and cutlery to Vernon Keyworth Boynton were to be taken into account together with the pecuniary legacies given by the will in calculating the shares of the residuary estate of the deceased.

From this decision Robert Lionel Dawes now appealed to the High Court.

Ligertwood K.C. (with him *Frisby Smith*), for the appellant. The gift of the debt to the appellant was a legacy (*Ward* v. *Grey* (1); *Bromley* v. *Wright* (2)). Forgiving a debt is not a specific but a pecuniary bequest, and is more like a demonstrative legacy than anything else (*Bythewood's Conveyancing Precedents*, 3rd ed. (1849), vol. XI., p. 464). If the mortgage debt had been wholly paid by the appellant, he would have been entitled to £3,000, which would have had to be "paid."

(1) (1859) 26 Beav. 485; 53 E.R. 986. (2) (1849) 7 Hare 334; 68 E.R. 137.

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Mayo K.C. and *Sholl*, for the respondents.

Mayo K.C. The proper method of approach is that of *In re Jodrell*; *Jodrell* v. *Seale* (1). The proportion of residue is in each case based on the relationship of several single sums of money to "one another." When one legatee is given several legacies, one only is the "one" to be related to "another." If this mortgage had been repaid, the substituted legacy of £3,000 would have been in the same position as the original gift of the debt.

Sholl. *Ward* v. *Grey* (2) turns on a very unusual provision. *Bromley* v. *Wright* (3) turns on the construction of the phrase "all and every the legatees." [Counsel also referred to *Nannock* v. *Horton* (4) and *Nicholson* v. *Patrickson* (5).]

Ligertwood K.C., in reply, referred to *Whitmore* v. *Trelawny* (6) and *Radnor* (*Earl*) v. *Shafto* (7).

Cur. adv. vult.

Mar. 11. The following written judgments were delivered :—

RICH AND DIXON JJ. This is an appeal from an order of *Richards* J. interpreting a somewhat difficult phrase in a residuary clause which governs the proportions in which the residue is distributed. The will which was made eight months before the testator's death disposes of a very large amount of property, about £90,000, chiefly among the collateral relatives of the testator. Specific bequests of articles of value including a motor-car are made to various legatees. The appellant, a nephew of the testator, is the legatee of the motor-car. The will then gives him the amount "owing by him" to the testator at his death under a mortgage and bill of sale. It directs the trustees to discharge these instruments "in satisfaction of such gift," and if the amount owing at the date of the testator's death is less than the then present amount of the appellant's indebtedness, which

(1) (1889) 44 Ch. D. 590.
(2) (1859) 26 Beav. 485; 53 E.R. 986.
(3) (1849) 7 Hare 334; 68 E.R. 137.
(4) (1802) 7 Ves. Jun. 391; 32 E.R. 158.
(5) (1861) 3 Giff. 209; 66 E.R. 386.
(6) (1801) 6 Ves. Jun. 129, at p. 133; 31 E.R. 975, at p. 977.
(7) (1805) 11 Ves. Jun. 448; 32 E.R. 1160.

is stated at £5,498 9s. 5d., the trustees are to pay him a sum equal to the reduction in the debt, and if the whole sum had at the date of the testator's death been repaid, then the nephew is given a sum of £3,000. By the next clause in the will the testator gives the appellant the sum of £1,000 which shall be in addition to the "gifts included in the previous paragraph." After clauses relating to legacies in favour of other relatives, including the gift of the amount of another debt owing by the legatee, the will proceeds to give what it describes as pecuniary legacies. They are ten in number and include legacies of £2,000 to five nephews and nieces and £1,000 to a nephew. These nephews and nieces together with the appellant are the beneficiaries under the residuary disposition which contains the words we are called upon to interpret in this appeal. The residuary clause directs the trustees to hold the surplus of the residuary estate in trust for a period of five years from the date of the testator's death, to invest the same and to accumulate and invest the income, and at the expiration of the period of five years to call in and convert the investments, and hold the net proceeds for such of the seven residuary legatees "as shall be living at the expiration of the said period of five years in the same proportions as the legacies herein bequeathed to them bear to one another absolutely." The question which this clause necessarily raises is whether, in ascertaining the amount or amounts upon which the calculation of the appellant's share is based, the legacy of £1,000 only is to be taken, or that legacy together with the amount of his debt to the testator given by the preceding clause, or those two amounts together with the value of the motor-car.

The last of the three possibilities may be summarily dismissed. Conceding that the specific bequest of the motor-car is a legacy, nevertheless the nature of the residuary clause sufficiently shows that the proportion it adopts refers to legacies expressed in terms of money, and not things which require valuation. But the question whether the amount of the appellant's debt to the testator should be included is much more formidable. *Richards* J. decided that it ought not. He began with the position that the word legacy should receive its legal meaning unless it was displaced by some sufficient

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Rich J. Dixon J.

indication to the contrary found in context or subject matter. He did not doubt that the gift of the amount of the debt to the debtor was a legacy within that meaning. But he found in several considerations arising on the face of the will enough to displace the ordinary meaning of the word legacy, and to confine its application to the pecuniary legacies of fixed amount. He said " I come to the conclusion that the legacies referred to in clause 6 are the legacies given to the persons named therein by clause 4 (11), and, in the case of ' the appellant,' the legacy of £1,000 given to him by clause 4 (7), and no other legacy in any case." To some extent his Honor was influenced by the opinion he held that the words " bear to one another " were ambiguous, and thus the ambiguity opened the door to the adoption of a qualified meaning of the provision in the residuary clause. The expression may not be logically accurate, but it is not easy to doubt that, whatever may be comprised within the expression " legacy," the proportions expressed by the words " bear to one another " must be ascertained by taking the amount which the beneficiary receives in respect of his legacy as the numerator in a fraction in which the total amount of all the legacies of the participants is the denominator. In the next place his Honor was impressed by the fact that in a general clause relating to the residuary legatees, providing for the substitution of children in the event of death of the legatee in the testator's life-time, the expression occurs " the share in my residuary estate and the legacy " which the parent would have taken. He treated this as showing that the testator regarded each legatee as taking one legacy only, and in the case of the appellant, that one legacy must be the sum of £1,000 and not either of " the gifts," as elsewhere the testator called the bequest of the motor-car and of the debt. He found support for this view in the application of the substitution clause to the case of the other legatees. His Honor also thought that in two " machinery " clauses of the will expressions occurred which tended to show that the testator drew a distinction between pecuniary legacies of a named amount and other benefits or dispositions. Upon full examination, however, these various considerations do not appear to supply any sufficiently persuasive reason for rejecting the prima facie legal

meaning of the word legacy in the residuary clause. The use of the words "the legacy" in the substitution clause is consistent with the view that the testator regarded the benefits sounding in money given to one beneficiary as amounting to a legacy. But even if in that clause "the legacy" must be restricted to one such gift to the exclusion of another where separately made, there is no presumption that in the residuary clause the word legacy is to be qualified and given a secondary meaning which in effect restricts it to legacies of a named amount. It must be remembered that if, before the testator died, the appellant had paid off the debt, he would have received a fixed sum of £3,000 as well as a fixed sum of £1,000. It would be extremely difficult to treat either of these sums as anything else but legacies within the narrowest meaning of the word. The respondents' counsel answered this difficulty by the argument that, inasmuch as the sum of £3,000 would be a substitution for the debt, it must be regarded as having the same character as the debt, and as falling outside the residuary clause for the purpose of the proportions adopted. But it is just as logical to argue in the opposite direction, and commence with the £3,000 as indubitably a legacy, and to infer that the debt must be, not only in the vocabulary of the law but also in that of the testator, a legacy. It is evident that the testator entertained some preference for the appellant, because he made a provision in his favour which must be at least double that of other pecuniary legatees. There is nothing unreasonable in the supposition that he desired his residue to be divided in proportions which similarly favour the appellant. It may be thought odd that the amount unpaid upon his death should enter into the calculation of a share of residue, but it must be remembered that the testator wished him to get the full sum of £5,498 even although he reduced his indebtedness. But the cardinal consideration in the case is that the testator has used an expression of perfectly definite legal import. All speculations as to his actual meaning are fruitless because, except by the use of this expression, he has not provided any means of ascertaining what it was. The appeal should be allowed with costs out of the estate, those of the trustees as between solicitor and client.

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STARKE J. The question in this case arises upon a residuary gift in a will. The testator, Willy Dawes, directed his trustees to hold the surplus of his residuary estate in trust for a period of five years from the date of his death, to invest the same, and to accumulate and invest the income from such investments, and at the expiration of the period of five years to convert the investments and hold the net proceeds for such of certain named persons as should be living at the expiration of the said period of five years, "in the same proportions as the legacies herein bequeathed to them bear to one another absolutely." The testator had given pecuniary legacies to each of these persons. But to Robert Lionel Dawes, one of the residuary legatees, he had also given his motor-car and a gift in these terms: "I give to my nephew Robert Lionel Dawes aforesaid the amount owing by him to me at my death under Mortgage No. 951460 and Bill of Sale and direct my trustees to discharge the said mortgage and Bill of Sale in satisfaction of such gift and if the amount owing by the said Robert Lionel Dawes at the date of my death shall be less than five thousand four hundred and ninety-eight pounds nine shillings and fivepence (£5,498 9s. 5d.) the present amount of his indebtedness I direct my trustees to pay to my said nephew a sum equal to the amount by which the said sum of five thousand four hundred and ninety-eight pounds nine shillings and fivepence (£5,498 9s. 5d.) shall have been reduced, provided that if the whole of the said sum of five thousand four hundred and ninety-eight pounds nine shillings and fivepence (£5,498 9s. 5d.) shall have been repaid by the date of my death then I give to my said nephew the sum of three thousand pounds (£3,000)." The amount owing by Robert Lionel Dawes to the testator at the date of his death amounted to £6,351 2s. 3d. *Richards* J. of the Supreme Court of South Australia, declared that according to the true construction of the will, neither the forgiveness of the debt of £6,351 2s. 3d. to Dawes nor the gift of the motor-car should be taken into account together with the pecuniary legacies given by the said will in calculating the share in the residuary estate of the testator to which the defendant Dawes was entitled. And from this decision Dawes has appealed to this Court.

The gift of the testator's motor-car to Dawes is no doubt a specific legacy, but the terms of the residuary clause sufficiently indicate

that the proportion contemplated is in reference to legacies expressed in money, and not to gifts such as a motor-car, which would require a valuation. The gift of the amount owing by Dawes to the testator at the time of his death, and the provisions following, all result in the satisfaction or payment of a sum of money, and clearly fall within the description of the word legacy. But it is said that the gift is not within the meaning of the word legacies in the residuary clause. One reason assigned during the argument for this conclusion was that the gift was not of the same type as that given to the other residuary legatees. But the gift is expressed in terms of money, though it varies according to circumstances ; it is of the same type. *Richards* J. however, found certain indications in the will itself which led him to the same conclusion. The main indication relied upon by the learned Judge is in clause 7 of the will, providing for the substitution of children of the residuary legatees if they (the residuary legatees) died in his lifetime. The will directs that "such child or children shall take, and if more than one equally between them, the share in my residuary estate and the legacy which his her or their parent would have taken if such parent had lived to attain a vested interest." But the words "the legacy" are consistent enough with the aggregation of the pecuniary benefits given to the parent or parents of the child or children the objects of the clause. The other indications referred to by the learned Judge are equally inconclusive.

The result is that the appeal should be allowed, and a declaration made that upon the true construction of the will the sum of £6,351 2s. 3d. owing by Dawes to the testator should be taken into account in calculating the share of the residuary estate of the testator to which Dawes is entitled.

Appeal allowed. Discharge so much of the first declaration contained in the order appealed from as declares that the forgiveness of a debt of £6,351 2*s.* 3*d. to the appellant is not to be taken into account in calculating the shares in the residuary estate of Willy Dawes deceased to which the defendants are respectively entitled. Declare that in calculating such shares in the said residuary estate*

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there should be taken into account not only the legacy of £1,000 *given by the will of the said deceased to the appellant but also the gift of the amount owing by the appellant to the said deceased under a mortgage and bill of sale more particularly described in paragraph* 4 *of the said will which said debt should as the appellant concedes be taken for the purpose of such calculation at* £5,498 9*s.* 5*d. only. Vary the third declaration contained in the order appealed from by substituting for the amount of* £1,000 *set opposite the appellant's name therein the amount of* £6,498 9*s.* 5*d. Costs of the appeal of all parties to be paid out of the residuary estate of the said deceased; costs, if any, of the trustees as between solicitor and client.*

Solicitors for the appellant, *Davies & Giles.*

Solicitors for the respondents, *Baker, McEwin, Ligertwood & Millhouse*, and *Hunter, Boucaut, Martin & Ashton.*

H. D. W.