[HIGH COURT OF AUSTRALIA.]

WILLIAMSON . . . . . - . APPELLANT;
DEFENDANT,

AND

CARTER AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Oct.* 10, 11, 17.

Rich, Starke, Dixon, Evatt, and McTiernan JJ.

Will—Construction—Gift to class—Ascertainment of class—Absolute gift—Cutting down absolute gift.

By her will a testatrix devised specific real property to her son W. during his life with remainder to his children. In the event of there not being any such children surviving him the property was to form part of her residuary estate. She directed her trustees to call in and convert the residue of her real and personal property and, after payment from the proceeds thereof of her debts, funeral and testamentary expenses, to divide the surplus equally between all her children who should then be living, children of deceased children to take their parent's share, but so that if W. should then be living her trustees should retain and pay his share into a savings bank, and, during his life, make him an allowance therefrom at a specified weekly amount, and after his death should hold the balance of those moneys on trust for his child or children. W., who was one of seven children who survived the testatrix, died childless seventeen years after her death.

Held, that W. was a member of the class entitled to share in the residuary estate, and the land specifically devised to him for life was not the subject of a separate disposition to a class to be ascertained when it fell into residue; that the gift to W. of a share of the residuary estate was absolute in form and the succeeding directions did not diminish it or cut it down; and therefore his legal personal representative was entitled to the balance remaining at his death of the moneys representing that share.

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The rule in *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 551; 41 E.R. 1379, applied.

Decision of the Supreme Court of New South Wales (*Long Innes* C.J. in Eq.) varied.

APPEAL from the Supreme Court of New South Wales.

Isabella Massey, who died on 2nd June 1917, made a will dated 18th April 1917 the material provisions of which were as follows:— "Subject to the foregoing bequests I devise and bequeath all my real and personal estate whatsoever and wheresoever to my . . . trustees . . . upon the trusts following namely . . . as to the Carrington Hall and two shops numbers 129 and 131 Miller Street . . . upon trust for my . . . son Wilfred John de Lissa Massey during his life (subject as hereinafter mentioned) with remainder to his children in equal shares as tenants in common in fee But if he shall die without leaving children him surviving then the last mentioned property shall fall into and form part of my residuary estate Provided always and the gift to my said son Wilfred John de Lissa Massey of a life estate in the last mentioned property is upon this express condition namely that if from any cause whatever his interest in the said property would but for this proviso be alienated anticipated encumbered or made liable in any way for the payment of his debts then his interest therein shall thereupon cease and the said property shall go and be to the uses provided by this my will as if he were then dead . . . And as to all the residue of my real and personal estate upon trust to sell call in and convert the same into money and to stand possessed of the net proceeds of such sale calling in and conversion with my ready money upon trust after payment thereout of my just debts funeral and testamentary expenses to divide the surplus thereof equally between all my children who shall then be living and the children of such of them as shall then be dead the children of a deceased child taking only the share to which his her or their parent would have been entitled if living and if more than one equally between them But so that if my said son Wilfred John de Lissa Massey shall then be living my trustees or trustee shall retain and pay his share into a savings bank and make him an allowance out of the moneys for the time

being to the credit of such account at the rate of one pound ten shillings per week during his life And after his decease shall hold the balance of such moneys upon trust for his children in equal shares as tenants in common And if there shall be only one such child then the whole shall be in trust for such one child only."

Wilfred John de Lissa Massey was one of seven of her children who survived the testatrix. He died without issue on 10th July 1934.

An originating summons was taken out by John Carter and James Henry Laws, trustees appointed under the will of the testatrix, for the determination of questions which, so far as material to this report, were substantially as follows :—

6. Whether Wilfred John de Lissa Massey or his personal representative became entitled upon his death without having had a child or children to the balance remaining at his death of the moneys being his share of the residuary estate of the testatrix directed by the will to be retained by the trustees and paid into a savings bank or whether the testatrix died intestate as to the beneficial interest in the balance of those moneys ?
7. Whether the children of the testatrix entitled to share in the distribution of the proceeds of sale of any portion of the residuary real and personal estate were the children living (*a*) at the respective times of such sale, or (*b*) at the respective dates when the residuary real and/or personal estate so sold became available for sale and conversion, or (*c*) at the expiration of one year from the death of the testatrix, or (*d*) at the respective dates of the actual distribution of the proceeds of sale ?
8. Whether according to the true construction of the will and in the event which had happened, namely, the death of Wilfred John de Lissa Massey without leaving a child or children him surviving he or his personal representative was entitled to any share, and if so what share, in the proceeds of sale available for distribution of " Carrington Hall " and the two shops referred to in the will ?

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The defendants to the summons were Annabella Susanna Greentree, George Albert Massey and Victoria Maria Isabella Hawley, children of the testatrix, and Marie Louise Williamson, sole beneficiary under, and executrix of, the will of Wilfred John de Lissa Massey.

The summons was heard by *Long Innes* C.J. in Eq., who made a decretal order whereby it was declared, in answer to question 6 of the summons, that the testatrix died intestate as to the beneficial interest in the balance remaining at the death of Wilfred John de Lissa Massey of the moneys referred to therein; in answer to question 7, that the children of the testatrix entitled to share in the proceeds of sale referred to were the children living at the death of the testatrix, or at the expiration of one year after her death; and, in answer to question 8, that according to the true construction of the will and in the event which had happened, namely, the death of Wilfred John de Lissa Massey childless, his share in the proceeds of sale referred to therein passed on his death to the next of kin of the testatrix as on her intestacy.

From that decision, so far as it related to questions 6 and 8, Marie Louise Williamson appealed to the High Court. The respondents to the appeal were the other parties to the summons. George Albert Massey cross-appealed from the decision so far as it related to the three questions.

Miller (with him *Roberts*), for the appellant. Upon the proper construction of the will the testatrix made an absolute gift to her son Wilfred of a one-seventh share of her residuary estate. There is a complete severance of that share from the estate. The words of the initial gift are clear and unambiguous; therefore it is immaterial that as between the legatee and the persons taking under the engraved trust the legatee takes for life. It is a question in each case of this nature whether the matters which follow limit or reduce the estate which is given in the first instance or whether they are merely engraved upon it. The absolute gift prevails (*Lassence* v. *Tierney* (1)). The testatrix has merely restricted the legatee's mode of enjoyment of his share. If it were not regarded as a gift absolute,

(1) (1849) 1 Mac. & G. 551; 41 E.R. 1379.

effect would not be given to the obvious intention of the testatrix as shown in the expression " divide the surplus . . . equally between all my children " and in the meaning of the words there used (*Hancock* v. *Watson* (1); *Fisher* v. *Wentworth* (2); *Rogers* v. *Rogers* (3) and *McRae* v. *Frazer* (4)). Words much more suitable for the purpose could have been used had the testatrix intended the gift to take the form of an annuity only. The important words are " share equally " and " retain " (*Whittell* v. *Dudin* (5); *Lassence* v. *Tierney* (6); *In re Marshall*; *Graham* v. *Marshall* (7); *Jarman* on *Wills*, 7th ed. (1930), vol. 2, p. 1152). [He was stopped.]

Kitto, for the respondents Annabella Susanna Greentree and Victoria Maria Isabella Hawley. A fair construction of the words used neither establishes nor indicates an absolute gift in favour of Wilfred John de Lissa Massey. The words " divide equally " must be read in conjunction with the word " retain." The scheme or intention of the testatrix was that he should receive a weekly amount from the income of a share equal in amount to the share of his brothers and sisters. The clause commencing with the words " But so " qualifies the nature and substance of the word " divide," which is incorporated in the gift itself (*Gompertz* v. *Gompertz* (8)). The use of the word " retain " is merely a negative notion of " pay " raised by the word " divide." The principal feature is a direction for division (*Lassence* v. *Tierney* (9)). *In re Marshall* (10) is distinguishable. In that case the emphatic words " pay and transfer " indicated that the notion of pay incorporated in " divide " was to operate in respect of the particular sum. In the absence of emphatic words the rule in *Lassence* v. *Tierney* (11) does not apply in the light of a subsequent provision which cuts down the effect of the word " divide" (*In re Payne*; *Taylor* v. *Payne* (12)).

(1) (1902) A.C. 14, at p. 22; (1901) 1 Ch. 482, at p. 496.
(2) (1925) 36 C.L.R. 310.
(3) (1916) 21 C.L.R. 296.
(4) (1932) 32 S.R. (N.S.W.) 191, at p. 205; 49 W.N. (N.S.W.) 37, at p. 39.
(5) (1820) 2 Jac. & W. 279, at pp. 284, 285; 37 E.R. 634, at pp. 636, 637.
(6) (1849) 1 Mac. & G., at p. 565; 41 E.R., at p. 1384.
(7) (1928) Ch. 661, at p. 663.
(8) (1846) 2 Ph. 107, at p. 109; 41 E.R. 882, at p. 883.
(9) (1849) 1 Mac. & G., at p. 565; 41 E.R., at p. 1385.
(10) (1928) 1 Ch. 661.
(11) (1849) 1 Mac. & G. 551; 41 E.R. 1379.
(12) (1927) 2 Ch. 1.

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Leaver, for George Albert Massey, adopted the argument addressed to the Court on behalf of the other respondents to the appeal in respect of question 6. Wilfred John de Lissa Massey died prior to the period of distribution. The contingent residue fell eventually into residue and became distributable only after the termination of his life interest. The children entitled to share in the distribution of the proceeds of sale of the residuary estate, or of any part thereof, are the children who survived the termination of Wilfred's life estate. Question 7 should be so answered. When he died without children him surviving a vested interest was created in the testatrix's children then living. *Hagger* v. *Payne* (1) and *Coventry* v. *Coventry* (2), referred to in the Court below, are not applicable (see *Jarman* on *Wills*, 7th ed. (1930), vol. 3, pp. 1645, 1646). In those cases there was not any contingency at all; the class was decided at the date of the death of the testator. There is nothing to show that the testatrix intended that the various funds should be dealt with at different times. As used in the will in relation to residue, the word "then" means "for the time being." Whenever the various properties referred to in the will eventually fall into residue they become subject to the trust for conversion and have to be distributed as personalty; there are obviously different periods of distribution specified, the first of which must take place within twelve months of the death of the testatrix. The words "then living" refer to the children of the testatrix who are living at the time or times when the several properties fall into residue. The beneficiaries are ascertained as at each period of distribution (*Brograve* v. *Winder* (3); *Newton* v. *Ayscough* (4); *In re Hunter's Trusts* (5); *Jarman* on *Wills*, 7th ed. (1930), vol. 3, p. 2058). Upon the proper construction of the will the property and share in which the son Wilfred was interested on his death passed to his children, or in default of any such children fell into residue.

Miller, in reply.

Cur. adv. vult.

(1) (1857) 23 Beav. 474; 53 E.R. 186.
(2) (1865) 2 Dr. & Sm. 470; 62 E.R. 699.
(3) (1795) 2 Ves. Jun. 634; 30 E.R. 815.
(4) (1815) 19 Ves. 534; 34 E.R. 614.
(5) (1865) L.R. 1 Eq. 295.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. This appeal raises a question whether a share of residue is, in the event which has happened, undisposed of, or forms part of the estate of a deceased son of the testatrix, or is distributable among her other children.

The deceased son, whose name was Wilfred John de Lissa Massey, was one of seven children who survived the testatrix. He died without issue seventeen years after her death. The will contains a devise of specific real property in the following terms :—" Upon trust for my said son Wilfred John de Lissa Massey during his life (subject as hereinafter mentioned) with remainder to his children in equal shares as tenants in common in fee But if he shall die without leaving children him surviving then the last mentioned property shall fall into and form part of my residuary estate." The testatrix directs that the residue of her real and personal estate shall be converted and the proceeds held upon trust after payment thereout of debts and funeral and testamentary expenses " to divide the surplus thereof equally between all my children who shall then be living and the children of such of them as shall then be dead the children of a deceased child taking only the share to which his her or their parent would have been entitled if living and if more than one equally between them But so that if my said son Wilfred John de Lissa Massey shall then be living my trustees or trustee shall retain and pay his share into a savings bank and make him an allowance out of the moneys for the time being to the credit of such account at the rate of one pound ten shillings per week during his life And after his decease shall hold the balance of such moneys upon trust for his children in equal shares as tenants in common And if there shall be only one such child then the whole shall be in trust for such one child only."

At the death of Wilfred John de Lissa Massey childless, the land, the subject of the specific devise to him for life with remainder to his children, fell into residue as a result of the direction that it should, in that event, fall into and form part of the residuary estate. But the trust to sell and convert the residuary estate is immediate and is followed by the direction to divide the proceeds between the children " then living and the children of such of them as should

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then be dead." At what time is the class to be ascertained among whom the distribution is made of so much of the residue as arises from the failure of the specific devise ? *Long Innes* C.J. in Eq. has decided that the class taking residue is ascertained once for all on the death of the testatrix or within twelve months therefrom and that consequently Wilfred John de Lissa Massey took a share. This conclusion is attacked on behalf of the other residuary legatees upon the ground that the class taking residue is not, upon the construction of the residuary clause, to be ascertained once for all, but independently as to each distribution required by the terms of the clause. It is said that, while the net residue which, according to the trusts of the will, is ascertainable at or within a year of the death of the testatrix is distributable among the class of children living at that time and the children of those then dead, yet what afterwards becomes part of residue as a result of the subsequent failure of prior gifts is distributable among the class of children at that time living and the children of those then dead. According to this construction of the residuary gift, as the very occasion of the accretion to residue was the death of Wilfred John de Lissa Massey without children, he could not form a member of the class taking the proceeds of the accretion. Two difficulties stand in the path of this contention. A disposition of residue is a disposition of property conceived of as one subject matter. When, upon the failure of the specific devise, the land sinks into residue it merely swells the quantum of that subject matter ; it does not supply a new subject of a distinct disposition. The second difficulty is akin to the first. It lies in the fact that the gift of residue is actually expressed as a trust to divide the surplus among children then living and the children of those then dead. This language describes a single class—not two classes—and a single fund, viz., the surplus. These difficulties appear insuperable. Accordingly the decision of *Long Innes* C.J. in Eq. is right that the class sharing in residue was ascertainable before the death of Wilfred John de Lissa Massey so that he was a member of it.

Upon this footing the question arises whether, under the terms of the additional provision describing how the gift to him of a share of residue is to be dealt with on his death without issue, it failed

so that his share is distributable among the next of kin. *Long Innes* C.J. in Eq. decided that this was so. The question concerns the application of the rule in *Lassence* v. *Tierney* (1). Is there a primary gift to him of a share of residue definitively made over to his purposes and then subjected to a superadded direction controlling the extent of his enjoyment and the mode in which the share shall devolve among his family ? Or, on the other hand, upon the total effect of the residuary disposition considered with the rest of the will, is there no more than a gift to him of an allowance out of an aliquot share of the estate and on his death a gift to his children of the corpus remaining of the share ? *Long Innes* C.J. in Eq. said that in each case the question is whether one can find an absolute gift in the first instance, and that, in this case, he had come to the conclusion that he could not ; that other Judges might come to a different conclusion and it was for them to say, if the matter went further. It has gone further and we have come to a different conclusion. We think the trust to divide the surplus among the children amounts to a primary gift to each which, as between him and the estate, is absolute. The particular provision relating to the share of Wilfred John de Lissa Massey is introduced by the words " But so that ". These are apt to describe a restriction or modification which, when expressed, does not go to undo the effect of the earlier direction to divide but to impose a fetter upon the enjoyment and disposal of the gift. The words " if my said son . . . shall then be living " state only the contingency which makes the ensuing provision relevant, namely, the contingency of his being a member of a class sharing in residue. The direction to retain the share and pay it into a savings bank is expressed in language which acknowledges a prima facie right in him to receive the share cash in hand. It is directed to the manner in which the trustees shall secure the benefit to him and his children. Further, it is described as " his share." The argument that the direction to " retain " cancels the dispositive efficacy of the word " divide," because it forbids " payment " and it is only because " divide " involves payment that it is dispositive, is fallacious, as well as artificial in its analysis. For the word " divide," as used in the

(1) (1849) 1 Mac. & G. 551 ; 41 E.R. 1379.

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main gift, carries the three notions of proportioning, making over in point of property and actually distributing in point of enjoyment. The allowance is not restricted to the income of the share, and we were informed that in fact the income is insufficient to meet it. It is only the balance which is to go to his children after the death of Wilfred John de Lissa Massey. Thus there is nothing to suggest that the chief objects of the gift were his unborn children. The purpose of the gift of his share remains the benefit of himself. But, for reasons which other provisions of the will suggest, it was thought right to restrain his enjoyment of the gift.

The appeal should be allowed. The decretal order should be varied by omitting the declarations answering the sixth and eighth questions in the originating summons and substituting therefor a declaration answering the sixth question that the legal personal representative of Wilfred John de Lissa Massey deceased is entitled to the balance remaining at his death of the moneys representing his share of the residuary estate of the testatrix, and a declaration answering the eighth question that the proceeds therein referred to form part of the residuary estate of the testatrix in which the legal personal representative shares in accordance with the declaration made in answer to the sixth question. Cross-appeal dismissed. All parties to have their costs of the appeal and the cross-appeal out of the estate.

STARKE J. This appeal depends upon the construction of the will of Isabella Massey. One of the questions raised is whether a gift to trustees to call in and convert all the residue of her real and personal estate and after payment of debts, funeral and testamentary expenses to divide the surplus equally between all her children who shall then be living, is diminished or cut down, so far as her son Wilfrid John de Lissa Massey is concerned, by succeeding directions or trusts engrafted on the gift to the effect that the trustees of the will shall retain and pay his share into a savings bank account and make him an allowance of thirty shillings per week during his life and after his decease hold the balance of such moneys upon trust for his children in equal shares as tenants in common. The son survived the testatrix by many years, but died without ever having

had a child. *Long Innes* C.J. in Eq., with some hesitation, declared that the testatrix died intestate as to the balance of the moneys remaining at the death of the son in the savings bank account.

If there be an absolute gift to a legatee in the first instance, and directions or trusts are engrafted or imposed on that absolute interest which fail, then the absolute gift takes effect so far as the directions or trusts have failed, but if the absolute gift is diminished or cut down by the succeeding directions or trusts, the Court can only give effect to the gift as so cut down or diminished (*Lassence* v. *Tierney* (1); *Hancock* v. *Watson* (2); *Re Richards*; *Williams* v. *Gorvin* (3)). The gift in the present case belongs, I think, to the former class of cases. It is absolute in form in the first instance and in my opinion the succeeding directions do not diminish it or cut it down; they restrict the manner of the son's enjoyment of his share during his life and then enjoin in effect that the balance of the share remaining after his death be held upon trust for his children. The declaration to the contrary should therefore be set aside and a declaration substituted that the personal representative of the son is entitled to the balance of the moneys remaining in the savings bank at his (the son's) death.

Another question raised on the appeal arises out of a gift of certain real property to the testatrix's son during his life with remainders to his children, but if he should die without leaving children him surviving, then such property should fall in and form part of the testatrix's residuary estate. As stated above, the testatrix directed that her residuary real and personal estate should be called in and converted, debts paid, and the surplus divided equally between all her children "who shall then be living." *Long Innes* C.J. in Eq. declared that the children of the testatrix entitled to share in the distribution of the residuary estate were the children living at the death of the testatrix or at the expiration of one year after her death. It was not necessary, the learned Judge said, to say which, because the class in either case was the same. The argument before us, as I followed it, was that the provisions of the will necessarily

(1) (1849) 1 Mac. & G. 551; 41 E.R. 1379.
(2) (1902) A.C. 14.
(3) (1883) 50 L.T. 22.

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indicated an intention to treat the property given to the son separately from other portion of the residue, so that the class entitled to share in its division would be ascertained when it fell into residue. But I cannot think that the language of the will warrants any such conclusion ; the residue is given as a whole and divided as a whole. The declaration of *Long Innes* C.J. in Eq. in this respect was therefore right and should be affirmed.

Appeal allowed. Cross-appeal dismissed. Costs of all parties both of appeal and cross-appeal out of estate.

Solicitor for the appellant, *J. J. Lynn.*
Solicitors for the respondents, *Makinson & D'Apice.*

J. B.