[HIGH COURT OF AUSTRALIA.]

FAIRWEATHER . . . . . APPELLANT;
DEFENDANT,

AND

FAIRWEATHER AND OTHERS . . . RESPONDENTS.
DEFENDANTS AND PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1944.

SYDNEY, *Mar.* 30, 31; *May* 11.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Will—Specific devise—Ademption—Contract for sale of devised property to devisee after date of will—Subsequent confirmation of will by codicils—Contract executory at date of death of testator—Intention of testator—Wills, Probate and Administration Act 1898-1940 (*N.S.W.*) (*No.* 13 *of* 1898—*No.* 32 *of* 1940), *ss.* 4, 16, 17, 20, 21—*Moratorium and Interest Reduction* (*Amendment*) *Act* 1931 (*N.S.W.*) (*No.* 66 *of* 1931)—*Moratorium Act* 1932 (*N.S.W.*) (*No.* 57 *of* 1932), *s.* 35 (4).

By his will made in 1927, a testator devised his "property known as 'Birrell Court'" to his son subject to a mortgage thereon. In 1928, the testator contracted to sell the devised real estate to his son on terms providing for payment of the purchase money by instalments and interest. The testator executed a first codicil in 1929 and a second codicil in 1936, neither of which in terms referred to the devised real estate. In both codicils the testator confirmed the will. He died in 1941. The contract was then still executory, the son being considerably in arrears with his payments thereunder.

Held, by *Latham* C.J., *Rich*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting), that the devise of the real estate failed. By *Latham* C.J., *Rich* and *McTiernan* JJ. (*Williams* J. *contra*) on the ground that, having been adeemed by the contract of sale, it did not form part of the will as confirmed and republished by the codicils; by *Williams* J. on the ground that by the confirmations in the codicils the testator did not intend to make the gift of the real estate operate in a different manner, that is as a gift of the proceeds of sale, and that at the date of his death the only beneficial interest of the testator was in the proceeds of sale.

Effect of the *Moratorium and Interest Reduction* (*Amendment*) *Act* 1931 (N.S.W.) and s. 35 (4) of the *Moratorium Act* 1932 (N.S.W.) considered by *Williams* J.

H. C. OF A. 1944.

FAIR-WEATHER v. FAIR-WEATHER.

Decision of the Supreme Court of New South Wales (*Roper* J.): *Gilder* v. *Fairweather*, (1943) 44 S.R. (N.S.W.) 229; 61 W.N. 50, by majority, affirmed.

APPEAL from the Supreme Court of New South Wales.

The will made by Walter Richard Fairweather on 25th October 1927, contained, *inter alia*, the following provisions: "I direct my Trustees to forgive my son Stanley Fairweather . . . any moneys owing by him to me at the time of my death I likewise direct my Trustees to forgive my son Walter Fairweather . . . any money owing by him to me at the time of my death I give devise and bequeath to my son Roy Fairweather my property known as 'Birrell Court' Birrell Street Waverley for his own absolute use and benefit subject however to the mortgage of One thousand pounds secured thereon."

At that date the property known as Birrell Court was owned by the testator subject to a mortgage of £1,000.

On 21st December 1928, the testator entered into a contract with his son Roy Gilbert Fairweather, referred to in the will as Roy Fairweather, for the absolute sale to that son of Birrell Court for the sum of £1,500, payable, together with interest, by monthly instalments.

The testator covenanted in the contract that he would not at any time thereafter encumber the property to any greater extent than the amount then secured on mortgage and, also, that he would comply with all the covenants, terms and conditions in the mortgage. The contract provided, *inter alia*, that the testator should be entitled to the rents and profits, and should pay or bear all rates, taxes and outgoings up to the date of the contract, from which date the son should be entitled to or should pay or bear the same respectively.

Up to the date of the making of the contract the said son had occupied Birrell Court as a tenant of the testator at a rental of £1 10s. per week.

On 27th July 1929, the testator made a first codicil whereby he revoked the appointment of one of the executors named in the will, appointed another person in his stead, and in all other respects confirmed the will. On 23rd March 1936, the testator made a second codicil whereby he altered certain of the dispositions in the will without any reference to Birrell Court and concluded: "And in all other respects I do now hereby ratify and confirm my said will except and in so far as the same may in any wise have been altered or revoked by my said first codicil thereto and I do hereby ratify and confirm my said first codicil."

The testator died on 16th October 1941.

After the making of the contract Roy Gilbert Fairweather made certain payments to the testator on account of the instalments of purchase money and interest payable under the contract, but fell into arrears with his payments and at the date of the death of the testator owed in respect of purchase money and interest the sum of £1,705 5s. 7d. The *Moratorium and Interest Reduction (Amendment) Act* 1931 (N.S.W.) abolished the personal liability of Roy Gilbert Fairweather to pay the purchase money and interest referred to in the contract.

The mortgage of £1,000 mentioned by the testator in his will was at the date of his death still a valid and subsisting mortgage and the whole of the principal moneys thereunder still remained secured thereby.

Upon an originating summons brought in the equitable jurisdiction of the Supreme Court of New South Wales by Telford Graham Gilder, one of the executors of the testator's will and codicils, and to which the defendants were Roy Gilbert Fairweather and Walter Richard Fairweather, sons of the testator, Amelia Louisa Hurley and Gladys Airam Crocker, daughters of the testator, Ailsa Joan Gallie, niece of the testator, and Trevor Stanley Fairweather and Clyde Walter Fairweather, nephews of the testator, *Roper* J. held that the devise contained in the will of the property known as Birrell Court to Roy Gilbert Fairweather was revoked by the contract for sale of that property made by the testator with Roy Gilbert Fairweather: *Gilder* v. *Fairweather* (1).

From that decision Roy Gilbert Fairweather appealed to the High Court, the other parties to the originating summons being respondents to the appeal.

Upon the hearing of the appeal there was not any appearance by or on behalf of the respondents Amelia Louisa Hurley and Gladys Airam Crocker.

Kitto K.C. (with him *Flattery*), for the appellant. The codicils, by their confirmatory clauses, brought the will down to their respective dates. In legal effect the codicils had the same result as if they had contained the very words of the will. Those words notionally read into the codicils produce the result that the devisee takes the property now by force of the devise without further payment of moneys. On the facts and documents it sufficiently appears that the intention of the testator was that as part of his testamentary bounty the appellant should take whatever interest the testator had in Birrell Court at the date of his death. There is nothing to suggest

(1) (1943) 44 S.R. (N.S.W.) 229; 61 W.N. 50.

H. C. OF A. 1944. FAIRWEATHER v. FAIRWEATHER.

that when he confirmed his will the testator had any idea that the devise of Birrell Court had been affected by the contract. The intention of the testator was that if during his lifetime the property had not been acquired by the appellant under the contract the devise should operate on his death, whereby the appellant would acquire the property as part of the testator's bounty. The words "Birrell Court" in the will should be read as meaning "such interest as I have in Birrell Court whatever it may be." If the codicils had contained the words of devise they would have been sufficient to carry the whole of the interest of the testator as vendor under the contract (*In re Lowman*; *Devenish* v. *Pester* (1); *In re Glassington*; *Glassington* v. *Follett* (2); *In re Pyle*; *Pyle* v. *Pyle* (3); *In re Fieldhouse*; *Newell* v. *Shorter* (4); *Seath* v. *Bogle* (5)). The effect of confirming a will by a codicil is as if the provisions of the will, as expressly altered by the codicil, had been written into the codicil as at the date of the codicil (*In re Champion*; *Dudley* v. *Champion* (6); *Goonewardene* v. *Goonewardene* (7); *Grealey* v. *Sampson* (8)). The words of the will should be read into the codicils with the meaning they would have in the new circumstances even if it be a meaning different from that which they would have had in the circumstances existing at the date of the execution of the will (*Grealey* v. *Sampson* (9)). By the confirmation of the will the devise of Birrell Court to the appellant operates in the same way as it would have done if the words in the will had been contained in the codicils of later date (*In re Fraser*; *Lowther* v. *Fraser* (10); *In re Reeves*; *Reeves* v. *Pawson* (11); *In re Hardyman*; *Teesdale* v. *McClintock* (12); *In re Tredgold*; *Midland Bank Executor and Trustee Co. Ltd.* v. *Tredgold* (13)). *Powys* v. *Mansfield* (14) is a case of double portions, and is not an authority applicable to this case. In *Drinkwater* v. *Falconer* (15), *Cowper* v. *Mantell* (16) and *Sidney* v. *Sidney* (17) nothing remained to answer the description in the will; therefore those cases are distinguishable from this case.

Mason K.C. (with him *Henry*), for the respondents Walter Richard Fairweather, Trevor Stanley Fairweather, Ailsa Joan Gallie and Clyde Walter Fairweather. The devise of Birrell Court is a specific

(1) (1895) 2 Ch. 348, at p. 354.
(2) (1906) 2 Ch. 305, at pp. 312, 313.
(3) (1895) 1 Ch. 724, at p. 727.
(4) (1940) 40 S.R. (N.S.W.) 405; 57 W.N. 129.
(5) (1889) 15 V.L.R. 813.
(6) (1893) 1 Ch. 101, at pp. 109-111.
(7) (1931) A.C. 647, at p. 650.
(8) (1917) 1 I.R. 286.
(9) (1917) 1 I.R., at p. 289.
(10) (1904) 1 Ch. 726, at p. 734.
(11) (1928) 1 Ch. 351, at pp. 357, 358.
(12) (1925) 1 Ch. 287, at pp. 290-292.
(13) (1943) 1 Ch. 69.
(14) (1837) 3 My. & Cr. 359 [40 E.R. 964].
(15) (1755) 2 Ves. Sen. 623 [28 E.R. 397].
(16) (1856) 22 Beav. 223 [52 E.R. 1094].
(17) (1873) L.R. 17 Eq. 65.

devise not capable of being increased or decreased. It is a devise as at the date of the testator's death of specific property in existence and with a mortgage on it of one thousand pounds. Prior to and at the date of the first codicil there was not any moratorium legislation in force. The real point at issue is whether the confirmation of a will by a codicil is in effect a redating of the will. Generally speaking, it is correct to say that the effect of republishing a will is to redate the will, but this does not apply to adeemed or lapsed legacies (*Halsbury's Laws of England*, 2nd ed., vol. 34, pp. 96, 97 ; *Theobald* on *Wills*, 9th ed. (1939), p. 143 ; *Jarman* on *Wills*, 7th ed. (1930), vol. 1, p. 189). Although its republishing by a codicil makes a will speak as from the date of the codicil in respect of property acquired after the date of the will, it does not so speak for the purpose of reviving a legacy revoked, adeemed or satisfied or, as in this case, where the property has been sold. A codicil only acts upon a will as it existed at the time (*Powys* v. *Mansfield* (1) ; *Hopwood* v. *Hopwood* (2) ; *In re Warren* ; *Warren* v. *Warren* (3) ; *Sidney* v. *Sidney* (4) ; *Macdonald* v. *Irvine* (5)). Where there is a devise and a subsequent contract, the contract being on foot, and the testator becomes entitled to the purchase money, the words giving the devise are not apt. At the time he made the codicils the testator knew that Birrell Court had been sold and that all he had therein was an interest in the purchase money. In the circumstances there was not any gift either of Birrell Court or of the proceeds of sale. It is obvious that the intention of the testator was that the appellant should buy Birrell Court. Republication does not extend a specific gift to property which upon the true construction that gift was not intended to embrace (*Sidney* v. *Sidney* (6) ; *Watts* v. *Watts* (7) ; *In re Evans* ; *Evans* v. *Powell* (8) ; *In re Davies* ; *Scourfield* v. *Davies* (9) ; *In re Portal and Lamb* (10) ; *Read* v. *Van Brakkel* (11) ; *Farrar* v. *Earl of Winterton* (12) ; *Stilwell* v. *Mellersh* (13) ; *Mountcashel* v. *Smyth* (14) ; *Re Moore* ; *Long* v. *Moore* (15) ; *Jarman* on *Wills*, 7th ed. (1930), vol. 1, pp. 188-190 ; *Theobald* on *Wills*, 9th ed. (1939), p. 122). There is no rule of construction to the effect that by republication a testator writes into the codicil everything contained in the will and thereby brings it up to the date of the

(1) (1837) 3 My. & Cr., at p. 376 [40 E.R., at p. 971].
(2) (1859) 7 H.L.C. 728, at p. 740 [11 E.R. 290, at p. 295].
(3) (1932) 1 Ch. 42, at pp. 50, 51.
(4) (1873) L.R. 17 Eq. 65.
(5) (1878) 8 Ch. D. 101.
(6) (1873) L.R. 17 Eq., at pp. 68, 69.
(7) (1873) L.R. 17 Eq. 217.
(8) (1909) 1 Ch. 784.
(9) (1925) 1 Ch. 642, at p. 650.
(10) (1885) 30 Ch. D. 50, at pp. 55, 56.
(11) (1914) 14 S.R. (N.S.W.) 124 ; 31 W.N. 47.
(12) (1842) 5 Beav. 1 [49 E.R. 476].
(13) (1851) 20 L.J. Ch. 356, at p. 361.
(14) (1895) 1 I.R. 346, at pp. 360, 364.
(15) (1907) 1 I.R. 315, at p. 317.

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER.

codicil. By " in all other respects " confirming his will a testator does not make a substitutional gift. The doctrine in *In re Lowman* ; *Devenish* v. *Pester* (1) and *In re Glassington* ; *Glassington* v. *Follett* (2) does not apply to a case of republication. None of the cases cited on behalf of the appellant in support of the general proposition that the effect of the codicil was to redate the will, applies to a case where there is some suggestion of the property having been altered, revoked or adeemed ; they do not refer to cases where there is a specific devise and the subject matter has changed in the meantime. The subject contract was a firm contract and was not a conditional contract or option as in *In re Pyle* ; *Pyle* v. *Pyle* (3), *In re Carrington* ; *Ralphs* v. *Swithenbank* (4), and *Steele* v. *Steele* (5). The contract is a subsisting contract and was and is unaffected by moratorium legislation.

Loxton, for the respondent Gilder.

Kitto K.C., in reply. The effect of the moratorium legislation renders the contract conditional ; therefore this case is indistinguishable from *In re Pyle* ; *Pyle* v. *Pyle* (3), *In re Carrington* ; *Ralphs* v. *Swithenbank* (4), and *Steele* v. *Steele* (5). Confirmation of a will is sufficient to pass a totally different property if that property answers the words of the will at the date of the codicil (*Goonewardene* v. *Goonewardene* (6) ; *In re Reeves* ; *Reeves* v. *Pawson* (7) ; *In re Kempthorne* ; *Charles* v. *Kempthorne* (8) ; *In re Wheeler* ; *Jameson* v. *Cotter* (9) ; *In re Warren* ; *Warren* v. *Warren* (10)). The position created by a contract for sale upon a devise was dealt with in *In re Clowes* (11). Under the codicil the appellant takes a gift of the equity of redemption in Birrell Court for nothing. That property should be transferred to him without payment of any further moneys under the contract.

Cur. adv. vult.

May 11. The following written judgments were delivered: —

LATHAM C.J. This is an appeal from a decretal order of the Supreme Court of New South Wales (*Roper* J.) made on an originating summons for the determination of questions arising in the administration of the will and two codicils of Walter Richard Fairweather deceased.

(1) (1895) 2 Ch. 348.
(2) (1906) 2 Ch. 305.
(3) (1895) 1 Ch. 724.
(4) (1932) 1 Ch. 1.
(5) (1913) 1 I.R. 292.
(6) (1931) A.C. 647.
(7) (1928) 1 Ch. 351.
(8) (1930) 1 Ch. 268, at p. 293.
(9) (1929) 2 K.B. 81, at pp. 82, 83.
(10) (1931) 1 Ch., at pp. 47, 51.
(11) (1893) 1 Ch. 214.

The testator made his will on 25th October 1927. At that time he owned a property known as " Birrell Court " which was subject to a mortgage of £1,000. The will, *inter alia*, contained the following provisions : " I direct my Trustees to forgive my son Stanley Fairweather of Toongabbie any moneys owing by him to me at the time of my death I likewise direct my trustees to forgive my son Walter Fairweather of Lewisham any money owing by him to me at the time of my death I give devise and bequeath to my son Roy Fairweather my property known as ' Birrell Court ' Birrell Street Waverley for his own absolute use and benefit subject however to the mortgage of One thousand pounds secured thereon."

On 21st December 1928, the testator made a contract to sell Birrell Court to his son Roy for £1,500. The testator covenanted not to encumber the property to any greater extent than the amount then secured on mortgage and also to comply with all the covenants of the mortgage. Under this contract the son was entitled, upon performing the terms of the contract, but only upon such performance, to get a title to Birrell Court free from any mortgage. The *Moratorium Acts* of New South Wales did not alter this position. The son fell into arrears with his payments under the contract and at the time of the testator's death owed about £1,700 thereunder.

On 27th July 1929 the testator made the first codicil whereby he changed his executors and in all other respects confirmed his will.

On 23rd March 1936 he made a second codicil, making some alterations in the gifts contained in his will, and containing the following provision : " In all other respects I do now hereby ratify and confirm my said Will except and insofar as the same may in any wise have been altered or revoked by my said first Codicil thereto and I do hereby ratify and confirm my said First Codicil."

Neither codicil contained any express reference to Birrell Court.

The testator died on 16th October 1941.

The questions asked in the originating summons were as follows :—

(*a*) Whether the devise contained in the will of the property known as " Birrell Court " to R. G. Fairweather was revoked by the contract for sale of the said property made by the testator with the said R. G. Fairweather dated 21st December 1928.

(*b*) If the answer to (*a*) above is in the negative whether the said R. G. Fairweather is now indebted to the estate of the testator for arrears of instalments of purchase money and interest due under the said contract at the date of the death of the testator.

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Latham C.J.

Roper J. answered the first question in the affirmative. The son Roy appeals to this Court.

The object of construing a will is to give effect to the intention of the testator as disclosed by the words of the will applied to the relevant facts. In the present case, I find it difficult to have any doubt as to the real intention of the testator. He had three sons. When he made his will he forgave two sons debts which they owed to him, and gave Birrell Court, subject to the £1,000 mortgage, to his other son, Roy. When he made his codicils he should be taken to have known what he had done by the will which he confirmed and what he had subsequently done with respect to Birrell Court. He knew, therefore, that he had changed his mind about giving Birrell Court to Roy subject to the mortgage, and that he had decided not to give it to him, but to sell it to him for £1,500, free of the mortgage. He knew, therefore, that he had taken Birrell Court out of the operation of his will. When he made the codicils Roy owed him money under the contract. It would have been easy to forgive this debt altogether, or less £1,000. But this is just what the testator did not do, though he had forgiven the debts owed by the other two sons. He left the contract and its obligations standing. The words "subject to the mortgage of £1,000 secured thereon" make it impossible for the appellants to contend that the testator intended to devise Birrell Court free of the mortgage, i.e., simply to forgive his son Roy his debt under the contract of sale. These words can apply only to Birrell Court as land, and not to the purchase money for Birrell Court, which purchase money was not subject to any mortgage. Accordingly, taking the matter to be decided as that of ascertaining the intention of the testator from the words of the will as applied to circumstances which should be assumed to be known to the testator, I am of opinion that the question of ascertainment of intention should be approached in the following way:— The testator dealt with Birrell Court in his will as land subject to a mortgage; he gave it in his will to his son Roy as land so subject; he then sold it to that son, contracting to transfer it to him free of the mortgage, thus indicating a complete change of intention; his confirmation of his will operated only to confirm the will in so far as the will was operative as a testamentary disposition; and he did not intend to forgive his son the debt due under the contract. Upon this view of the intention of the testator the decision of *Roper* J. was right. I proceed to inquire whether there are any rules of law which prevent effect being given to this intention ascertained in the manner stated.

Some propositions which are clearly stated by *Roper* J. in a carefully reasoned judgment were not, as I followed the argument, contested upon the appeal, and they include the following :—

1. If a testator owns realty, devises it by will, and subsequently disposes of it by transfer or conveyance, so that he does not own it at his death, the devisee takes nothing (*In re Dowsett* ; *Dowsett* v. *Meakin* (1)). The testator cannot give by devise that which he no longer owns.

2. If a testator owns realty, devises it by will and subsequently enters into a contract to sell it, the contract being in existence at the time of his death, the devisee takes nothing beneficially (*In re Clowes* (2) and other cases cited in *Jarman* on *Wills*, 7th ed. (1930), vol. 1, p. 149). The devise of realty does not operate to transfer to the devisee the testator's rights under the contract of sale : that which was devised no longer belongs beneficially to the testator.

3. If a testator contracts to sell realty and subsequently devises that realty by will, the devisee is entitled to the benefit of the contractual rights of the testator to the purchase money (*In re Lowman* (3)). In such a state of facts it is held that the testator must have meant to confer some benefit in relation to the realty upon the person named as devisee, and effect is given to this intention by holding that the devisee takes the testator's rights to or interest in the purchase money.

If the codicils had not been made there would, on the authorities, have been no difficulty in the case. The testator's son Roy would have taken nothing by devise of Birrell Court under the principle stated in proposition No. 2, and the executors would have been compellable to transfer Birrell Court to him only if he had performed his contract by paying the purchase money.

The two codicils, however, each confirmed the will, each of them being made after the contract of sale to the son. It is argued for the respondents that therefore they must be regarded as repeating, after the sale, the devise of Birrell Court, so that the case would fall under proposition 3 above stated. This contention was rejected by *Roper* J. upon the authority of *Powys* v. *Mansfield* (4) where Lord *Cottenham* said :—" It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time ; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it " (5).

(1) (1901) 1 Ch. 398, at p. 401.
(2) (1893) 1 Ch. 214.
(3) (1895) 2 Ch. 348.
(4) (1837) 3 My. & Cr. 359 [40 E.R. 964].
(5) (1837) 3 My. & Cr., at p. 376 [40 E.R., at p. 971].

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Latham C.J.

Roper J. did not omit to point out that the term " ademption " is used in more than one sense. In *Powys* v. *Mansfield* (1) the form of ademption which the court had to consider was ademption of a legacy by a subsequent portion, the rule against double portions being applied. In the present case the form of ademption upon which the appellant relies is a different kind of ademption, namely, ademption by the act of a testator in converting realty into personalty after making his will: See, e.g., *In re Bagot's Settlement* (2); *Watts* v. *Watts* (3). In the argument before this Court it was sought by the respondents to confine the effect of the statement which I have quoted from *Powys* v. *Mansfield* (1) to the case of the ademption of a legacy by a portion, so that that case would not be an authority in relation to ademption arising from the act of a testator in selling land which he had devised by a will made before the sale. But *Roper* J. was of opinion that the principle upon which *Powys* v. *Mansfield* (1) was decided was that the legacy in that case (corresponding to the devise of the land in the present case) had been removed by the testator himself from the operation of his will so that it formed no part of the will. The same view of what was decided in *Powys* v. *Mansfield* (1) was taken by Lord *Kingsdown* in *Hopwood* v. *Hopwood* (4), where he said: " The principle seems to be, that when a parent has given a portion by a will, and afterwards pays or secures the same portion by a settlement, the legacy is from that moment gone, and the will is to be read as if that bequest had been expunged from it. The language of Lord *Cottenham*, in *Powys* v. *Mansfield* (1) upon this point is, I think, quite borne out by the cases." The confirmation of the will by the codicil was regarded by *Roper* J. as confirming only what had been left standing in the will (not what had been " expunged ") and, as the devise was no longer standing, the confirmation of the will did not re-institute the devise which had disappeared. I agree with this interpretation of the decision in *Powys* v. *Mansfield* (1). In my opinion the point of the decision is that the testator by his own voluntary act dealt with his property in such a way as to adeem a disposition which he had made by his will—to remove that disposition from his will. The principle appears to me to be the same whether the voluntary act of the testator is the payment or covenant to pay (See *Hopwood* v. *Hopwood* (5)) moneys as a portion or any other dealing by him with his property (such as an agreement to sell it) which shows that

(1) (1837) 3 My. & Cr. 359 [40 E.R. 964].
(2) (1862) 31 L.J. Ch. 772.
(3) (1873) L.R. 17 Eq., at p. 219.
(4) (1859) 7 H.L.C. 728, at p. 747 [11 E.R. 290, at p. 298].
(5) (1859) 7 H.L.C. 728 [11 E.R. 290].

he has changed his intention to give a testamentary bounty in respect of the property in question to the devisee or legatee.

The position may be different where a change in the nature of property has been made by law " independently of the testator and possibly without his knowledge." I take this phrase from the judgment of *Maugham* J. in *In re Warren* (1), where he expresses his opinion that adherence to the law as laid down in *Powys* v. *Mansfield* (2) does not require a court to hold that there is ademption when " an alteration in the nature of property has taken place by operation of law, and the testator by a codicil has confirmed his will after the alteration of the law " (3). Upon this ground *Maugham* J. distinguished *Powys* v. *Mansfield* (2) from the case then before him, but he did not express any doubt as to the relevance or binding authority of that decision in cases of " ademption by portion or by acts of the testator after the date of the will " (1). The ademption of a devise by a subsequent agreement to sell the devised property is ademption by a voluntary act of the testator in the same sense as ademption of a legacy by a portion is ademption by a voluntary act. For these reasons I am of opinion that *Roper* J. was right in regarding *Powys* v. *Mansfield* (2) as decisive in the present case.

As against this view, however, reliance was placed upon various statements in general terms to the effect that the confirmation of a will by a codicil amounts to a republication of the will as at the date of the codicil. A recent example of such a statement by the highest authority is to be found in *Goonewardene* v. *Goonewardene* (4) :—" It is well settled in England that, by virtue of s. 34 of the (English) *Wills Act*, the effect of confirming a will by codicil is to bring the will down to the date of the codicil, and to effect the same disposition of the testator's property as would have been effected if the testator had at the date of the codicil made a new will containing the same dispositions as in the original will but with the alterations introduced by the codicil. In the language used by *North* J. in his judgment in *In re Champion* (5) the effect is to make a devise in the will ' operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date ' " (6). Section 34 of the *Wills Act* 1837 is represented in New South Wales by s. 4 of the *Wills, Probate and Administration Act* 1898-1940 of New South Wales, which provides that every will republished by any codicil shall, for the purposes of Part I. of the Act, be deemed to have been made at the time at which the same is

(1) (1932) 1 Ch., at p. 51.
(2) (1837) 3 My. & Cr. 359 [40 E.R. 964].
(3) (1932) 1 Ch., at p. 52.
(4) (1931) A.C. 647.
(5) (1893) 1 Ch. 101.
(6) (1931) A.C., at p. 650.

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Latham C.J.

so republished. Part I. of the Act contains s. 21, which is as follows: —"Every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will." Upon this basis it is argued that each codicil in the present case republishes the will after the contract of sale of Birrell Court was made and that each codicil must therefore be taken to repeat the words with respect to Birrell Court which are contained in the devise in the original will, so that the codicils in effect say, after the testator had sold Birrell Court to his son, that he gave Birrell Court to him subject to a mortgage of £1,000. It is urged that, if the codicils are regarded in this way, the case falls under proposition No. 3 above stated, so that the son becomes entitled to Birrell Court (i.e., to a transfer of the land) subject to a mortgage of £1,000.

If the contract of sale had been made with a person other than the son, and all other facts had remained unchanged, it is clear that the will and codicils (which represented unilateral acts of the testator) could not have affected the contract. Further, it is difficult to see how the son could have claimed the purchase money due under the contract by virtue of the devise of Birrell Court subject to a mortgage of £1,000. In my opinion the fact that the purchaser of the land was the devisee does not alter this position. The appellant claims under the devise. He claims Birrell Court subject to the mortgage. He does not claim under the contract. The consequence of this contention in relation to the contract of sale was not, in my opinion, clearly developed in argument. No definite answer was given to the question—"What defence, upon the basis of the appellant's case, could he rely upon if the executors sued him upon the contract of sale?"—the legal position being considered, for the purpose of testing the case, apart from the *Moratorium Act*. One thing appears to me to be clear—the devise, even if regarded as repeated in the codicils, did not terminate the contract. If the son had paid all but a small sum due under the contract, he would plainly have become entitled to a transfer of the land free from any mortgage upon paying the balance due, without paying any attention to the devise of the land burdened with a mortgage of £1,000: he could certainly have disclaimed the devise. Thus the contract of sale continued to exist after the death of the testator. I have some difficulty in perceiving how, if the son is said to take under the devise, he gets rid of his obligations and the executors' rights or loses his own rights under the contract. The *Moratorium and Interest Reduction (Amendment) Act* 1931

(N.S.W.) relieved him of his personal liability under the contract, but it did not alter the position that, in order to obtain a transfer in pursuance of the contract, he had to pay the purchase money. Perhaps, from the point of view of the appellant, the argument can be worked out in the following way: By virtue of the devise the son Roy is entitled to the land subject to the mortgage. He therefore has the right to require a transfer upon giving the executors an indemnity against liability under the mortgage. If he elects to accept the devise upon these terms, he then becomes owner of Birrell Court subject to the mortgage, irrespective of whether or not he performs his contract. When he has obtained Birrell Court as devisee, the executors, it can be argued, are no longer in a position to enforce the contract against him, because they can do so only if they can allege and prove that they are in a position to transfer Birrell Court to him upon payment of the purchase money. As Birrell Court would, if the son elects to take the benefit of the advice, already have been transferred to him, the executors are no longer in a position to carry out the contract. It appears to me that it must be by some such reasoning as this that the result would be brought about that the son Roy would be entitled to Birrell Court subject to the mortgage, but would not be bound to make any further payments under his contract—the son not wishing to enforce the contract against the executors, and the executors not being in a position to enforce it against him, though the contract would still exist as a matter of law.

The whole of the argument for the appellant, however, depends upon the proposition that the confirmation of the will by the codicils must be taken to repeat in the codicils all the words of the will. If, owing to circumstances which have happened since the making of the will, the words of the devise are not to be regarded as repeated in the codicils, the argument fails. There are authorities which show that the confirmation of a will by a codicil does not always have the effect of repeating in the codicil all the words of the will (*Hopwood* v. *Hopwood* (1); *In re Park*; *Bott* v. *Chester* (2); *In re Portal and Lamb* (3)). I mention some established examples of the application of this proposition. The republication of a will by a codicil prima facie does not alter the effect of intermediate codicils so as to re-establish the will as originally made and independently of those codicils. As Lord *Cranworth* said in *Stilwell* v. *Mellersh* (4): "If there be any legal effect that is brought to operate by what has taken place in the meantime" (that is, between the will and codicil)

(1) (1859) 7 H.L.C. 728 [11 E.R. 290].
(2) (1910) 2 Ch. 322.
(3) (1885) 30 Ch. D., at p. 55.
(4) (1851) 20 L.J. Ch. 356.

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Latham C.J.

"you have the benefit of that" (1). If a first codicil has expressly revoked a disposition contained in a will, the confirmation of the will by a second codicil without any express new reference to the original disposition does not have the effect of restoring that disposition (*Crosbie* v. *Macdoual* (2); *Green* v. *Tribe* (3)). Similarly, it has long been regarded as settled law that a codicil confirming a will does not restore a gift in the will which has lapsed in the meantime (*Hutcheson* v. *Hammond* (4))—See *Jarman* on *Wills*, 7th ed. (1930), vol. 1, p. 400. An accepted view as to the application of the principle that a confirming codicil does not mechanically repeat the words of a will is stated in the following words by *Theobald* on *Wills*, 9th ed. (1939), p. 143: "Where a specific gift has been adeemed by conversion into something else, a codicil republishing the will will not have the effect of passing to the legatee the thing into which the subject-matter of the specific gift has been converted" with references to *Drinkwater* v. *Falconer* (5), *Monck* v. *Lord Monck* (6), *Montague* v. *Montague* (7), *Cowper* v. *Mantell* (8), *Hopwood* v. *Hopwood* (9), *Sidney* v. *Sidney* (10), *Macdonald* v. *Irvine* (11), and *In re Warren* (12).

In my opinion the true doctrine is that the confirmation of a will by a codicil republishes the will, but that it republishes only so much of the will as still represents the will of the testator. It is for this reason that, prima facie, that is, subject to any expression of contrary intention, the republication of a will by a second codicil does not deprive of effect a first codicil which has altered the will. It is quite true to say, in the words of *Goonewardene* v. *Goonewardene* (13), that the confirmation of the will by a codicil brings the will down to the date of the codicil. But that which it brings down is the will as then operating, and not the will as it once was, but no longer is. If words contained in the will have been deprived of their operation, either by an intermediate codicil, or by events which have occurred before the execution of the later codicil the effect of which is in question, then the confirmation of the will operates only to repeat so much of the will as was effective at the date of the later codicil. The effect of confirming a will by a codicil was said by *Simonds* J. in *In re Tredgold* (14), in a passage upon

(1) (1851) 20 L.J. Ch., at p. 361.
(2) (1799) 4 Ves. 610 [31 E.R. 314].
(3) (1878) 9 Ch. D. 231.
(4) (1790) 3 Bro. C.C. 128, at p. 143 [29 E.R. 449, at p. 456].
(5) (1755) 2 Ves. Sen. 623 [28 E.R. 397].
(6) (1810) 1 Ba. & Be. 298, at p. 306.
(7) (1852) 15 Beav. 565 [51 E.R. 657].
(8) (1856) 22 Beav. 223 [52 E.R. 1094].
(9) (1859) 7 H.L.C. 728 [11 E.R. 290].
(10) (1873) L.R. 17 Eq. 65.
(11) (1878) 8 Ch. D. 101.
(12) (1932) 1 Ch., at p. 52.
(13) (1931) A.C. 647.
(14) (1943) 1 Ch., at p. 78.

which both appellant and respondents relied, to be as follows :— " A testator, by using such words as ' I confirm my will in other respects,' is giving formal expression to his testamentary wishes. The fact that he makes a codicil shows that he is reviewing his testamentary dispositions and, reviewing them, he in effect says : ' This and this I want to alter. This and this I want to stand.' " That which the testator is reviewing is " his testamentary dispositions," that is, his testamentary dispositions which still stand as testamentary dispositions, not dispositions which have been abandoned and which no longer express his will.

In my opinion *Roper* J. was right in determining this case upon the basis of the principle stated in *Powys* v. *Mansfield* (1) to the effect that the republication of a will by a codicil does not make the will speak from the date of the codicil with reference to a gift which has been adeemed, and in holding that this rule applies not only in the case of the ademption of a legacy by a portion, but also in the case of ademption brought about by the voluntary act of a testator in relation to the property which was the subject matter of the disposition, such as dealing with it in such a way that it is no longer " substantially the same thing," to use the phrase employed by *Turner* V.C. in *Oakes* v. *Oakes* (2), quoted in *In re Slater* ; *Slater* v. *Slater* (3).

I wish to add that in my opinion this decision is not in conflict with cases such as *In re Reeves* (4) and *In re Fieldhouse* (5). In the former case there was a bequest of a " present " leasehold estate in certain land : the lease expired : the testator acquired a new lease of the same property : he made a codicil confirming his will : it was held that the new lease passed under the devise. In that case there still existed in the testator an interest in the relevant property of exactly the same kind as that which existed when he made his will. The position is different in the present case. In *In re Fieldhouse* (6) the testator sold land and then devised it : the sale went off : he resold the land : it was held that the gift in the will covered the proceeds of the second sale. In that case it was evident that when the testator purported to deal with land in his will he meant his disposition to cover the proceeds of sale : in any other view the disposition would have had no operation at any time. The case is an example of the application of proposition No. 3 stated above. The distinctions in this branch of the law have become rather refined,

(1) (1837) 3 My. & Cr. 359 [40 E.R. 964].
(2) (1852) 9 Hare 666, at p. 672 [68 E.R. 680, at p. 683].
(3) (1907) 1 Ch. 665, at p. 672.
(4) (1928) 1 Ch. 351.
(5) (1940) 40 S.R. (N.S.W.) 405 ; 57 W.N. 129.
(6) (1940) 40 S.R. (N.S.W.) 405 ; 57 W.N. 129.

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER.

as may be seen by comparing the last-mentioned two cases with *Sidney* v. *Sidney* (1) and *In re Gibson* ; *Mathews* v. *Foulsham* (2).

In my opinion the relevant rules of law do not prevent effect being given to the intention of the testator that Birrell Court should be regarded as dealt with by the contract and not by testamentary disposition. I therefore am of opinion that the decision appealed from was right and that the appeal should be dismissed.

RICH J. This matter in the first instance came before *Roper* J., on an originating summons, which asked two questions :—

Whether upon the true construction of the will and codicils of W. R. Fairweather deceased and in the events which have happened—

(*a*) the devise contained in the said will of the property known as Birrell Court Birrell Street Waverley to Roy Gilbert Fairweather was revoked by the contract for sale of the said property made by the testator with the said Roy Gilbert Fairweather dated December 21st 1928,

(*b*) if the answer to (*a*) is in the negative whether the said Roy Gilbert Fairweather is now indebted to the estate of the testator for arrears of instalments of purchase money and interest due under the said contract at the date of the death of the testator.

His Honour in his judgment answered the first question in the affirmative. The appeal to this Court is from that judgment.

I see no reason for disagreeing with his Honour's conclusion. It is well settled that if a testator gives something to a person by his will, and afterwards, in his lifetime, sells or otherwise disposes of it, the thing itself is necessarily removed from the operation of the will, and the action of the testator is a sufficient indication of intention that the donee is not to have it (*In re Bridle* (3)). Furthermore, the donee is not entitled to receive anything which the testator may have acquired in substitution for the thing with which he has parted, unless, of course, the will or some subsequent testamentary instrument so provides, expressly or by implication. The mere fact that the testator subsequently makes a codicil which, altering his dispositions in certain other respects, contains only a general confirmation of the will, express or implied, does not indicate such an intention ; because, in such a case, all that is confirmed or republished is a will from the operation of which the particular thing has already been removed. This is clearly pointed out by *Cottenham* L.C. in *Powys* v. *Mansfield* (4), and by *Romilly* M.R. in *Cowper* v. *Mantell* (5).

(1) (1873) L.R. 17 Eq. 65.
(2) (1866) L.R. 2 Eq. 669.
(3) (1879) 4 C.P.D. 336, at p. 341.
(4) (1837) 3 My. & Cr., at pp. 375, 376 [40 E.R., at p. 971].
(5) (1856) 22 Beav., at pp. 229, 230 [52 E.R., at p. 1096].

In the present case, by selling the land to the devisee, the testator both manifested and carried into effect a clear intention that the devisee was not to have it for nothing after his death, but was to have it at once, although only on the terms of paying for it. Thus, what the codicil confirms is a will containing a reference to land which at the date of the codicil and of his death no longer belonged to him. It cannot operate on the land, and there is nothing in the codicil to suggest an intention on his part to give the purchaser (and former devisee) a gift of an entirely different kind, namely, a right to receive, or to be forgiven, any money to which at his death the testator may be legally entitled in respect of the land. It is sometimes said that confirmation by codicil makes the will speak as if it had been re-executed at the date of the codicil; but, although this is a convenient formula, it is neither necessary nor legitimate in all cases and for all purposes to construe the will as if it had been made in all its details at the date of the codicil. As Lord *Parker* (then *Parker* J.) put it in *In re Park* (1): "I do not think that any of the authorities quoted go to this length, that for all purposes in construing it I must treat the will as having been made at the date of the codicil. A doctrine of that sort would lead to extraordinary results" (2). The principle is not a rigid formula or technical rule, but "a useful and flexible instrument for effectuating a testator's intentions, by ascertaining them down to the latest date at which they have been expressed" (*In re Moore* (3)). And it is one of which Lord *Cottenham* cannot be supposed to have been ignorant. In this connection it may be mentioned that although s. 24 of the *Wills Act* 1837 (Imp.) provides that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will," it has been pointed out that this does not mean that we are to construe whatever a testator says in his will as if it were made on the day of his death (*In re Portal and Lamb* (4)).

There are certain cases, decided upon the equitable doctrine of conversion, in which reference has been made to the effect of codicils, but I do not think that they throw any light on the question now before us. Thus, it has been decided that if a will contains a general devise of realty and a general bequest of personalty, and afterwards during the testator's lifetime certain of his realty, by operation of law and without any act of his, becomes notionally converted into personalty, it passes under the gift of personalty, not under the gift

(1) (1910) 2 Ch. 322.
(2) (1910) 2 Ch., at pp. 327, 328.
(3) (1907) 1 I.R., at pp. 318, 319.
(4) (1885) 30 Ch. D., at p. 55.

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Rich J.

of realty (*In re Kempthorne* (1)). But if specifically devised realty undergoes a similar notional conversion, the devisee remains entitled to it unless it is actually converted before the testator's death. In *In re Wheeler* (2) reference was made to there having been a confirmatory codicil after the date of the notional conversion by operation of law of land specifically devised ; but the position would have been the same if there had been no codicil. The property still remained *in specie* at the testator's death ; and he had done nothing to alter its actual character, nor had the law : Cf. *In re Kempthorne* (3). Similar questions have arisen where a testator has given a lease with an option to purchase, and the option is exercised after the testator's death. If the lease precedes the will, and the will contains a general devise of all realty and a general bequest of all personalty, the exercise of the option is treated as effecting a conversion for the purposes of the will and transferring the interest in the property in question to the beneficiaries of the personalty (*Lawes* v. *Bennett* (4)) ; but if the subsequent will contains a specific devise of the property in question a post-mortem exercise of the option does not divest the devisee's interest (*Nicol* v. *Chant* (5) ; *In re Calow* ; *Calow* v. *Calow* (6)), because the specific reference to the property is a sufficient indication that the specific devisee is to have whatever interest in it the testator has not parted with at his death. If the will precedes the lease, and contains a general devise of realty and a general bequest of personalty, the exercise of the option transfers the interest from the general devisee (*In re Blake* ; *Gawthorne* v. *Blake* (7)), and it was held in *Weeding* v. *Weeding* (8) that even if the will which precedes the lease specifically devised the property subsequently leased, yet if the option is exercised after the testator's death, the property becomes divested from the devisee and goes to the persons entitled to the personalty. In the latter type of case, the testator, by creating the option to purchase, has not done anything which will necessarily involve the property being outside the scope of the will at his death ; and hence, if the option is not exercised in his lifetime, to treat a subsequent exercise of it as defeating the gift does nothing to effectuate any intention expressed by the testator, but on the other hand defeats the intention expressed by the gift. However, the Court of Appeal in *In re Carrington* (9) felt constrained to hold that *Weeding* v. *Weeding* (8) had stood too long to be overruled ; although *Romer* L.J. did not conceal his disapproval of it. It is not

(1) (1930) 1 Ch. 268.
(2) (1929) 2 K.B. 81.
(3) (1930) 1 Ch., at pp. 293, 294.
(4) (1785) 1 Cox. 167 [29 E.R. 1111].
(5) (1909) 7 C.L.R. 569.
(6) (1928) 1 Ch. 710, at p. 714.
(7) (1917) 1 Ch. 18.
(8) (1861) 1 J. & H. 424 [70 E.R. 812].
(9) (1932) 1 Ch. 1.

surprising, therefore, since *Weeding* v. *Weeding* (1) tends to defeat intention, that courts should have been astute to discover reasons for arriving at a different conclusion where the devise is specific. Prior to *Weeding* v. *Weeding* (1) it had been already held in *Emuss* v. *Smith* (2) that the subsequent republication of the will by codicil was not in itself conclusive but a make-weight which could be taken into consideration along with other factors indicating that it was not intended that a post-mortem exercise of the option should cause an ademptive conversion. *In re Pyle* (3) goes no further, if it goes as far: cf. *Nicol* v. *Chant* (4). All that *In re Aynsley*; *Kyrle* v. *Turner* (5) decides is that in a case in which it is doubtful whether a subsequent dealing by the testator himself was intended to be an ademption, a confirmation by codicil may be a factor which, though not decisive, should not be left out of consideration. In the present case, the situation created by the sale to the devisee was quite unambiguous, and, in my opinion, clearly amounted to an ademption in every relevant sense of the word. The fact that a *Moratorium Act* was passed in 1930 which prevented the testator from specifically enforcing the contract of sale throws no light on his intention when he made his will in 1927 or on his intention or the nature or quality of his act when he entered into that contract in 1928, nor does the fact that thereafter, if the son wished to avoid his personal obligation under the contract he could treat himself, for the purposes of the Act, as having mortgaged the land to the testator to secure the unpaid purchase money.

In principle, the case is completely covered by the reasoning of Lord *Cottenham* (6). By what he did in selling the property, the testator manifested and effectuated an intention to prevent it from being any longer the subject of the specific devise. In my opinion, the court would not be justified in departing from Lord *Cottenham's* rule (6), and adopting instead, with the result of defeating expressed intention, a use which has sometimes been made of the existence of a subsequent codicil as an aid to giving effect to intention in relation to the equitable doctrine of conversion, where intention might otherwise be defeated by an arbitrary principle established by cases which have been decided upon certain aspects of that doctrine. "'Ademption'" (which is what we are concerned with) "postulates the *destruction* of the subject-matter, whether by physical dealing or by operation of rules of equity, while the word 'conversion'

(1) (1861) 1 J. & H. 424 [70 E.R. 812].
(2) (1848) 2 De G. & Sm. 722 [64 E.R. 323].
(3) (1895) 1 Ch. 724.
(4) (1909) 7 C.L.R., at p. 580.
(5) (1914) 2 Ch. 422; (1915) 1 Ch. 172.
(6) (1837) 3 My. & Cr., at pp. 375, 376 [40 E.R., at p. 971].

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Rich J.

postulates only a change in its character, so that one person cannot take it, while another can " (*Law Quarterly Review*, vol. 49, at p. 174).

The *Wills Act* has, in my opinion, made no differences in this respect. This sufficiently appears from such authorities as *Hopwood* v. *Hopwood* (1), *Farrar* v. *Earl of Winterton* (2), *Sidney* v. *Sidney* (3), *In re Clowes* (4), and *In re Bick* ; *Edwards* v. *Bush* (5).

The appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales which declared that a devise in the will of Walter Richard Fairweather deceased of a property known as Birrell Court to the testator's son Roy Gilbert Fairweather was revoked by the contract for the sale of the property made between the testator and his son.

The will, which was made in 1927, devised to his son Roy testator's property known as Birrell Court for his son's own absolute use and benefit subject to the mortgage of £1,000 secured thereon. In 1928, the testator sold the property to his son for £1,500, such sum to be paid by calendar monthly instalments of principal and interest (calculated at the rate of seven and a half per cent per annum on annual rests) each of £12 until the whole of the principal moneys and interest were fully paid. The testator covenanted that he would not further encumber the property and it was agreed that the testator should be entitled to the rents and profits and bear the rates and taxes up to the date of the contract and thereafter the son but so nevertheless that the son having occupied the property for some considerable time should pay all rents due and owing in respect of his occupation of the property. In 1929 the testator made a codicil to his will whereby he made an alteration in his personal representatives but " in all other respects " confirmed his will. In 1936 the testator made a second codicil to his will whereby he revoked a bequest in favour of a daughter but included her in his residuary disposition and he confirmed his will " except in so far as the same may in anywise have been altered or revoked by my first codicil thereto " and he confirmed his first codicil.

As I understand the judgment the devise of Birrell Court failed because the words were only apt to pass the real property known as Birrell Court and not the rights of the testator under the contract of sale with his son or the proceeds of the property thereby accruing to him : See *In re Newman* ; *Slater* v. *Newman* (6). And the codicil,

(1) (1859) 7 H.L.C., at pp. 747, 748 [11 E.R., at p. 298].
(2) (1842) 5 Beav., at p. 8 [49 E.R., at p. 479].
(3) (1873) L.R. 17 Eq. 65.
(4) (1893) 1 Ch. 214.
(5) (1920) 1 Ch. 488.
(6) (1930) 2 Ch. 409.

it was held, did not operate to pass the property known as Birrell Court, for that property had passed from the testator at the date of the respective codicils.

A dozen or more cases were brought to our attention, but it is only necessary, I think, to refer to the case above mentioned and two others. In *Goonewardene* v. *Goonewardene* (1) the Judicial Committee stated the effect of the confirmation of a will by means of a codicil in these words: "It is well settled in England that, by virtue of s. 34 of the (English) *Wills Act*" (s. 4 of the New South Wales *Wills Act*, and note also s. 21), "the effect of confirming a will by codicil is to bring the will down to the date of the codicil, and to effect the same disposition of the testator's property as would have been effected if the testator had at the date of the codicil made a new will containing the same dispositions as in the original will but with the alterations introduced by the codicil. In the language used by *North* J. in his judgment in *In re Champion* (2) the effect is to make a devise in the will 'operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date.'" Let it therefore be assumed that the codicils of the testator operate so as to contain the disposition of Birrell Court as in the will, what then is the effect of such a devise when in fact the testator has sold the property and has an interest only in its proceeds? The question depends upon the testator's intention gathered from his words in the surrounding circumstances. When the testator confirmed his will he had sold his property known as Birrell Court. It is said that the words of the codicil and the words of the will, despite the different state of facts, have the same meaning and exhibit an intention on the part of the testator to dispose of Birrell Court only as land and not to dispose of the proceeds of the property or of the testator's interest, whatever it was which he had in that property. But, if that be the effect of the confirmation of the testator's will by his codicils, then nothing passed to his son under the devise of Birrell Court. The court should, if possible, give some effect to the codicils, and when the testator confirmed his will in the altered circumstances already stated must he not have intended to apply the words of the will to the interest, whatever it was, which he had in Birrell Court? The answer should, I think, be in the affirmative. There is no rule of law or of construction which prevents the court from giving effect to that intention gathered, as it is, from the words of the codicils used in the altered circumstances of the case (*In re Warren* (3)).

(1) (1931) A.C., at p. 650. (2) (1893) 1 Ch. 101.
(3) (1932) 1 Ch., at pp. 49, 52, 53.

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Starke J.

A practical difficulty arose, it was suggested, in effectuating the intention and gift of the testator because the son was both the devisee and the purchaser of Birrell Court. But a transfer to the son of Birrell Court, subject to the mortgage secured thereon, will vest in him all the legal and equitable estate or interest therein of the testator, whatever it was, and render unnecessary further performance of the contract of sale.

The appeal should be allowed.

McTiernan J. In my opinion the appeal should be dismissed.

The devise which the testator made to his son Roy of the property known as " Birrell Court " was a specific devise. It was a gift of a particular item of the testator's property and nothing else. The subsequent sale converted the subject of the gift into property of a different kind. It is a well-established principle that if a testator should sell to a third person any property which beforehand he had specifically given to another by his will, the purchase money would not pass at his death under the terms of the specific gift (*Watts* v. *Watts* (1)). This principle is not disputed by the appellant, who is the testator's son Roy, and it is not argued that the principle does not apply to the case where the purchaser of the property, the subject of a specific gift by will, is the devisee or legatee of the property. It is necessary for the success of the claim made by the appellant in respect of the balance of the purchase money due according to the terms of the sale of Birrell Court, that the codicils confirming the will republished the devise of this property and operated as a disposition to the appellant of the balance due at the testator's death. It is true that the confirmation of a will by codicil operates as a republication of a will. The confirmation is a declaration that generally the provisions of the will express the testamentary intentions of the testator at the date of the codicil. If any disposition in the will should be presumed not to express the testator's intention at that date a general confirmation of the will would not operate to republish that disposition, although it were to be found standing in the will. The question whether a general confirmation republishes every part of the will is one of the testator's intention. In the present case the testator by his own act took away—adeemed it is called—the specific devise by selling the devised property. This fact, it seems to me, stands in the way of presuming from the general confirmation of the provisions of the will that the testator intended to republish the words of the devise as an effective part of his testamentary dispositions.

(1) (1873) L.R. 17 Eq. 217.

In the case of *Lord Chichester* v. *Coventry* (1) Lord *Romilly* described the nature of the act which the law calls ademption. " In ademption the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may, either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word *ademption*, because the bequest or devise contained in the will is thereby *adeemed*, that is, taken out of the will." If it is correct to apply the word ademption, as many authorities do, to describe the operation of a conversion of the property which is the subject of a specific devise or bequest, on the devise or bequest, there is no reason why it should not be said that the effect of the conversion is notionally or constructively to take the devise or bequest out of the will, although physically the devise or bequest remains a part of the text of the will.

In *Powys* v. *Mansfield* (2) Lord *Cottenham* explained why the confirmation of a will containing an adeemed legacy by a codicil which does not expressly refer to the legacy affords no evidence of an intention that the legacy should take effect. He used these words : " It has been argued that the codicil of 23rd June 1818, confirming the will, makes the will speak as of the date of the codicil, and, therefore, revives the legacy if it had been adeemed by the settlement ; and, at all events, is evidence of an intention that the legacy should take effect. It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time ; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest, and so revoke any codicil by which a legacy given by the will had been revoked, and undo every act by which it may have been adeemed or satisfied. The cases are consistent with this rule, as *Drinkwater* v. *Falconer* (3), *Monck* v. *Lord Monck* (4), *Booker* v. *Allen* (5), and the case of *Roome* v. *Roome* (6) is not an authority against these decisions, because the codicil was not considered in that case as reviving an adeemed legacy, it having been decided that there was no ademption ;

(1) (1867) L.R. 2 H.L. 71, at pp. 90, 91.
(2) (1837) 3 My. & Cr., at pp. 375, 376 [40 E.R., at p. 971].
(3) (1755) 2 Ves. Sen. 623 [28 E.R. 397].
(4) (1810) 1 Ba. & Be. 298.
(5) (1831) 2 Russ. & M. 270 [39 E.R. 397].
(6) (1744) 3 Atk. 181 [26 E.R. 906].

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. McTiernan J.

but the codicil was referred to as an additional proof that no ademption was intended. And as to the argument that the codicil must, at any rate, be evidence of an intention that both sums should be paid, the same answer may be given which has been given to a similar argument in other cases; namely, that the testator, if he knew the rule of law, must have known that the codicil could not revive the adeemed legacy, and, therefore, it was unnecessary for him to mention it: the probability, however, is, that his attention being directed to the only object of the codicil, the words of confirmation of the will were introduced as words of course without any reference to the legacy in question." This reasoning is, in my opinion, applicable in considering the effect of the republication of a will containing a specific devise which had been adeemed by the conveyance or conversion of the property by the testator's own act. In my opinion the confirmation of the will by either codicil did not operate as a republication of the specific devise of Birrell Court. It is unnecessary to determine whether, if this specific devise were included in the republication of the testator's testamentary intentions as at the date of either codicil, it would operate as a gift to his son, Roy, of the balance of purchase money.

I agree with the conclusion of *Roper* J. and the reasons by which he reached it.

WILLIAMS J. On 25th October 1927 Walter Richard Fairweather, hereinafter called the testator, made his last will and testament whereby he devised and bequeathed his property known as "Birrell Court", Birrell Street, Waverley, to his son, Roy Gilbert Fairweather, the appellant, for his own use and benefit, subject however to the mortgage of £1,000 secured thereon.

On 21st December 1928 the testator contracted to sell Birrell Court to his son Roy for £1,500. The contract provided, *inter alia*, that the vendor should be entitled to the rents and profits, and should pay or bear all rates, taxes and outgoings up to the date of contract, from which date the purchaser should be entitled to or should pay or bear the same respectively.

On 27th July 1929 the testator made a first codicil whereby he revoked the appointment of one of his executors, appointed T. G. Gilder in his stead, and in all respects confirmed the will of 25th October 1927. At the date of this codicil the appellant was in possession of Birrell Court as the purchaser under the contract. In 1930 the New South Wales Parliament passed a *Moratorium Act*, which in 1931 was amended first by the *Moratorium (Amendment) Act*, and subsequently further amended by the *Moratorium and*

Interest Reduction (Amendment) Act which came into force on 11th December 1931. This last-mentioned Act abolished the appellant's personal liability to pay the purchase money and interest referred to in the contract. The effect of the Act was to eviscerate the contract to one which the testator could not enforce against the appellant, so that his only remedy, in the event of non-performance, subject to complying with the requirements of the Act, was rescission. Further performance of the contract became, therefore, entirely optional on the part of the appellant. These *Moratorium Acts* were repealed by the *Moratorium Act* 1932, but the personal liability of the appellant was not restored, so that the contract remained in the same condition at the date of death.

On 23rd March 1936 the testator made a second codicil by which, after reciting the execution of his will, the first codicil and the bequest of the legacy of £100 and the devise and bequest of residue contained in his will, he revoked the bequest of £100 and altered the disposition of his residuary estate. The codicil then proceeded : " in all other respects I do hereby ratify and confirm my said will except and in so far as the same may in any wise have been altered or revoked by my said first codicil thereto and I do hereby ratify and confirm my said first codicil."

The testator died on 16th October 1941. The appellant had only partly performed the contract at the date of death, the amount still owing for principal and interest being £1,705. The property was still subject to the mortgage for £1,000.

The question that arises for decision is whether the appellant is entitled as a beneficiary under the will and codicils to have Birrell Court transferred to him subject to the mortgage for £1,000, or whether he is only entitled as a purchaser to have the property transferred to him unencumbered upon payment in full of the purchase money and interest due under the contract. *Roper* J. declared that :—" Upon the true construction of the will and two codicils of the above-named testator Walter Richard Fairweather deceased and in the events which have happened the devise contained in the said will of the property known as ' Birrell Court ' Birrell Street Waverley to Roy Gilbert Fairweather was revoked by the contract for sale of the said property made by the testator with the said Roy Gilbert Fairweather dated 21st December 1928." It is from this declaration that the appellant has appealed to this Court.

Apart from the peculiar feature that the beneficiary and the purchaser are the same person, and, subject to the effect, if any, of the *Moratorium Acts*, the position would, I think, be as follows : If the testator had made the will but not the codicils, and had died,

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Williams J.

having subsequently contracted to sell Birrell Court to a stranger by a specifically enforceable contract which was still subsisting at the date of death, the specific devise would have failed, because the interest of the testator in the land would have been converted into an interest in the proceeds of sale, or, in other words, into personalty, and there would have been no land existing at the date of death to transfer to the appellant in accordance with the provisions of the will (*In re Clowes* (1)). But if the testator had contracted to sell the land prior to making the will the proceeds of sale still outstanding at the date of death would have passed under the specific devise. For, as *Lindley* L.J. said in *In re Lowman* ; *Devenish* v. *Pester* (2) : " What, after all, is a devise of land ? It is only a devise of such estate or interest as the devisor has in the land, and prima facie whatever estate or interest the testator has in land will pass under a devise of it by that name, if it is specifically referred to so as to show that the testator had that particular land in his mind, and if there is nothing else to answer the description."

In the present case the contract was made after the date of the will, so that, in the absence of the codicils, the devise would have failed. But the question is whether the execution of the codicils after the date of the contract does not place the appellant in the same position as that in which he would be if the contract had been made prior to the date of the will. In *In re Champion* ; *Dudley* v. *Champion* (3), *North* J. said :—" It is settled by authority that the effect of such a phrase as ' I confirm my will in other respects ' is a republication of the will, and when, under the old law, a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date."

This passage has been cited with approval in many subsequent cases. See the cases collected by *Simonds* J. in *In re Tredgold* (4). In *In re Kempthorne* (5) *Russell* L.J. said :—" Although the testator's devise was of all his real estate and undivided moiety of his real estate in the county of York, he had, after the Act had been passed, made a codicil by which he confirmed his will ; so that his testamentary disposition had to be treated as one made at the date of the codicil." In *Goonewardene* v. *Goonewardene* (6) Lord *Russell of*

(1) (1893) 1 Ch. 214.
(2) (1895) 2 Ch., at p. 354.
(3) (1893) 1 Ch., at p. 109.
(4) (1943) 1 Ch., at pp. 75, 76.
(5) (1930) 1 Ch., at p. 293.
(6) (1931) A.C., at p. 650.

Killowen, delivering the judgment of the Privy Council, said :— " It is well settled in England that, by virtue of s. 34 of the (English) *Wills Act*, the effect of confirming a will by codicil is to bring the will down to the date of the codicil, and to effect the same disposition of the testator's property as would have been effected if the testator had at the date of the codicil made a new will containing the same dispositions as in the original will but with the alterations introduced by the codicil. In the language used by *North* J. in his judgment in *In re Champion* (1) the effect is to make a devise in the will 'operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date.' "

But *Roper* J. thought that the specific devise of Birrell Court would not have the same effect as though it was contained in the codicils because, prior to their respective dates, the devise had been revoked by the contract of sale, so that it no longer formed part of the will, and was therefore incapable of being confirmed by the codicils. He relied on the following statement by Lord *Cottenham* in *Powys* v. *Mansfield* (2) :—" It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed or satisfied. The codicil can only act upon the will as it existed at the time ; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it."

With respect to this statement *Maugham* J. (as he then was) said in *In re Warren* (3) that : " In considering the effect of the codicil I have to bear in mind the decision in *Powys* v. *Mansfield* (4), where Lord *Cottenham* had to deal with the effect of such a codicil in relation to one of the various problems of ademption which arise as between persons *in loco parentis* and a child." And it is clear, I think, that Lord *Cottenham* was referring, when he used the word " revoked," to a legacy that had been revoked by a previous codicil ; and, when he used the words " adeemed or satisfied," to the subject matter then before him, namely, the ademption of a legacy by a subsequent portion. This was the view taken by Lord *Kingsdown* in *Hopwood* v. *Hopwood* (5), when he said :—" The principle seems to be, that when a parent has given a portion by a will, and afterwards pays or secures the same portion by a settlement, the legacy is from that moment gone, and the will is to be read as if that bequest had been expunged from it. The language of Lord *Cottenham*, in *Powys* v. *Mansfield* (4) upon this point is, I think, quite borne out by the

(1) (1893) 1 Ch. 101.
(2) (1837) 3 My. & Cr., at p. 376 [40 E.R., at p. 971].
(3) (1932) 1 Ch., at p. 50.
(4) (1837) 3 My. & Cr. 359 [40 E.R. 964].
(5) (1859) 7 H.L.C., at p. 747 [11 E.R., at p. 298].

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Williams J.

cases." Lord *Kingsdown* then cited the above statement. It would be strange if Lord *Cottenham*, in a statement apparently referring to legacies generally, intended to refer in the same breath to the ademption of legacies by subsequent portions, which is applicable to all three classes of legacies, and to the ademption of a legacy by the sale or destruction of the subject matter, which can only occur in the case of a specific legacy, and cannot occur in the case of a demonstrative or general pecuniary legacy. If the statement was intended to refer to the immediate ademption of a specific legacy (and by analogy of a specific devise) by a testator entering into a contract to sell the property, then, so far as it is material to this appeal because it relates to devises, it must be considered in the light of the fact that it was made with reference to the will of the testator made before 1st January 1838, and, therefore, to a will to which the *Wills Act* 1837 (Imp.) would not apply. In the case of wills made prior to 1st January 1838 the position was that where a testator, subsequently to making a specific devise of land, entered into a specifically enforceable contract to sell the land, the contract had the effect, under the equitable doctrine of conversion, of converting the testator's beneficial interest in the land into an interest in the proceeds of sale, and therefore into personalty, and of thereby revoking the will in equity. If, later, the contract was completed by the conveyance of the land to the purchaser, the specific devise was also revoked or adeemed at law. Although, therefore, the specific devise still remained written in the will, equity, after the date of the contract, regarded the land as having been removed from the operation of and the devise as forming no part of the will, and law, after the date of the conveyance, regarding the writing in the same way. The result was that, if the contract was subsequently cancelled, or, if the land, having been conveyed away, was subsequently reacquired in the lifetime of the testator, so that the testator was at the date of his death the legal and beneficial owner of the land, in the case where the contract was cancelled the devise failed in equity and in the case where the land was conveyed away and subsequently reacquired it failed both at law and in equity: See generally *Sugden* on *Vendors and Purchasers*, 14th ed. (1862), pp. 183-194.

The following passages show how, after a period of doubt, Lord *Romilly* considered that the old law had become settled. In *Andrew* v. *Andrew* (1) *Turner* L.J. said :—" This doctrine of revocation by contract seems to rest upon one or other of these grounds—either upon the alteration of the estate, the contract operating in equity

(1) (1856) 8 De G. M. & G. 336 [44 E.R. 419].

as the conveyance would operate at law, or upon the intention, the contract evincing an intention to make a disposition of the estate different from that which is made by the will; and upon one or other of these grounds it is quite settled by the authorities that whatever may be the effect of the abandonment of the contract in the lifetime of the testator, the will is certainly revoked if the contract be subsisting at his death. I leave the question of abandonment in the lifetime of the testator where it stands, upon the authorities, observing only that the cases which decide that there is a revocation where the contract continues in force till the death, seem to me to assume that there is a revocation by the contract, for the death cannot operate the revocation, and that if there be a revocation by the contract, I do not see how the abandonment can bring again within the operation of the will the property which, by the contract, has been taken out of its operation" (1).

In *Bennett* v. *Tankerville* (2) Sir *William Grant* M.R. said :—"The question must now be decided, as if it had arisen the day after Lord Tankerville's death. If at that period the will stood revoked with regard to these lands by his death, how by any subsequent event can that devise again become operative and effectual? Even if the contract had been abandoned in the testator's life, I very much doubt, whether that would have set up the will again without a republication: but, being revoked, at the time of his death, by a valid, subsisting contract, it is immaterial to the devisee, what becomes of the land, his only title being gone by the revocation of the devise" (3).

In *Cowper* v. *Mantell* (4) Lord *Romilly* said: "If a man devise Whiteacre to A and the residue of his estate to other persons, and he afterwards sells Whiteacre, but, subsequently, he repurchases it or it comes to him by devise, and he then republishes his will; upon the question whether A, the specific devisee under the will, takes Whiteacre, or whether it passes under the residuary devise, I have no doubt, under the old law, that the specific devisee would not take it. The devise was adeemed, and the specific devisee could not take it".

The *Wills Act* 1837 (Imp.) which, as I have said, applied to all wills made after 1st January 1838, contained the following sections :—

"19. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

(1) (1856) 8 De G. M. & G., at pp. 353, 354 [44 E.R., at p. 426].
(2) (1811) 19 Ves. 170 [34 E.R. 482].
(3) (1811) 19 Ves., at p. 179 [34 E.R., at p. 485].
(4) (1856) 22 Beav., at p. 228 [52 E.R., at p. 1096].

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Williams J.

20. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid," (i.e. by marriage) " or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

23. No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

24. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

These sections find their counterpart in ss. 16, 17, 20 and 21 of the *Wills Probate and Administration Act* 1898-1940 (N.S.W.). It is clear that they were intended to alter the law in many respects from that which existed prior to the Act.

The effect of these sections, on their plain construction, is, in my opinion, to prevent courts holding that wills are revoked except where they are revoked in accordance with the provisions of the Act, but the Act did not affect the operation of the equitable doctrine of conversion. When, therefore, a testator specifically devised land by a will made after 1st January 1838 and subsequently entered into a specifically enforceable contract of sale, his beneficial interest in the land was still converted into an interest in the proceeds of sale, and therefore into personalty. In a sense, therefore, the devise could still be said to be revoked or adeemed from the date of the contract of sale, but in law the devise still formed part of the will because it could only be revoked in accordance with the Act, and, unless revoked in this way, had to remain in the will in order that, in compliance with s. 24 of the Act, if the testator had any beneficial interest in the specifically devised land in the nature of realty at the date of his death, then, irrespective of what might have occurred to the land between the date of the will and of the death, this beneficial interest would pass to the devisee. Accordingly, if the contract was cancelled by the testator during his lifetime, or if the land, having been conveyed away, was subsequently reacquired, the land would pass under the devise. If there was a specifically enforceable

contract in existence at the date of death, but, under that contract, the testator was entitled to some interest in the land, as for instance to the rents and profits pending completion, this interest would pass to the devisee. If, therefore, after the date of the devise, a testator has entered into a contract to sell the specifically devised land and has then confirmed his will by a codicil, I cannot agree that, since the *Wills Act*, by reason of the contract, the devise has been expunged from the will and does not become part of the contents of the will which is republished by the codicil. If I am wrong, then the strange result would seem to follow that, if there was no codicil, and the contract was subsequently cancelled in the lifetime of the testator, the devised land would pass to the devisee, but, if there was a codicil, it would not do so because the specific devise would not form part of the will republished by the codicil.

That a specific devise does continue to form part of a will since the *Wills Act*, so that, if the testator recaptures the beneficial interest in the land in any of the ways already mentioned, it will pass to the devisee, is supported by the statement to that effect by the learned author of *Sugden* on *Vendors and Purchasers*, 14th ed. (1862), p. 191 ; by the decision of *Innes* C.J. in Eq., in *Public Trustee* v. *Regan* (1), to which I will venture to add my own remarks in *In re Fieldhouse* (2) ; and also, as I understand it, by the judgment of *Lindley* L.J. in *In re Clowes* (3) (in which *Bowen* and *A. L. Smith* L.JJ. concurred). In that case Lord *Lindley*, in referring to a specific devise, said :—" *The will has to be applied to the state of things existing when the testator died. The effect of that is to make James Hudson the devisee of the house*, but only as trustee for the persons entitled to the beneficial interest in the money secured thereon. I have no reasonable doubt that this is the effect of the clauses in the *Wills Act*. If authority is wanted, this case is covered by *Moor* v. *Raisbeck* (4), where the decision is right, *though some of the observations of the judge as to the revocation of the will may be questionable* " (5).

In *In re Clowes* (6) the contract had been completed by the conveyance of the legal estate to the purchaser, who had then reconveyed the land to the testator by way of mortgage. Under the old law, therefore, the devise was revoked both at law and in equity. How then could *Lindley* L.J. (5) have said, if the *Wills Act* has not altered the law, that the legal estate after such reconveyance passed under the will to the specific devisee ? His Lordship's statement that James Hudson was still the devisee, although only as a trustee for the

(1) (1933) 33 S.R. (N.S.W.) 361, at pp. 366, 367.
(2) (1940) 40 S.R. (N.S.W.), at p. 408 ; 57 W.N., at p. 130.
(3) (1893) 1 Ch. 214.
(4) (1841) 12 Sim. 123 [59 E.R. 1078].
(5) (1893) 1 Ch., at pp. 217, 218.
(6) (1893) 1 Ch. 214.

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Williams J.

persons entitled to the beneficial interest in the moneys secured thereon, and his disapproval of the view taken in *Moor* v. *Raisbeck* (1) that the effect of the sale and conveyance of the specifically devised land there in question was to revoke the devise, are, surely, a plain indication that he did not consider that, since the *Wills Act*, the effect of a sale and conveyance of specifically devised land to a purchaser was immediately to revoke or adeem the devise and to expunge it from the will.

That the position since the *Wills Act* is that a specific devise which is not revoked in accordance with the Act remains a part of the will, and only fails if there is no beneficial interest on which it can operate at the date of death appears, I think, from *Ford* v. *De Pontès* (2) where Lord *Romilly* said :—" The question depends on the *Wills Act* (1 Vict. c. 26), and it has been observed that under the construction of that statute, so far as it affects this case, the disposition by will can only be revoked either by some writing declaring an intention to revoke the will or by ademption, that is to say, by taking away the subject matter of the devise. The two modes may be illustrated thus :—If a person devise Whiteacre to A, and he afterwards signs a paper attested by two witnesses, in which he says ' I wish to alter my will, and I declare that the devise to A shall not stand ' or ' I wish that my will shall be revoked,' this would no doubt operate as a revocation. Again, if a testator sells or parts with Whiteacre and does not possess it at his death, then there is nothing on which the will can operate " (3). Further, when the judgment of Lord *Langdale* M.R. in *Farrar* v. *Earl of Winterton* (4) is read carefully, it does not, in my opinion, contain any suggestion that the specific devise was adeemed at the date of the contract. His Lordship held that the devise failed because, although it still formed part of the will, the testator had at the date of death no beneficial interest in the land on which it could operate. He said :—" But revocation, in the manner directed by the Act, is not the only mode in which the will may be rendered inoperative. If she " (the testatrix) " had conveyed the estate, and thereby completed the alienation, the will would have had no operation upon it, or upon the purchase money " (5). But his Lordship was there referring to the position which existed at the date of death, because later he said :—" The beneficial interest in the land which she had devised was not at her disposition ; but was, by her act, wholly vested in another, *at the time of her death* . . . Being of opinion, that by

(1) (1841) 12 Sim. 123 [59 E.R. 1078].
(2) (1861) 30 Beav. 572 [54 E.R. 1012].
(3) (1861) 30 Beav., at p. 592 [54 E.R., at pp. 1019, 1020].
(4) (1842) 5 Beav. 1 [49 E.R. 476].
(5) (1842) 5 Beav., at pp. 7, 8 [49 E.R., at p. 479].

the contract, the testatrix must, in this Court, be deemed to have alienated the whole of her beneficial interest in the estate :—*that at the time of her death she had no beneficial interest in the land at her disposition and that the will only passes that which was at her disposition*, I am of opinion, that the devisees of the land have no interest in the purchase money " (1). The position since the *Wills Act* was, if I might say so with respect, accurately and succinctly stated by *Farwell* J. in *In re Dowsett* (2) where he said :—" It appears to me that there is no difference in principle between a gift of ' Blackacre ' or of moneys specifically described, by virtue of property in ' Blackacre,' and an appointment under a general power of ' Blackacre ' or moneys so specifically described. If the testator, having made his will in those terms, afterwards parts with the property, *the gift fails for the very excellent reason that there is nothing on which it can operate when the testator dies.*"

For these reasons I am of opinion that, in the present case, the devise of Birrell Court was part of the will which was confirmed and republished by each of the codicils. But it was republished in the same form as it appeared in the will, namely, as a devise of land subject to a mortgage of £1,000. It is the duty of the court to give effect to what it considers to be the testator's intentions to be gathered from the contents of his testamentary instruments construed in the light of such facts as are admissible in evidence. It is permissible, therefore, for the court to have regard to the fact that, between the date of the will and the codicils, the testator had sold Birrell Court, and, if the court can gather that the testator in all the circumstances intended to give to the devisee by the confirmation of the will by the codicils, the interest, in the present case a right to the proceeds of sale, into which the land had been converted between the date of the will and the codicils, then the court, applying *mutatis mutandis* the principles of construction laid down in *In re Lowman* ; *Devenish* v. *Pester* (3), can give effect to that intention by holding that the proceeds of sale passed under the devise. This is shown by the statement of *Lindley* L.J. in *In re Clowes* (4), when, after saying that it was contended that it was a fundamental rule that if possible some meaning should be given to every clause in a will, he then said :—" That argument might have some force if the testator had made the codicil when he was mortgagee."

Further, in the passage already cited from *In re Kempthorne* (5), *Russell* L.J. evidently thought that the devise was republished by

(1) (1842) 5 Beav., at pp. 8, 9 [49 E.R., at p. 479].
(2) (1901) 1 Ch., at p. 401.
(3) (1895) 2 Ch. 348.
(4) (1893) 1 Ch., at p. 218.
(5) (1930) 1 Ch. 268.

H. C. OF A. 1944. FAIR-WEATHER v. FAIR-WEATHER. Williams J.

the codicil and that the effect of a subsequent codicil confirming the will could be to cause the proceeds of the compulsory sale to pass to the devisee : See his remarks (1) with respect to the *ratio decidendi* of *In re Wheeler* (2). It is also shown by the way in which *Eve* J. approached the problem in the case of a specific bequest of leaseholds in *In re Richards* ; *Jones* v. *Rebbeck* (3), where the facts were very close to the present facts.

But I am not satisfied that the testator, by the confirmations of the will by codicils, in the absence of some specific reference to Birrell Court, did intend to make the devise of Birrell Court in the will operate, when confirmed by the codicils, in a different manner from that in which it would have operated apart from the codicils, or, in other words, that, having sold the property to the appellant, he intended to make a gift of either the whole of the proceeds of sale outstanding at the date of his death, or of the proceeds of sale less the amount of the mortgage still outstanding at that date.

The appellant can, therefore, only take under the will and codicils any beneficial interest which the testator had in Birrell Court as land at the date of his death. The nature of the testator's beneficial interest in the property at that date depends upon whether at that date his interest under the contract of sale to the appellant could still be considered in equity as notional personalty. The effect of the *Moratorium and Interest Reduction (Amendment) Act* 1931 was, as I have said, to destroy the personal liability of the appellant to pay the balance of the purchase money and interest. Apart from some special statutory provision, therefore, the contract was, after that date, no longer specifically enforceable, because, in the case of an executory contract, specific performance can only be decreed where there is mutuality or, in other words, where either party can at the date of suit brought enforce the contract against the other (*Hume* v. *Monro* [*No.* 2] (4)). Further, a contract which at one stage is specifically enforceable, may, at a later stage, cease to be so, and the trusteeship of the vendor, which exists only while the contract is specifically enforceable, then comes to an end (*Central Trust and Safe Deposit Co.* v. *Snider* (5) ; *Attorney-General* v. *Day* (6)).

But the *Moratorium Act* 1932 (N.S.W.), s. 35 (4), provides in effect that the abolition by the Act of 1931 of the personal covenant is not to prevent a purchaser under a contract for the sale and purchase

(1) (1930) 1 Ch., at p. 293.
(2) (1929) 2 K.B. 81.
(3) (1921) 90 L.J. Ch. 298 ; 124 L.T. 597.
(4) (1943) 67 C.L.R. 461, at p. 483.
(5) (1916) 1 A.C. 266, at p. 272.
(6) (1748-1749) 1 Ves. Sen. 218, at p. 220 [27 E.R. 992, at p. 994].

of land suing the vendor for the specific performance of the contract, so that, at the date of death, although the testator could not sue the appellant to recover the purchase money, the appellant had a unilateral statutory right specifically to enforce the contract against the testator. In *Dart* on *Vendors and Purchasers*, 8th ed. (1929), vol. 1, p. 276, the learned author states :—" If during the vendor's lifetime he himself abandon the contract, or if through want of title *or for any other reason it is at his death capable of being enforced only against and not by him*, whether a conversion is or is not effected depends upon whether the purchaser does or does not choose to enforce specific performance ; the case being, in effect, similar to those in which the purchaser has *ab initio* a mere option to purchase."

But the case of *In re Thomas* ; *Thomas* v. *Howell* (1), which the learned author of *Dart* on *Vendors and Purchasers* cites as authority for this proposition, does not, in my opinion, bear it out, because the *ratio decidendi* of that case was that, because the testator who was the vendor could not make title, there was not a binding contract between him and the purchaser. In the present case there was a binding contract at the date of death upon the performance of which the appellant was at that date entitled to insist and was insisting. In *Haynes* v. *Haynes* (2) the Vice-Chancellor, Sir *R. T. Kindersley*, said that it must be remembered that the question which alone was material with respect to conversion was whether a bill would lie by the company against the landowner (the testator), and in *Attorney-General* v. *Day* (3) there is a statement to the same effect. In the present case it appears to me that, in view of s. 35 (4), the only beneficial interest of the testator at the date of his death in Birrell Court under the subsisting contract was in the proceeds of sale, although they were not recoverable as a debt.

For these reasons I am of opinion that the devise failed and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant and the respondents Roy Gilbert Fairweather, Amelia Louisa Hurley and Gladys Airam Crocker, *Perkins, Stevenson & Co.*

Solicitors for the respondent Gilder, *W. A. Gilder, Son & Co.*

Solicitors for the other respondents, *Holdsworth, Summers & Garland.*

J. B.

(1) (1886) 34 Ch. D. 166.
(2) (1861) 1 Dr. & Sm. 426, at pp. 458, 459 [62 E.R. 442, at p. 454].
(3) (1748-1749) 1 Ves. Sen., at p. 220 [27 E.R., at p. 994].