[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
PLAINTIFF,

AND

LAYH AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1953.

HOBART, *March* 18;

SYDNEY, *April* 23.

Dixon C.J., Fullagar, Kitto and Taylor JJ.

Will—Construction—Gift of any part share or interest to which testator entitled in specified hotel—Testator entitled under Tasmanian law to ultimate net residue of wife's estate as to which she died intestate—Hotel included in ultimate residue of wife's estate.

By her will the testator's wife, who predeceased him, gave the freehold property of an hotel to her niece M. and her nephew W. After her death a certificate of death on war service was given in respect of W., who had predeceased the testatrix. The gift to him accordingly lapsed, and it fell into the residue which was directed by the will to bear the debts, funeral and testamentary expenses, probate duties and other expenses. As to the ultimate residue of her estate there was an intestacy, and to this ultimate residue the testator was entitled under Tasmanian law. By his own will the testator had left his residuary estate to his nieces. After having been informed of the death of W. the testator executed a codicil wherein, after reciting the gift by the wife's will to M. and W. of the hotel and the presumption of the death of W. in consequence whereof there might be an intestacy as to the half share of W. in that property and that he was desirous of disposing of the same he gave devised and bequeathed "any part share and interest to which I may be entitled of and in the said property known as the Duke of Wellington Hotel" to M. for her own use and benefit absolutely.

Held, that although the testator took no interest in the lapsed half share of the hotel viewed as a specific asset but merely an equitable interest in the totality of his wife's residuary estate and thus in the assets comprising it including such lapsed half share, the codicil sufficiently indicated the testator's intention to give to M. the interest taken by him in his wife's residuary estate attributable to such lapsed half share and that such interest consisted in the proceeds of such lapsed half share reduced by a due proportion of the outgoings borne by residue.

Decision of the Supreme Court of Tasmania (Full Court) reversed.

H. C. OF A. 1953.

SMITH v. LAYH.

APPEAL from the Supreme Court of Tasmania.

This was an appeal from an order of the Full Court of the Supreme Court of Tasmania dismissing an appeal from an order of *Green* J. made on an originating summons for the interpretation of certain questions arising under the will and codicil of Francis Allen Ansell. The contents of the will and codicil and other relevant facts appear sufficiently in the headnote and are set out in the judgment of the Court.

The questions submitted for determination were: (1) Whether Marjorie Sigrid Ekblade (the niece of the wife of the testator) was entitled under the codicil to that portion of the residuary estate of Ada Ansell, the testator's wife, which passed to the testator, represented by the net proceeds of the sale of the one half share in the Duke of Wellington Hotel less a proportionate share of the debts, funeral and testamentary expenses trustees' commission and other outgoings properly payable out of the residuary estate of Ada Ansell; and (2) if not, whether the residuary beneficiaries under the will of Francis Allen Ansell were entitled to such portion of the residuary estate of Ada Ansell.

On the hearing of the originating summons, *Green* J. answered the questions as follows: (1) Marjorie Sigrid Ekblade was not so entitled; and (2) the residuary beneficiaries were so entitled.

On appeal, the Full Court of the Supreme Court of Tasmania (*Morris* C.J. and *Crisp* J., *Gibson* J. dissenting), affirmed the decision of *Green* J. The basis of the decision of *Green* J. and of the majority of the Full Court was that as the testator had no interest in the Duke of Wellington Hotel considered as specific property but only in the net proceeds of the realization of the residuary estate of Ada Ansell after the payment thereout of debts &c., the language used by the testator was incapable of passing such an interest and was not intended to do so.

From that decision the plaintiff appealed to the High Court.

G. H. Crawford, for the appellant. The will is a stop-gap will. The testator supplied his own dictionary. There is a mistake in the description of what the testator had. A testator may dispose of his interest even if there is only a right to have the administration of an estate properly carried out (*Re Cranfield; Mosse* v. *Cranfield* (1)). [He also referred to *In re Weeding*; *Armstrong* v. *Wilkin* (2); *In re Rowe*; *Pike* v. *Hamlyn* (3).] There is an interest in the land in these circumstances (*Duckett* v. *Collector of Imposts* (4); *Re*

(1) (1895) 1 I.R. 80.
(2) (1896) 2 Ch. 364.
(3) (1898) 1 Ch. 153.
(4) (1927) V.L.R. 457.

H. C. OF A. 1953.

SMITH v. LAYH.

Marchetti; *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* v. *Marchetti* (1)).

J. R. M. Driscoll, for the respondents William Oswald Layh and Thomas William Maloney, the trustees, submitted to the order of the court.

N. L. Campbell, for the respondent Mary Ayers, appointed to represent the residuary beneficiaries under the testator's will. The appellant is estopped from denying that there was no intestacy in Ada Ansell's estate. The testator never addressed his mind to whether he had a half share of land or in a blended fund. His only interest was in the ultimate blended fund. [He referred to *Re Mulder*; *Westminster Bank Ltd.* v. *Mulder* (2); *Re Gifford*; *Gifford* v. *Seaman* (3); *In re Kempthorne*; *Choles* v. *Kempthorne* (4); *In re Newman*; *Slate* v. *Newman* (5); and distinguished *Re Glassington*; *Glassington* v. *Follett* (6).]

G. H. Crawford, in reply.

Cur. adv. vult.

April 23.

THE COURT delivered the following written judgment:—

This is an appeal from an order of the Full Court of the Supreme Court of Tasmania dismissing an appeal from an order of *Green* J. There is a cross-appeal as to costs. The order of *Green* J. was made upon an application by way of originating summons for an interpretation of the will and codicil of Francis Allen Ansell, who died on 8th June 1946. His will was dated 23rd August 1945. The date of his codicil was 20th February 1946. The testator's wife, Ada Ansell, predeceased him; she died on 11th August 1945, leaving a will dated 29th November 1944 which was admitted to probate on 11th March 1946.

It appears that Ada Ansell was entitled to the freehold property of the Duke of Wellington Hotel, which is situated in Wellington Street, Launceston. By her will she gave, devised and bequeathed this freehold unto her niece Marjorie Sigrid Ekblade and her nephew William John Ekblade, children of her sister Vera May Ekblade. At the time when she made her will it was supposed that William John Ekblade was a prisoner of war in the hands of the Japanese, he having been serving with the 2/22 Australian Infantry Battalion.

(1) (1950) 52 W.A.L.R. 20.
(2) (1943) 2 All E.R. 150, at p. 151.
(3) (1944) Ch. 186, at p. 188.
(4) (1930) 1 Ch. 268.
(5) (1930) 2 Ch. 409.
(6) (1906) 2 Ch. 305, at p. 311.

But on 4th February 1946 the Department of the Army issued by a duly authorized officer a certificate of death on war service in respect of William John Ekblade. The certificate stated that whilst engaged on war service within the meaning of the *National Security* (*War Deaths*) *Regulations*, he had become missing on 1st July 1942 and was for official purposes presumed to be dead. It is not disputed that William John Ekblade predeceased the testatrix. The result was that the gift to him of the undivided half share of the Duke of Wellington Hotel contained in the will of the testatrix lapsed.

The will contained a provision as to residue in the following terms: " Any other real and personal estate of which I may die possessed to be disposed of and the proceeds to be utilised in discharging my just debts, funeral, testamentary, estate and Federal Probate Duty and other expenses. Should there not be sufficient money to pay all the aforementioned expenses I leave it entirely in the hands of my Executors to decide which of my beneficiaries shall be responsible for the balance and to make such arrangements as they may consider necessary to discharge the liability, their decision shall be final ". There was no disposition of the net balance of the " other real and personal estate " caught by this clause. In other words, as to the ultimate net residue there was an intestacy.

The person entitled under Tasmanian law to take any properties as to which Ada Ansell died intestate was her husband Francis Allen Ansell. By his will he had given, devised and bequeathed all his estate, both real and personal of whatsoever kind and wheresoever situate of which he should be possessed or entitled to or over which he should have any disposing power at the date of his death to his trustees upon trust in favour of his niece. This will was made twelve days after the death of his wife. The codicil, which was made a fortnight after the date of the certificate issued by the Department of the Army of the death of William John Ekblade, was directed, as appears on its face, to ensure that the lapsed share or interest in the Duke of Wellington Hotel would not pass under the residuary bequest contained in his will but would devolve upon Marjorie Sigrid Ekblade. The codicil recited that by her will Ada Ansell had given, devised and bequeathed to Marjorie Sigrid Ekblade and William John Ekblade, her nephew and niece, her freehold property known as the Duke of Wellington Hotel to be shared equally between them. It recited that William John Ekblade is presumed to have been killed whilst a prisoner of war prior to the death of Ada Ansell and in consequence thereof there may be an

H. C. OF A. 1953. SMITH v. LAYH. Dixon C.J. Fullagar J. Kitto J. Taylor J.

intestacy as to the half share of the said William John Ekblade in the said property which share would in that event devolve upon the testator, and that he was desirous of disposing of the same. The codicil then proceeded: "Now therefore I hereby give devise and bequeath any part share and interest to which I may be entitled of and in the said property known as the Duke of Wellington Hotel unto my niece the said Marjorie Sigrid Ekblade for her own absolute use and benefit".

The questions submitted by the originating summons for determination are (1) whether Marjorie Sigrid Ekblade is entitled as a beneficiary under the codicil to that portion of the residuary estate of Ada Ansell which passed to the testator represented by the net proceeds of the sale of the one half share in the Duke of Wellington Hotel less a proportionate share of the debts, funeral and testamentary expenses &c. payable out of the residuary estate of Ada Ansell, and (2) if not, whether the residuary beneficiaries under the will of the testator are entitled to that portion of the residuary estate of Ada Ansell.

Green J. answered the questions (1) that Marjorie Sigrid Ekblade was not so entitled and (2) that the residuary beneficiaries were so entitled. He ordered that the costs of the application as between the solicitor and client be paid out of the estate. The Full Court dismissed an appeal from this order and directed that the trustees' costs of the appeal be paid out of the estate as between solicitor and client, that the appellant pay the costs of the appeal of the respondent Mary Ayers as between party and party and that the balance of the costs of the respondent Mary Ayers as between solicitor and client be paid out of the estate. Mary Ayers is a representative party representing persons entitled to the residuary estate of the testator. She cross-appeals from the order directing that the costs of the trustees be paid out of the estate of the testator and seeks an order that the costs of the trustees be paid by the appellant.

The grounds upon which *Green* J. and the Full Court (*Morris* C.J. and *Crisp* J., *Gibson* J. dissenting) decided that the residuary legatees took under the will of the testator the net proceeds of the lapsed share of the Duke of Wellington Hotel and that Marjorie Sigrid Ekblade did not take the same may be stated very simply. They consist in a contrast between the interest which the codicil professed to dispose of and the actual interest which the testator took on the partial intestacy of his wife. The codicil related to a share or interest in a specific asset to which the testator said that he might be entitled, namely in the Duke of Wellington Hotel;

such a description was incapable of passing and was not intended to pass the interest in the net proceeds of realization to which the testator was entitled as on an intestacy after the provision relating to residue contained in the will of Ada Ansell had been carried out. In other words the testator had no interest in the Duke of Wellington Hotel considered as specific property but only in the net proceeds of realization of the residuary estate of Ada Ansell after the payment of funeral and testamentary expenses, Federal and State estate duties, debts and other outgoings, thereout.

The decision of *Green* J. and the majority of the Full Court proceeded upon this ground. The question is affected by an order made on 31st July 1947 by *Clark* J. on originating summons. The summons was in the estate of Ada Ansell and was entitled in the matter of the *Trustee Act*, in the matter of the *Deceased Persons' Estates Duties Act* 1915 and the *Estate Duty Assessment Act* 1914-1928, and in the matter of the *Administration and Probate Act* 1935. By this order it was declared in answer to questions that by reason of the death of William John Ekblade before the testatrix, the devise to him of one half share of the Duke of Wellington Hotel lapsed and that the testatrix did not die intestate as to the said half share of the Duke of Wellington Hotel and that the debts payable under the *Deceased Persons' Estates Duties Act* 1931 (Tas.) and the *Estate Duty Assessment Act* 1914-1928 (Cth.) should be borne by the property referred to in the will as " any other real or personal estate of which I may die possessed " and that such property included one share in the Duke of Wellington Hotel which was devised to William John Ekblade.

The parties to the originating summons upon which *Clark* J. made this order include the executors of the will of Ada Ansell deceased, the executors of the will and codicil of her husband, Francis Allen Ansell, the testator, and Marjorie Sigrid Ekblade. The last mentioned is plaintiff in the originating summons in which the order now in question was made by *Green* J. The executors of the testator are defendants. The other defendants are the nieces of the testator taking under the general or residuary devise and bequest in his will. They were not parties to the earlier originating summons. For the purposes of the question whether the codicil of the testator or the residuary devise and bequest attaches to the testator's interest, under his wife's will or on her partial intestacy, in or in respect of the half share in the Duke of Wellington Hotel, these nieces can hardly be considered to be represented in the former summons by the executors of the testator. If the questions in that summons had been answered in a sense adverse to or

H. C. OF A. 1953. SMITH v. LAYH. Dixon C.J. Fullagar J. Kitto J. Taylor J.

prejudicing their claim in reference to that half share, the order expressing the answer would not have bound them as an estoppel by record. Such estoppels are mutual and the order declaring that there was a lapse of the half share in the hotel by reason of the death of William John Ekblade and that Ada Ansell did not die intestate as to that share cannot work an estoppel against Marjorie Sigrid Ekblade for the purpose of the question decided by *Green* J. But this is perhaps of little or no importance. For the answer given by *Clark* J. does not mean more than that the provision relating to the residuary estate and directing that it should be applied to the payment of funeral and testamentary expenses, debts, State and Federal estate duties and other expenses caught the lapsed share in the hotel.

What would pass to the testator or his executors as a consequence of a failure to dispose of the balance of residue after meeting these outgoings is something markedly different from a half share in the freehold of the hotel. It is a right to enforce the execution of the dispositions and directions of the will and call for the balance of the residuary estate. To execute the direction in respect of residue the executors possessed a power of sale exercisable for the purpose of converting into money the property falling into residue. If the power of sale were exercised in respect of some of the property only forming part of residue and the outgoings for which residue was answerable were all discharged, then the testator or his executors might have sought a transfer of the remaining assets *in specie*. But otherwise they could not be entitled to any specific asset forming part of residue.

The analysis of the right which residuary legatees or persons entitled as next-of-kin take in the unconverted assets of an estate before the estate is fully administered has occasioned much difficulty. They have no separate or separable property in the specific items or assets of which the estate is made up: "When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration" per Lord *Cave*: *Dr. Barnardo's Homes National Incorporated Association* v. *Special Income Tax Commissioners* (1). But it is not the consequence that

(1) (1921) 2 A.C. 1, at p. 10.

the residuary legatee or next-of-kin has no right of property in the totality of assets forming the residue of the intestate estate. The beneficial interest is not vested in the legal personal representative, subject to the rights of creditors. The right of the next-of-kin or residuary legatee to have the estate properly administered and to receive payment of the net balance gives them an equitable interest in the totality and therefore in the assets of which it is composed : cf. *Horton* v. *Jones* (1). It is what equity calls property : a *jus in personam ad rem* : see *H. G. Hanbury* (1928) 44 *Law Quarterly Review* 468, and cf. 50 *Law Quarterly Review*, pp. 158, 320.

The difficulties which the cases upon this subject create have been examined by *Jordan* C.J. in *McCaughey* v. *Commissioner of Stamp Duties* (2). The conclusions which the late Chief Justice of New South Wales reached are expressed in the following passage : " The position, therefore, is that although the beneficiaries in the residuary estate of a deceased person have undoubtedly beneficial proprietary interests in each and every item of that estate whether it has been fully administered or not, nevertheless when questions of income tax or locus of property in relation to liability to death duties have to be determined, if the estate has not been fully administered the beneficial interests in the items must be treated as non-existent and the beneficiaries must be regarded as having nothing but a chose in action in the nature of a right *in personam* against the personal representative " (3). His Honour in this passage states his conclusions from authority as something which in his view no reasoning upon principle can altogether justify or explain. The purposes of this case can be served without attempting to carry his Honour's conclusions any nearer to a reconciliation with principle. It is evident that the language employed by the testator in his codicil for the purpose of disposing of the interest which he conceived that he might take in the Duke of Wellington Hotel, in consequence of the death of his wife's nephew, does not fit the situation as it existed. The actual words of the devise contained in the codicil, " any part share and interest to which I am entitled of and in the said property ", may perhaps be capable of applying to the net proceeds of the residue in so far as they can be attributed to the hotel, because " share and interest " are very wide words. Moreover, the word " part " is hardly a word of legal import at all and it possibly may be treated as covering part of the proceeds as well as part of the property. But it is clear enough that the basis of the testator's codicil was the supposition, as he expressed

(1) (1935) 53 C.L.R. 475, at p. 486.
(2) (1945) 46 S.R. (N.S.W.) 192, at pp. 201-206 ; 62 W.N. 230.
(3) (1945) 46 S.R. (N.S.W.), at p. 205 ; 62 W.N. 230.

H. C. OF A. 1953.

SMITH v. LAYH.

Dixon C.J. Fullagar J. Kitto J. Taylor J.

it, that in consequence of it being presumed that his wife's nephew was killed, it might be that there was an intestacy as to half the share of the nephew in the property, which share in that event would devolve upon the testator.

An important question in the decision of the case seems to be whether this supposition prevents a wide elastic meaning being given to the disposing portion of the codicil so as to embrace so much of the proceeds of the conversion of residue as may be attributed to the half share in the hotel. Does it involve or import an intention on the part of the testator to bestow on his niece an interest which would give her the entirety of the hotel so that it cannot be said that he possessed an intention of sufficient width or scope to give her the proceeds attributable to the half share in the hotel? On the whole we do not think the recitals in the codicil should be treated as confining his intention to giving her a specific interest in the hotel to the intent that she would have the entirety. The codicil seems to us rather to suggest that he did not wish his own residuary legatees to obtain the benefit of the windfall which arose from the presumptive death of his wife's nephew. The recitals are due to misapprehension, perhaps a very natural misapprehension, of the legal situation and of the description of property under which, according to a proper understanding of the law as to the administration of assets, that windfall comes.

But this does not dispose of the difficulties which exist in applying the language of the codicil to the interest taken in the undisposed-of net residue in so far as it is attributable to the lapsed half share in the hotel. How can it be determined what amount of the net residue is attributable to the half share in the hotel? In common with the other assets forming residue the lapsed half share in the hotel appears to have been realized. We were told that the proceeds of the assets other than that half share were roughly equal to the amount of the liabilities and other outgoings charged on the residue. But this equivalence can hardly matter. In fact there was no discrimination in meeting the charges and in law the executors of Ada Ansell were not required to discriminate between the proceeds of the lapsed share in the hotel and the proceeds of the other assets. Unless the terms or implications of the codicil of the testator Francis Allen Ansell, when applied to his will, make it necessary or right to throw notionally the estate duties, funeral and testamentary expenses, debts and other expenses payable under his wife's will against the assets other than the lapsed half share forming residue of her estate, the proceeds of all the assets forming residue must be considered to have borne them rateably. The general rule is that

where a payment is made out of an aggregate sum made up from several sources without differentiation, the payment must be taken to have been borne rateably by every part of it so that so much in the pound is provided from the respective sources. This would mean that the proceeds of the lapsed share in the hotel would be treated as bearing a proportion of the debts, estate duties, &c. The amount of the net residue representing or attributable to the lapsed half share would be the proceeds of that half share reduced by this proportion of the debts, estate duties, &c. : cf. *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Saxton's Case)* (1) ; *W. & A. McArthur Ltd.* v. *Federal Commissioner of Taxation* (2) ; *Douglass* v. *Federal Commissioner of Taxation* (3) ; *Resch* v. *Federal Commissioner of Taxation* (4) ; *Federal Commissioner of Taxation* v. *Miller Anderson Ltd.* (5). But the question we have to decide concerns the administration of Francis Allen Ansell's estate. It is in the administration of that estate that the question arises what must be treated as representing or attributable to the lapsed half share. In the end, therefore, the question must depend on the intention to be extracted from the will and codicil of that testator. If he is to be taken to have intended that the death duties, liabilities and other outgoings which under his wife's will were to be paid out of the residue should be treated in the administration of his estate as if they were thrown exclusively against the other assets falling into her residue so as to effect a notional exoneration of the lapsed half share of the hotel, then such intention must receive effect. It would mean that for the purpose of the disposition contained in the codicil, the amount of the net residue representing or attributable to the lapsed half share would be the actual net proceeds of the realization of that half share. But we can find nothing in the will or codicil of Francis Allen Ansell to indicate that he did intend thus to throw notionally the death duties, liabilities and other outgoings against other assets to the exoneration of the lapsed half share of the hotel for the purpose of the disposition contained in his codicil. At best all that can be obtained from the codicil is that so much of the assets as come to him under his wife's will as represents or is attributable to the half share of the hotel shall devolve upon Marjorie Sigrid Ekblade. If it means this, then a rateable amount of the net proceeds bearing the same proportion to the net proceeds as the gross proceeds of the hotel bore to the gross proceeds of the assets falling into residue should belong to her.

(1) (1929) 43 C.L.R. 247, at p. 266.
(2) (1930) 45 C.L.R. 1, at p. 20.
(3) (1931) 45 C.L.R. 95, at pp. 105-106.
(4) (1942) 66 C.L.R. 198, at pp. 230-231.
(5) (1946) 73 C.L.R. 341, at p. 379.

H. C. OF A. 1953. SMITH v. LAYH. Dixon C.J. Fullagar J. Kitto J. Taylor J.

On the whole we think that this is the effect that should be given to the codicil. The testator desired to provide for the devolution of what came to him in consequence of the lapse of the half share in the hotel in favour of Marjorie Sigrid Ekblade to the exclusion of his own residuary legatees. In spite of his misapprehension as to the nature of the interest resulting from the lapse and his consequent misdescription, we think his intention to cover by the codicil whatever interest he took sufficiently appears and the interest he took in fact and law consists in the proceeds of the lapsed half share reduced by a due proportion of the outgoings borne by residue.

For these reasons we are of opinion that the appeal should be allowed, that the order made by *Green* J. answering question 1 should be discharged and that in lieu thereof question 1 should be answered as follows: Yes. The answer to question 2 should be discharged and in lieu thereof the question should be answered: This question does not arise. The costs of the appeal should be paid out of the estate, the costs of the trustees as between solicitor and client. This order removes the subject matter of the cross-appeal which should simply be struck out.

Appeal allowed. Order of the Full Court of the Supreme Court of Tasmania discharged. In lieu thereof order that the appeal from the order of Green J. dated 2nd April 1951 *be allowed and that his order be discharged in so far as it answers the first and second questions in the originating summons and in lieu thereof that it be ordered that question* 1 *in the originating summons be answered: Yes; that question* 2 *be answered that such question does not arise, and that it be ordered that the costs of the appeal to the Supreme Court be taxed as between solicitor and client and when so taxed be paid out of the estate of the testator. Order that the cross-appeal be struck out and that the costs of the appeal and of the cross-appeal be paid out of the estate, the costs of all parties to be taxed as between solicitor and client.*

Solicitors for the appellant, *Dobson, Mitchell & Allport* by *Douglas & Collins*, Launceston.

Solicitors for the respondents Layh and Maloney, *Ogilvie McKenna Wilmshurst & Mills*, by *T. W. Maloney*, Launceston.

Solicitors for the respondent Ayers, *Butler McIntyre & Butler*, by *Archer, Hall, Waterhouse & Campbell*, Launceston.

M. G. E.