[HIGH COURT OF AUSTRALIA.]

PERPETUAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF TASMANIA LIMITED AND ANOTHER
PLAINTIFF AND DEFENDANT, } APPELLANTS;

AND

WALKER AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *March* 17, 18;

SYDNEY, *April* 28.

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

Will—Construction—Condition as to residence—Annuity to wife while residence remained unsold and wife resided there—If residence sold annuity to be increased—Right of wife to annuity while residence unsold and she ceased to reside therein—Whether condition subsequent—Certainty—Enforceability—Intention of testator.

A testator devised his residence known as "Huonden" to his trustee, upon trust for sale, but with power to postpone at discretion and subject to a direction that the property should not be sold during the lifetime of his wife without her written consent. He empowered the trustee, until the sale of Huonden, to let the property and directed that the balance of the rent received, after payment of outgoings, should be paid to his wife during her life without power of anticipation. He further directed that, until Huonden should be sold, the trustee should, instead of letting the property, permit his wife, if she should wish to do so, to reside therein, she being responsible during her residence for the maintenance and upkeep and outgoings. Then, after a devise and bequest of residue to the trustee, cl. 7 of the will provided: "While 'Huonden' remains unsold and my wife resides there, I direct my Trustee out of the income of my Trust Fund to pay to my said wife but without power of anticipation One thousand pounds per year by equal quarterly instalments but if 'Huonden' be sold during the lifetime of my wife I direct my Trustee to increase such sum payable to her to One thousand one hundred and fifty Pounds per year". The remaining income of the estate until the death of the widow was given upon certain trusts for the benefit of the testator's daughter and the children of his son. Upon the death of

the widow trusts were declared in favour of the daughter and the son and the son's children. The wife resided at Huonden for some time after the testator's death and then ceased to reside there. Huonden remained unsold.

Held, by *Fullagar*, *Kitto* and *Taylor* JJ. (*Dixon* C.J. dissenting), that cl. 7 of the will should be read as giving by implication to the widow an annuity of £1,000 during any period between her ceasing to reside at Huonden and the sale of Huonden.

Held further, by the whole Court, that if the right to receive the annuity was subject to the condition of the widow residing at Huonden the condition was not a condition subsequent, but that even if it had been a true condition subsequent it was not too uncertain to be enforceable. *Per Dixon* C.J., after a consideration of the cases, the preponderance of authority supports the conclusion that where personal residence in a dwelling place is required as a thing which is to continue, and where otherwise there is to be a cesser, such a condition has enough certainty and the event in which there is to be a forfeiture or cesser is sufficiently ascertainable from the beginning.

Decision of the Supreme Court of Tasmania (*Green* J.) reversed.

APPEAL from the Supreme Court of Tasmania.

This was an appeal from an order of the Supreme Court of Tasmania (*Green* J.) upon an originating summons which sought answers to certain questions arising under the will of the testator. Some of the questions are not material to this report. The facts and portions of the will relevant to this report are set out in the judgments.

The appeal was confined to the principal question arising under the originating summons, viz., whether or not the widow was entitled to the annuity after she had finally left Huonden and ceased to use it as her dwelling place.

Green J. held that the provision as to residence at Huonden in cl. 7 of the will was not void for uncertainty and that if Huonden were let by the trustee of the will the widow was entitled to receive the rent after payment of outgoings. It was further held that the widow was entitled to receive the annuity of £1,000 only while Huonden remained unsold and she resided there. It was further declared that if Huonden were sold, the widow was then entitled to receive the annuity of £1,150 whether she had resided at Huonden or not.

From this decision the appellant company, the trustee under the testator's will, and the testator's widow appealed to the High Court. By notice of cross-appeal the respondents to this appeal sought a variation of the order of *Green* J. with respect to his Honour's answer to question 3 (a) in the originating summons, but such cross-appeal is not material to this report.

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P. B. Walker, for the appellant Perpetual Trustees Executors and Agency Co. of Tasmania Ltd. The intention of the testator was that the widow should receive an annuity of £1,000 whether she resides at Huonden or not. If she ceases to reside there she also is to receive the rents and profits. If Huonden is sold she is to receive an annuity of £1,150. The words in cl. 7 "while 'Huonden' remains unsold and my wife resides there" are merely explanatory. They were never intended to create a condition, but if they amount to a condition then it is a condition subsequent. If they create a condition precedent, it has been fulfilled. The condition of residence is void for uncertainty.

T. E. Cleland (with him *R. C. Wright*), for the appellant Daisy May Walker. The main question is the construction of the will as a whole. The testator could not have meant what he wrote. The term "residence" must not be read literally or narrowly. It must be given a modified meaning or ignored. The annuity cannot be increased on the sale of Huonden if it has lapsed because the widow has ceased to reside there. It is a case in which the draftsman has made a mistake. [He referred to *Towns* v. *Wentworth* (1); *Wills* v. *Wills* (2); *McDonnell* v. *Neil* (3).] The testator attached no importance to the residence of his widow at Huonden. The words requiring residence by the widow are so uncertain as to be void. The estate given to the widow is not a conditional limitation.

H. S. Baker (with him *J. R. M. Driscoll*), for the respondents. There must be a manifest reason to justify the alteration of the will. The direction given to the trustees to increase the annuity to the widow is a slender foundation on which to base an argument for fundamental changes in the will. The draftsman has simply proceeded on the basis that Huonden will remain unsold and the widow will reside there. The residence may be intermittent, but it is a term of the limited gift. There is no justification for overriding the expressed intentions of the testator. The language is plain, viz., the widow must reside at Huonden if she is to receive the annuity. The condition is part of the gift and not a condition subsequent, but even if it is such a condition it is not uncertain.

R. C. Wright, in reply, referred to *Jarman* on *Wills* 8th ed., (1951), at p. 1451; *Re Gyde*; *Ward* v. *Little* (4); *In re Akeroyd's Settlement*; *Roberts* v. *Akeroyd* (5).

Cur. adv. vult.

(1) (1858) 11 Moo. P.C. 526, at p. 543 [14 E.R. 794, at p. 800].
(2) (1875) L.R. 20 Eq. 342.
(3) (1951) A.C. 342, at pp. 349-350; 82 C.L.R. 275, at pp. 279-280.
(4) (1898) 79 L.T. 261, at p. 265.
(5) (1893) 3 Ch. 363, at p. 366.

The following written judgments were delivered :—

DIXON C.J. This is an appeal from an order of the Supreme Court of Tasmania made by *Green* J. upon an originating summons which raised questions concerning the meaning and effect of the will of Alan Cameron Walker deceased. The testator died on 12th December 1931, his will being dated 27th February 1930. He left a widow, his second wife, and a son and daughter by his first wife, both of whom attained full age. Included in his estate was his residence, which was situated in Macquarie Street, Hobart, and called " Huonden ". At the time of his death he and his wife were living at Huonden. By his will he bequeathed all his household furniture and effects, silver, silverplated ware, pictures, glass, china and musical instruments to his wife absolutely. He devised his residence to his trustee upon trust for sale with power of postponement and directed that the net proceeds of the sale should be paid into his trust fund. He added a declaration that Huonden should not be sold without the written consent of his wife. He then empowered his trustee until the sale of Huonden to let the same for such periods not exceeding three years at the best rent the trustee could reasonably obtain, and he directed that after payment thereout of all rates, taxes, assessments, repairs, insurance premiums and other outgoings the trustee should pay the balance to his wife during her life without power of anticipation. But by the fifth clause of his will he went on to direct that until Huonden was sold, his trustee, instead of letting the same, should permit and suffer his wife if she should wish to do so to reside therein, she being responsible during her residence for the maintenance and upkeep thereof and for the payment of rates, taxes, land taxes and fire insurances and all other outgoings thereon. Next he devised and bequeathed all the residue of his real and personal estate to his trustee upon trust for sale and conversion and out of the proceeds thereof to pay debts, funeral and testamentary expenses, to invest the balance, which in his will he called his trust fund, and to pay the net income from such investments as his will afterwards set forth. Then followed a direction upon which much turns. It is cl. 7 and is in the following terms :—" While ' Huonden ' remains unsold and my wife resides there I direct my Trustee out of the income of my Trust Fund to pay to my said wife but without power of anticipation One thousand pounds per year by equal quarterly instalments but if ' Huonden ' be sold during the lifetime of my wife I direct my Trustee to increase such sum payable to her to One thousand one hundred and fifty Pounds per year ". The will proceeded by the clauses which

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followed to dispose of the remaining income of his trust fund by dispositions in favour of his son and daughter and his son's children.

After the testator's death his widow continued for some time to live at Huonden but she says that she found it much too large for her in the circumstances in which she was situated. Without objection from the trustees or her husband's children she converted the residence into two flats and converted an outbuilding into a maisonette. She let the maisonette and one of the flats but kept the other flat for her own use until 1938. In February 1936 she went abroad and did not return until December 1937. During her absence she let her flat furnished. In 1938 she purchased a house in Daly Street, Hobart, and proceeded to live there. The flat she had occupied in Huonden she let. Apparently she has never afterwards made Huonden or any part of it her dwelling place. She left Huonden finally in April 1938. All this was done with the knowledge of her trustee and without objection by the trustee or her stepchildren. In September 1938, however, her trustee arranged with her to take over the collection of the rent and pay the net balance of the rents received into her bank account. Up to the year 1950 the income from the estate was insufficient to pay her a full £1,000 a year in pursuance of the direction contained in cl. 7 of the will and varying amounts were paid to her representing the net available amount of income. From 1950 the trustee has paid to the widow the full £1,000 a year. The chief question raised by the originating summons is whether she was entitled to the annuity after she had finally left Huonden and ceased to use it as a dwelling. No claim is made by the stepchildren in respect of any period prior to April 1938.

In answer to the questions contained in the originating summons, *Green* J. declared that the provisions contained in cll. 5 and 7 of the will that the wife might reside at Huonden were not void for uncertainty and that if Huonden were let by the trustee of the will the testator's widow was entitled to receive the rent after payment thereout of all rates, taxes, assessments, repairs, insurance premiums and other outgoings and that she was entitled to receive the annuity of £1,000 only while Huonden remained unsold and she resided there. It was further declared that after Huonden is sold the widow is entitled to receive the annuity of £1,150 per annum, whether she has resided at Huonden or not.

Certain further questions were asked by the originating summons relating to the purported exercise by the testator's will of a power of appointment contained in the will of one Emma Jane Walker deceased. The only persons affected by these questions, answers

to which were contained in the order of *Green* J., are the two children of the testator and they have agreed upon a division of the property concerned. At their instance and without objection from the other parties to the appeal we agreed to discharge so much of the order as answered these questions, leaving the matter to the agreement which the children arrived at.

Both the widow and the trustee have appealed from that part of the order which relates to Huonden. They contend that so much of the order as declared that the widow was entitled to receive the annuity of £1,000 mentioned in cl. 7 only so long as she resided in Huonden is erroneous and that it ought to have been declared that the expression " while my wife resides there " contained in the clause was not a condition precedent to the payment of the annuity. Alternatively it was maintained that it was void, whether as a condition precedent or not, and in support of this contention it was argued that it was a condition subsequent.

As the provisions of the will are expressed they give the widow, if she fails to live at Huonden while it is unsold, only the net rents obtained by the trustees from the property. Yet if she does live there while it is unsold she is to receive £1,000 a year, and after it is sold she is to receive £1,150 a year. No doubt it strikes the mind as anomalous, if not unfair, that she should lose the annuity and be restricted to the rent because she chooses not to live at Huonden, though after it is sold the amount of the annuity is increased. There is nothing else to suggest that the testator particularly wished to preserve Huonden or entertained any special desire that his widow should live there. On the contrary his primary direction is to sell Huonden and he qualifies this direction by a provision requiring her consent and by a clause enabling her to live there, as if it was her desire, not his, that he was consulting.

On this foundation it is contended that the will should not be given effect according to its expressed terms, unqualified by implication, but that it should be read so as to entitle the widow to the annuity of £1,000 while Huonden is unsold notwithstanding that she did not reside there. There is little or nothing in the text or language of the will to add to the foregoing considerations of justice or logic in support of the *a priori* supposition that the testator would provide for the payment of the annuity while Huonden remained unsold after his widow ceased to live in it. What little there is appeared to me to lie in the use by the testator in the concluding part of cl. 7 of the words " increase such sum payable to her ". He directs his trustee to increase the sum payable to her, " if ' Huonden ' be sold during the lifetime of my wife ". This

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form of expression, so it is contended, exhibits an assumption that at the time when Huonden comes to be sold, the widow, unless she has died, will be in receipt of the annuity of £1,000 and this whether or not she has ceased to reside at Huonden. Therefore, so it is argued, the testator could not have intended the annuity to be payable as by the express words of cl. 7 he says only " while . . . my wife resides there ". Accordingly words must be supplied as inadvertently omitted or the words quoted must not be understood as importing a condition.

To extract all this from the use in the context of the word " increase " seems to ascribe to the draftsman too much precision in his choice of expression and too fine an appreciation of the logical implications or consequences of the language he employed. If it were granted that the manner in which the word " increase " is used does imply an assumption that at the time of sale the widow would be receiving an annuity of £1,000, why should not the assumption be attributed to his supposal that she would in fact be living in the house ? Why should it be attributed to a belief that he had provided by a clause that does not appear in the text that the annuity of £1,000 would be payable while she did not reside there ? But there is no sufficient ground for treating the use of the word " increase " as implying any assumption that at the time of sale the widow would be in actual receipt of £1,000 a year. The word " increase " may well have been used simply in relation to the figure the testator had named without any consideration of the contingencies in which one or other amount was payable. In any case there are limits to what a court of construction can do in reforming the provisions of a will by inference and those limits seem to me to be transcended by the proposal to read out of the will the condition so clearly expressed by the words " while my wife resides there " or to read into the will a further condition producing a contrary effect. As Lord *Eldon* said, individual belief ought not to govern the case, it must be judicial persuasion : *Attorney-General* v. *Grote* (1). Speaking for the Privy Council, *Turner* L.J. described the rule thus :—" it is upon intention, either expressly declared or collected by just reasoning upon the terms of the instrument, or evidenced by surrounding circumstances, where surrounding circumstances can be called in aid, and not upon conjecture merely, their Lordships feel bound to proceed. The strict observance of this rule, unimportant as it may be in particular cases, is of the highest importance, when considered generally, with reference to the rights of property ; for if it be not strictly

(1) (1827) 2 Russ. & M. 699, at p. 700 [39 E.R. 561, at p. 562].

observed, those rights will become dependent upon the mere arbitrary will of the Judges whose duty it may be to adjudicate upon them"—*Doe d. Brodbelt* v. *Thomson* (1). Lord *Halsbury* expressed the contrast with some of his accustomed vigour :—" it would be a strange canon of construction for a will to say that wherever you can discover what a testator's desires and wishes were, although you cannot find express words in the will which give the authority sought for, nevertheless you can supply words and declare trusts which are not to be found in the will itself"—*Hunter* v. *Attorney-General* (2). In *Coltsmann* v. *Coltsmann* (3), a contention was advanced based upon what the testator must be supposed to have intended. Lord *Cairns*, in referring to the contention, said the " argument proceeds upon an *a priori* assumption of what the testator would naturally intend ; which cannot be allowed to weigh against the proper construction of the words which he has used " (4).

Whatever ground there may be for suspecting that the testator did not thoroughly think out the provisions he should make, there is none in my opinion for inferring that words were mistakenly omitted or for feeling assured that his actual meaning was anything but what his words plainly express. It must be remembered that although reliance is often placed upon the well-known passage in the reasons of Lord *Kingsdown* in *Towns* v. *Wentworth* (5), with reference to carrying out the main purpose and intention of a testator, when ascertained to the satisfaction of the court, notwithstanding inconsistency or deficiencies in the terms of the will, the passage itself occurs in a judgment where the conclusion was against supplementing the limitations actually expressed. Indeed as to one question involved Lord *Kingsdown* said : " Now, a Court is not justified either in inserting or striking out words, or in any manner altering the language of a clear devise upon mere conjecture ; upon the mere ground that the devise seems capricious, and that a gift in other terms would be more in conformity with other dispositions contained in the Will. Their Lordships can find here no certain indication of an intention that the Testator meant anything else than he has said " (6). In the language of Lord *Blackburn*, " it all comes round to the same thing. The Court cannot make a will for the testator, it must construe the will he has made " : *Robertson* v. *Broadbent* (7).

(1) (1858) 12 Moo. P.C. 116, at p. 127 [14 E.R. 855, at p. 859].
(2) (1899) A.C. 309, at pp. 315, 317.
(3) (1868) L.R. 3 H.L. 121.
(4) (1868) L.R. 3 H.L., at p. 130.
(5) (1858) 11 Moo. P.C. 526, at p. 543 [14 E.R. 794, at p. 800].
(6) (1858) 11 Moo. P.C., at p. 550 [14 E.R., at p. 803].
(7) (1883) 8 App. Cas. 812, at p. 820.

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On the assumption, however, that cl. 7 meant that the annuity was not payable unless the widow resided in Huonden or it was sold, an assumption which I regard as quite plainly correct, the appellants contended that the condition amounted to a condition subsequent and that it was bad for uncertainty. It is, of course, well settled that a true condition subsequent cannot operate in defeasance of the estate to which it is annexed unless it is certain. The best known statement of the principle is that contained in the opinion of Lord *Cranworth* in *Clavering* v. *Ellison* (1): "Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine" (2). The rule is formulated by *Parker* J. in *In re Sandbrook*; *Noel* v. *Sandbrook* (3): "conditions subsequent, in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the Court can say with reasonable certainty in what events the forfeiture will occur" (4).

The condition in the present case does not appear to me to be a true condition subsequent. The words "while my wife resides there" are attached to a direction to pay to her £1,000 a year by equal quarterly instalments. They express a condition which she must fulfil in order to qualify for the payments. It is true that there is a difficulty as to the period over which she must reside to qualify for the payment. Probably the better construction is that she is to be paid by equal quarterly instalments at the rate of £1,000 a year provided that during the quarter preceding the payment of the instalment she has resided at Huonden. Perhaps the condition would be better designated a continuing condition. The appellants, however, treat the condition as describing a state of facts which the testator treated as existing, if not at the time when he made his will, at all events at the time when it would take effect. So regarding it, the appellants construe it as impliedly requiring a forfeiture in the event of that state of affairs ceasing. It is true that *Jarman* on *Wills* in speaking of continuing conditions 8th ed., (1951), at p. 1465 says that to this class seem to belong conditions requiring a devisee to reside in a particular house or to use and bear the name and arms of the testator, &c., and then proceeds "Strictly speaking . . . continuing conditions are merely a variety of conditions subsequent". This may be correct when

(1) (1859) 7 H.L.C. 707 [11 E.R. 282].
(2) (1859) 7 H.L.C., at p. 725 [11 E.R., at p. 289].
(3) (1912) 2 Ch. 471.
(4) (1912) 2 Ch., at p. 477.

an estate or interest in a corpus is given, but it does not appear to me to be a proper characterization of a condition attached to periodical payments of income when that condition must be fulfilled and in default payment does not accrue due to the annuitant. But in any event I am not prepared to hold that the condition that the testator's widow must reside at Huonden is too uncertain even if it be a condition subsequent. The condition makes it incumbent upon her to live at a definite place. It is expressed in the terms of ordinary speech and appears plainly to require that she shall make it her ordinary dwelling. It is true that, like very many conceptions of ordinary life, there is an incompleteness of logical definition in the conception; but it does not follow that it is too uncertain to be made the ground of a forfeiture. The amount of absence from a man's dwelling which is necessary to rob it of that character and make it no longer his residence may be a matter of degree. But everyone understands that if it is the place to which he returns from temporary absences, from journeys abroad and from peregrinations upon pleasure or business, where he maintains an establishment, and keeps his more permanent personal belongings and household furniture, it is his home and he resides there. The legislature has had no hestitation in making "residence" in a given place the criterion of liability to taxation, of rateability and of the right to vote. Indeed the jurisdiction of this Court may depend on the residence of a litigant in a State. It seems strange that a testator should be denied the power of prescribing residence in a given dwelling place as a qualification for his bounty.

The question whether in a particular context a condition that a beneficiary shall reside or occupy or dwell or live and reside at a particular place is sufficiently explicit has been dealt with in authorities which do not pursue a steady line. I shall attempt to trace its course.

In *Fillingham* v. *Bromley* (1) Lord *Eldon* had to decide whether in an action for specific performance the vendor showed a good title. His title was deduced through a will containing a devise of the land subject to a condition that the devisee or devisees should live and reside on the estate and in default thereof a devise over as if such devisee so refusing or neglecting to reside on the land had been actually dead. The facts showed that the devisee had lived and resided on the property and had maintained servants there throughout the requisite period but that he had been absent for a continuous period of a year and had gone through another long period when he only occasionally came with his wife and family to

(1) (1823) Turn. & R. 530 [37 E.R. 1204].

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the house for some weeks or months. The Lord Chancellor refused to hold that there had been any forfeiture, holding in effect that no clear meaning could be put upon the will which would entitle him to do so.

In *Clavering* v. *Ellison* (1), the condition subsequent did not depend on residence but upon the education of children in England and in the Protestant religion, but Lord *Cranworth* referred to *Fillingham* v. *Bromley* (2) and said: "I concur in Lord *Eldon's* observations about an estate being defeated by a person not living and residing in a particular house, which he thought too remote" (3).

In *Walcot* v. *Botfield* (4), there was a proviso in the will requiring the devisee for life of a mansion house and estates to reside there for six months in every year and imposing a penalty for breach of such condition and, if he should neglect to observe it for five years, devising it over. *Page-Wood* V.C. decided that it was necessary under the provision for the devisee to be personally present in the house for 168 days in every year. His Lordship observed that a great part of the difficulty in these cases had arisen from no time being limited for the residence required and that Lord *Eldon* in *Fillingham* v. *Bromley* (2) had, by a question he put, shown the difficulty that occurred when no specific period for residence is pointed out. The decision of *Page-Wood* V.C. was summed up in the statement that "the whole will appears to me to be carefully penned so as to tie down the devisee, when of full age, to a personal residence at this house during a certain period in each year" (5).

In *Dunne* v. *Dunne* (6), *Knight Bruce* and *Turner* L.JJ. decided that a proviso was sufficiently distinct to create a forfeiture on a widow refusing to reside at a mansion house, the proviso being expressed to require the person or persons entitled to possession, with his or their family or families, while he or they should continue so entitled, to reside at the mansion house, and make it his or their principal place of abode, and in default thereof that the devise to him or them should cease.

In *Wynne* v. *Fletcher* (7), *Romilly* M.R. decided that a clause forfeiting a devise in case the devisee did not make the mansion house his usual and common place of abode and residence was not void for uncertainty.

In *Maclaren* v. *Stainton* (8), *Romilly* M.R. held that the personal occupation of the devisee was effectively required by a devise of

(1) 1859) 7 H.L.C. 707 [11 E.R. 282].
(2) (1823) Turn. & R. 530 [37 E.R. 1204].
(3) (1859) 7 H.L.C., at p. 726 [11 E.R., at p. 290].
(4) (1854) Kay. 534 [69 E.R. 226].
(5) (1854) Kay., at p. 549 [69 E.R., at p. 232].
(6) (1855) 7 De G. M. & G. 207 [44 E.R. 81].
(7) (1857) 24 Beav. 430 [53 E.R. 423].
(8) (1858) 27 L.J. Ch. 442.

a house upon trust to offer the use or enjoyment to a specified child rent free so long as he pleased, but on refusal, death or ceasing to occupy, then to offer it to other children in succession.

In *In re Moir*; *Warner* v. *Moir* (1), there was a devise of a messuage and hereditaments in the country to the use of the devisee for life provided as a *sine qua non* that he, within six months after the testator's decease, should enter upon and take actual possession of the messuage and hereditaments as and for his residence and place of abode and should as such tenant for life thereafter during his life continue to reside in and upon the same capital messuage for at least six calendar months in every year. After the devisee's death or his failing to take such possession as aforesaid and to reside in the house there was a devise to his first and other sons in tail male. *Bacon* V.C. said that the words of the will provided for an occasional and accidental occupation: "They preclude the idea that he was to live there for six months at a time in any one year. Well, but what does 'to reside at' a house mean? To reside at a house means that a man is to be found at that house whenever he is wanted, that for that house he is rated to the poor-rate, or is on the parish or the Government rate-books, and that there he has a home. It is necessary, moreover, in order to comply with the conditions contained in the will, that the place should be kept up" (2). His Lordship went on to decide that on the facts there had been no forfeiture.

In *In re Wright*; *Mott* v. *Issott* (3), it fell to *Kekewich* J. to decide whether a forfeiture had been incurred by a beneficiary under a proviso to a trust to permit her to hold and occupy a house rent free. The proviso made the trust subject "to her residing upon the premises during her life time" unless (according to the construction which *Kekewich* J. ultimately placed upon it) she married. She did marry and thereupon she let all the rooms in the house but one, which she reserved. To avoid a forfeiture, in case the proviso was construed as extending beyond her marriage, she kept a bed in this room ready for use, her books, some clothes and some writing materials and other things. She retained the key, went there two or three times a week and occasionally slept there. *Kekewich* J. referred to *Walcot* v. *Botfield* (4), and observed that "personally residing and residing are the same thing" (5). After mentioning the decision of *Bacon* V.C. in *Re Moir*; *Warner* v. *Moir* (1), his Lordship said: "Although I am unwilling to deprive this lady of

(1) (1884) 25 Ch. D. 605.
(2) (1884) 25 Ch. D., at pp. 609-610.
(3) (1907) 1 Ch. 231.
(4) (1854) Kay. 534 [69 E.R. 226].
(5) (1907) 1 Ch., at p. 236.

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this house without urgent cause, I cannot bring myself to think that what she has been doing is 'residing' in the house. It seems to me that she has been using it for a place of rest and amusement, and not for a residence. I cannot say that she is at home there, though she receives certain business letters and conducts some other correspondence there. Her husband's house is really, of course, her home, and I cannot say that she makes the house in question her home as the testator intended it to be. If, therefore, I was bound to decide the case on this ground, I should have to hold that she did not reside there within the meaning of the will, and there would have been a forfeiture under the condition" (1). The learned judge, however, went on to construe the condition as not extending beyond spinsterhood.

In *In re Wilkinson*; *Page* v. *Public Trustee* (2), *Tomlin* J. held that a gift was sufficiently certain which bequeathed a sum upon trust to pay the income thereof to a legatee for and during the term of her natural life or until she should voluntarily cease to make the main dwelling house her permanent home, without power of anticipation, with a direction that in the event of her voluntarily ceasing to make the dwelling house her permanent home this sum should fall into residue. *Tomlin* J. said:—"I confess I do not feel any difficulty in giving a rational meaning to the words 'to make the dwelling-house her permanent home'; I think it is reasonably plain what that means; it seems to me it means, to keep it up as what may be colloquially called her headquarters. I do not think there is any particular difficulty in attaching a reasonable meaning to the phrase. I do not propose, and I do not think it necessary for me to-day to define precisely what I understand the phrase to mean. I am satisfied that it bears a sufficiently definite meaning to enable me to say that there is no case of uncertainty which renders the gift in any way bad, or defective" (3).

In *Re the Estate of Talbot-Ponsonby* (4), *Crossman* J. held valid a condition attached to a devise of a dwelling house that the devisee should make it his home and not allow a named person to set foot upon the property. The validity of the condition was attacked as a condition subsequent that was too uncertain. His Lordship quoted the passage, already set out, from the judgment of *Tomlin* J. in *In re Wilkinson*; *Page* v. *Public Trustee* (2), and the passage from Lord *Eldon's* judgment in *Fillingham* v. *Bromley* (5). *Crossman* J. then proceeded:—"I feel no real doubt as to what the testator

(1) (1907) 1 Ch., at p. 236.
(2) (1926) Ch. 842.
(3) (1926) Ch., at p. 849.
(4) (1937) 4 All E.R. 309.
(5) (1823) Turn. & R. 530 [37 E.R. 1204].

meant, and, if some circumstances were put before the court, and the court were asked to say whether, in those circumstances, there had been a forfeiture of this interest under the will, I do not see any reason why the court would be unable to determine that question. The only difficulty I feel is whether the court can see from the beginning upon the happening of what event the estate is to determine. Whether in particular circumstances the devisee has ceased to make the estate his home or not may be difficult to determine, but I am not prepared to hold that it is an impossibility to determine it. I do not hold the condition void for uncertainty. I do not think there would be any difficulty in saying whether the owner had allowed the man named to come upon the property, within the meaning of this will " (1).

In this state of authority the Privy Council decided the important case from Ontario of *Sifton* v. *Sifton* (2). The provision there in question consisted in a trust for the testator's daughter. The trust was to pay to or for his said daughter a sum sufficient in the trustees' judgment to maintain her suitably until she was forty years of age, after which the whole income of the estate should be paid to her annually. Then followed the critical clause, viz., " The payments to my said daughter shall be made only so long as she shall continue to reside in Canada " (3). Their Lordships held that this clause was a condition subsequent and that it was void for uncertainty. The judgment of the Privy Council which was delivered by Lord *Romer* proceeded upon the ground that the proviso failed to lay down with sufficient definition how much absence from Canada was permissible and for what purposes and occasions. Lord *Romer* referred to the questions which had been raised involving, as they did, (1) the effect of a period of absence exceeding eleven months for the purpose of study in Europe, (2) the possibility of the daughter's again proceeding to Europe after returning for one month to Canada, (3) the relevancy of the purpose or occasion of her absence, (4) a request for a definition of the periods for and the circumstances in which absences from Canada were permissible. Not a little turned on the word " continue ". Lord *Romer* said that the learned judges in Canada who upheld the validity of the condition had found themselves unable to give any more precise direction than that the testator's daughter might leave Canada for a limited period and for a purely temporary purpose without being able to define either the word " limited " or the word " temporary ". His Lordship had cited the statement of *Fry* J. in *In*

(1) (1937) 4 All E.R. 309, at pp. 312, 313.

(2) (1938) A.C. 656.

(3) (1938) A.C., at p. 657.

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re Viscount Exmouth; *Viscount Exmouth* v. *Praed* (1), that a condition subsequent must be "such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect" (2). "If the provision be clearly expressed, it is the fault or the misfortune of the person affected if he should fail to know whether he is committing a breach of it. But this is implied in the language used by Fry J. He said that it must be 'ascertainable' whether the provision has taken effect or not; not that it must be ascertained in fact by the person affected, or even ascertainable by him without difficulty" (3). In the application of this test Lord *Romer* referred to the foregoing questions and said: "But if the appellant's" (the daughter's) "interest under the will is to be forfeited upon her 'ceasing to reside in Canada,' she has a right to have those questions categorically answered; and inasmuch as they cannot be so answered, the words, if constituting a condition subsequent, are void for uncertainty" (4). It will be seen that this decision does not relate to residence in or occupation of a house but to the degree of connection which must be maintained with a country to fulfil a requirement of "continuing to reside" in it. That connection, described by the word "residence", was considered too elastic and too much a matter of degree to form the ground of a condition subsequent. It is not a decision of general application to the word "residence" and does not appear to me to govern such a case as the present. Indeed Lord *Romer's* judgment includes the following passage: "Their Lordships' attention was called during the arguments to numerous authorities in which the Court has been called upon to consider the meaning of the words 'reside' and 'residence,' and the like. But these authorities give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least six weeks in a year can present no difficulty. In some contexts the word 'reside' may clearly denote what is sometimes called 'being in residence' at a particular house. In other contexts it may mean merely maintaining a house in a fit state for residence. It is plain, however, that in the present case the word 'reside' means something different from either being in residence or merely maintaining a residence" (5). Of this passage *Jenkins* J. in *In re Coxen*; *McCallum* v. *Coxen* (6),

(1) (1883) 23 Ch. D. 158.
(2) (1883) 23 Ch. D., at p. 164.
(3) (1938) A.C., at p. 671.
(4) (1938) A.C., at p. 676.
(5) (1938) A.C., at pp. 675-676.
(6) (1948) Ch. 747.

said that he thought that it showed: "(*a*) that the meaning (whether definite or uncertain) of the words 'reside' and 'residence' in a will depends on the context in which the words are used, (*b*) that in some contexts a perfectly definite meaning can be attached to such words, and (*c*) that the words 'reside' and 'residence' have different (and less readily ascertainable implications) when used in relation to residence in a particular country from these which they have when used in relation to residence in a particular house" (1). The devise his Lordship had to consider in that case was of a dwelling house to trustees who were directed to permit the testator's wife to reside therein during her life or for so long as she should desire to reside therein. The house was to fall under the residuary trusts "from and after her death or if in the opinion of the trustees she should have ceased permanently to reside therein". *Jenkins* J. construed the provision as requiring personal residence and as meaning that on permanent cesser of personal residence the house should fall under the residuary trusts. His Lordship said:—"Therefore, the condition is, as a matter of definition, to operate in the double event of (*a*) Lady Coxen ceasing personal residence in the house, and (*b*) such cesser being permanent. The latter event involves intention. Lady Coxen must have given up all intention of ever again resuming personal residence in the house, or in other words, must have no 'animus revertendi.' To put it objectively, she must have given up personal residence once and for all. It seems to me that so far as definition goes the double event involved in the condition as I have construed it is prescribed with sufficient certainty and precision. I see no reason why a judge of fact should not on any given state of facts be perfectly capable of deciding whether it has or has not happened. Indeed, the problem is no more insoluble than the question whether a given individual has in a given state of facts abandoned his domicile of origin and acquired a domicile of choice, which the court has never regarded as incapable of decision. The circumstance that it may be difficult in this or that state of facts to determine whether the double event has happened or not does not, in my judgment, make the condition bad. (See *In re Wilkinson* (2) and *In re Talbot-Ponsonby's Estate* (3)). I do not see why it should ever be impossible to do so" (4).

This decision was distinguished by *Harman* J. in *In re Field's Will Trust*; *Parry-Jones* v. *Hillman* (5). The bequest there in

(1) (1948) Ch., at p. 760.
(2) (1926) Ch. 842.
(3) (1937) 4 All E.R. 309.
(4) (1948) Ch., at p. 761.
(5) (1950) Ch. 520.

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question was of some furniture used by the testatrix in her house. She devised the house to A. for life and after his death to B., if B. should survive the testatrix and attain the age of twenty-five years, conditions that were fulfilled. She bequeathed the furniture upon trust to permit A. to have the use of it during his life and after his death in trust for B. if he should attain the age of twenty-five and should occupy the property. *Harman* J. held the condition that he should occupy the property to be a condition subsequent and to be void for uncertainty. His Lordship said of *Re Coxen* ; *McCallum* v. *Coxen* (1), that the condition was that in the opinion of the trustees the beneficiary had ceased to reside and that *Jenkins* J. had no difficulty in holding that such a condition was certain because the court could tell what the opinion of the trustees was. " It was not the court's opinion, but theirs, which mattered " (2). This point was discussed by *Jenkins* J. (3). If what precedes the discussion is examined it will appear, I think, that *Jenkins* J. was prepared to hold the condition valid independently of the reference to the trustees' opinion. Further, with great respect to *Harman* J., the discussion itself shows that *Jenkins* J. took the view that " if the testator had insufficiently defined the state of affairs on which the trustees were to form their opinion, he would not . . . have saved the condition from invalidity on the ground of uncertainty merely by making their opinion the criterion " (4). How *Jenkins* J. regarded the introduction of the trustees' opinion as a criterion is shown by his Lordship's statement, " and in my view the testator by making the trustees' opinion the criterion has removed the difficulties which might otherwise have ensued from a gift over in a double event the happening of which, though in itself sufficiently defined, may necessarily be a matter of inference involving nice questions of fact and degree " (5). The grounds of the decision of *Harman* J. were that it was not a condition entitling the beneficiary to enjoyment of the chattels so long as his occupation of the house should last, " but one under which, once there is occupation, the condition is satisfied and the chattels and the money belong absolutely to the person who is to fulfil the condition " (6). Consequently " there must be a certainty ab initio as to what he must do to fulfil it " (6). " I think," said his Lordship, " that it is the event required by the will which is uncertain. What is meant, it may be asked, by the words, ' and shall occupy my freehold property ' ? Must it

(1) (1948) Ch. 747.
(2) (1950) Ch., at p. 523.
(3) (1948) Ch., at pp. 761-762.
(4) (1948) Ch., at p. 761.
(5) (1948) Ch., at p. 762.
(6) (1950) Ch., at p. 524.

be a rateable occupation, must it be an occupation as a freeholder, as a lessee, as a weekly tenant, as a tenant at will, or as a sojourner overnight ? " (1).

At this point in the sequence of cases a decision was given by the House of Lords with reference to conditions subsequent, which has a considerable importance in the present case, although the condition there in question did not relate to residence. It is *Bromley* v. *Tryon* (2), and is important because it shows that it is not because a condition depends upon matters of degree or because questions of fact may arise involving difficulty in its application that it must be held uncertain. The condition of defeasance there included the contingency of any of certain persons described becoming " entitled to the possession of the Stoke Hall Estate or the bulk thereof ". It was a settled estate which might be composite of land and money and the word " bulk " was interpreted as referring to value not area. The Lord Chancellor (Lord *Simonds*) after giving the word this meaning proceeded :—" Then it was said that even so the words are uncertain in content, for it is purely a question of degree what constitutes the ' bulk.' I cannot accept this contention. I think that according to the ordinary use of language the bulk means the greater part, which may according to the subject-matter refer to area, number or value. And that I may not be thought guilty of a solution which is equally obscure, I will add that ' greater part ' means anything over one-half. I am of opinion that the words ' the bulk thereof ' are not subject to the same vice as were the words ' of the Jewish faith ' and ' reside ' in the cases that I have cited and as the expression ' relation by blood ' was thought to be by the Privy Council in *Sifton* v. *Sifton* (3), though Russell J. had determined otherwise in *In re Lanyon* (4). In deference to the argument of learned counsel who sought to illustrate the alleged obscurity of the relevant words by reference to the facts of the present case, I will only add this. It does not follow because the words of a defeasance clause are sufficiently clear to give the clause validity that there may not be cases in which its application is difficult, and I apprehend that, if there is a real doubt, the court will show the same favour to a vested estate in applying the clause as it does in construing it " (5).

In what, I believe, is the most recent case as to a condition requiring " residence ", namely, *In re Gape* ; *Verey* v. *Gape* (6), in the Court of Appeal, *Evershed* M.R. cited portion of the foregoing

(1) (1950) Ch., at p. 523.
(2) (1952) A.C. 265.
(3) (1938) A.C. 656.
(4) (1927) 2 Ch. 264.
(5) (1952) A.C., at pp. 275-276.
(6) (1952) Ch. 743.

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passage and applied it. His Lordship added: "But the question in the present case is not whether certain events might happen which might or might not make it difficult to say whether the event contemplated had occurred, but whether the language used is sufficiently precise and definite to give it validity; and, as I have already indicated, I think it is" (1). The condition in question required a beneficiary becoming entitled in possession to the residuary estate within six months of the date of so becoming entitled to take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with it, then the trusts in his favour were to determine and become void. Permanence in this context, it was held, involved intention. "If a synonym be required", said *Evershed* M.R., "I would say that the condition of taking up permanent residence in England was another way of saying: making England your permanent home; that is to say, residing in England with the intention of continuing to reside there until you die" (2). The Court of Appeal held that the condition was not uncertain and was valid.

My reason for stating so fully the course of judicial decision upon the certainty or uncertainty of conditions requiring residence in houses or countries, or occupation of property, is not because any very clear guidance may be thus obtained in the solution of the present case. There are three reasons for doing so. First, it exhibits the persistence and constant recurrence of two very different methods of treating such conditions when the principle enunciated by Lord *Cranworth* in *Clavering* v. *Ellison* (3) comes to be applied. Secondly, from a full examination it appears, as I think, that underlying this difference and explaining it is the very distinction made by Lord *Simonds* L.C., and repeated by *Evershed* M.R., between the certainty and precision with which the condition is expressed on the one hand and, on the other hand, the possibility of events occurring to which the application of the clause might be doubtful, or in other words the difference between the clearness of the definition of the events in which a forfeiture may take place and the possibility of a set of facts occurring of which it might not be altogether easy to say whether they did or did not satisfy the definition, notwithstanding its precision and certainty. In the third place, the preponderance of authority does seem to support the conclusion that where personal residence in a dwelling

(1) (1952) Ch., at p. 748.
(2) (1952) Ch., at p. 749.
(3) (1859) 7 H.L.C. 707 [11 E.R. 282].

place is required as a thing which is to continue, and where otherwise there is to be a cesser, such a condition has enough certainty and the event in which there is to be a forfeiture or cesser is sufficiently ascertainable from the beginning.

In the present case I think that the clause means that the annuity is payable, while the house Huonden is unsold, only so long as the widow personally resides there so that it is her home. No doubt to have your home in a given house is consistent with protracted absences from it, but the conception is one of common life involving little real difficulty, once it is applied to a particular dwelling and to a period of time regarded as indefinitely continuing and subject to termination only by a change of residence. Accordingly I think that the clause is valid.

In my opinion the appeal should be dismissed subject to the variation of the order necessary to discharge the answer to the third question in the originating summons.

FULLAGAR, KITTO AND TAYLOR JJ. This is an appeal from an order of the Supreme Court of Tasmania (*Green* J.) made upon an originating summons which sought answers to certain questions arising under the will of Alan Cameron Walker deceased. Two main questions were raised, only one of which is now the subject of this appeal.

The testator made his last will on 27th February 1930, and died on 12th December 1931. By his will he devised his residence known as "Huonden" at 178 Macquarie Street, Hobart, to the Perpetual Trustees Executors & Agency Co. of Tasmania Ltd. which he appointed as his executor and trustee, upon trust for sale, but with power to postpone at discretion and subject to a direction that the property should not be sold during the lifetime of his wife without her written consent. He empowered the trustee, until the sale of Huonden, to let the property, and directed that the balance of the rent received, after payment thereout of rates, taxes, repairs, insurance premiums and other outgoings, should be paid to his wife during her life without power of anticipation. He further directed that, until Huonden should be sold, the trustee should, instead of letting the property, permit his wife, if she should wish to do so, to reside therein, she being responsible during her residence for the maintenance and upkeep thereof and for the payment of rates, taxes, insurance and all other outgoings. Then, after a devise and bequest of residue to the trustee, comes cl. 7 of the will, which has created the difficulty. It provides:— "While 'Huonden' remains unsold and my wife resides there

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I direct my Trustee out of the income of my Trust Fund to pay to my said wife but without power of anticipation One thousand pounds per year by equal quarterly instalments but if 'Huonden' be sold during the lifetime of my wife I direct my Trustee to increase such sum payable to her to One thousand one hundred and fifty Pounds per year". The "remaining income" of the estate until the death of the widow is then given upon certain trusts for the benefit of his daughter and the children of his son. Upon the death of his widow trusts are declared in favour of the daughter and the son and the son's children.

After the testator's death his widow resided at Huonden for a few months. Whether at different times between 1932 and 1938 she could be said to have been "residing" there within the meaning of cl. 7 of the will might be a question of some difficulty, but it is a question which need not be considered on this appeal. It is clear that she ceased to reside there in 1938. Since that year the property, which has not been sold, has been occupied by tenants, who have paid rent to the trustee. Up to the year 1950 the total income of the estate was less than £1,000 per annum, and the trustee paid the whole of the income to the widow. In and since 1950 the total income has slightly exceeded £1,000 per annum, and £1,000 per annum has been paid to the widow.

For the persons entitled to the "remaining income" of the estate during the life of the widow it is contended that the widow was, under cl. 7, entitled to the annuity of £1,000 per annum only while she resided at Huonden, and that, when she ceased to reside at Huonden, the property not being sold, she became entitled to receive only the net rents of Huonden. For the widow two alternative arguments were put forward. It was said in the first place that, on the true construction of cl. 7, the annuity of £1,000 was payable to the widow until Huonden was sold, even if she ceased to reside there. Alternatively it was said that, if her right to receive the annuity was subject to the condition of her residing at Huonden, the condition was a condition subsequent and must be held void for uncertainty on the authority of *Sifton* v. *Sifton* (1).

The case is by no means free from difficulty, but we have come to the conclusion that the first argument presented for the widow is sound. On this construction of cl. 7, the words relating to the wife's residing at Huonden cannot, of course, import a condition subsequent. We desire, however, to say three things with regard to the alternative argument for the widow. In the first place, even on the other construction, we would not regard the words in question

(1) (1938) A.C. 656.

as importing a condition subsequent. On that construction they describe a state of affairs which must be found to have existed as and when the question arises whether the wife is entitled to receive an instalment of the annuity. In the second place, we would think, as at present advised, that such cases as *Sifton* v. *Sifton* (1) applied only to cases of true conditions subsequent: cf. *In re Harris*; *National Trustees Executors & Agency Co. of Australia Ltd.* v. *Sharpe* (2). In the third place, if the words in question were regarded as importing a condition subsequent, we would not think that the condition was too uncertain to be enforced: we would, on this question, agree with what is said by the Chief Justice, whose judgment we have had the advantage of reading. As we have said, however, on the view which we take of the construction of cl. 7 these questions do not arise.

It may be at once conceded that a gift of an annuity during the subsistence of a given state of affairs must prima facie be construed as a gift of an annuity ending with the cessation of that state of affairs. For example an annuity given "to my wife during the minority of my daughter" would clearly be prima facie an annuity ending when the daughter attained the age of twenty-one years. But the words of gift are not necessarily or logically inconsistent with an intention that the annuity shall continue for some period after the daughter attains twenty-one years, and, if such an intention is sufficiently indicated, there is no reason why effect should not be given to it. The words of gift indicate prima facie the absence of such an intention, but they do not contradict it. If, for instance, they were followed by a gift over of the annuity when the daughter attained the age of twenty-five years, it might be quite reasonably inferred that the annuity was to continue during the period between the daughter's twenty-first and twenty-fifth birthdays. A gift over has often provided a basis for the inference of a gift not made in express terms. A good recent example is to be found in *Currie* v. *Glen* (3). In that case *Dixon* J. said: "But if indications of the intention which the testator sought to express appear in the will and they are convincing, effect must be given to them, notwithstanding that a gift or even a series of limitations must be implied" (4). His Honour proceeded to quote from the judgment of *Bacon* V.C. in *Re Redfern*; *Redfern* v. *Bryning* (5) and found, in the particular case, a "paramount consideration" in a gift over contained in the will. The reason of such cases is

(1) (1938) A.C. 656.
(2) (1950) V.L.R. 182.
(3) (1936) 54 C.L.R. 445.
(4) (1936) 54 C.L.R., at p. 458.
(5) (1877) 6 Ch. D. 133, at p. 138.

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that the presence of the gift over indicates that the testator believes or assumes that, in what has gone before he has disposed of the subject matter up to the occurrence of the event on which it is given over.

There is not, of course, in the present case a gift over of the annuity of £1,000 given to the wife. But we find in what follows the gift of that annuity, read in the light of earlier provisions in the will and of all the circumstances, enough to convince us that cl. 7 should be read as giving by implication to the widow the same annuity during any period between her ceasing to reside at Huonden and the sale of Huonden.

We begin with this, that it is extremely difficult, and indeed impossible, to suppose that the testator intended his widow, if she ceased to reside at Huonden but Huonden remained unsold, to receive nothing but the net rents of Huonden. He begins by devising Huonden upon trust for sale, but it is not to be sold without the written consent of his wife, who is given a right, if she wishes to do so, to reside therein. If she resides therein, she has the benefit of a residence rent free. If she does not, and the property is let, she is to receive the net rents. We were told that the net rental value of Huonden at the date of the testator's death would be something in the vicinity of £150. This accounts for the difference between the two annuities which are alternatively given by cl. 7. What the testator must have intended seems indeed very clear. While his widow resides at Huonden, she has the benefit of a home rent free. If she chooses not to reside at Huonden, she receives the net rents of Huonden. In addition she is to have an annuity of £1,000 per annum. If Huonden is sold, she will have neither a home rent free nor the net rents of Huonden. So her annuity is to be increased by the equivalent of what she has lost through the sale of Huonden: that is to say, it is to be increased to £1,150 per annum.

It is clearly not enough, however, to feel sure that the testator would intend the annuity of £1,000 to continue until Huonden should be sold even though his widow should not be residing there. If the will contained nothing but a direction to pay that annuity to her while she resides at Huonden, there would be no alternative but to say that the annuity ceased when she ceased to reside at Huonden. But there is much more than that. The annuity of £1,000 is given originally " while ' Huonden ' remains unsold and my wife resides there ". Then there is a provision for a change " if ' Huonden ' be sold during the lifetime of my wife ", but no express provision for a change if Huonden remains unsold but the wife

ceases to reside there. If Huonden be sold during her lifetime the trustee is directed " to *increase such sum payable* to her to £1,150 per year ". The word " increase " and the reference to the " sum payable to her " strongly suggest that the testator is regarding his wife as receiving £1,000 per year whenever Huonden is sold if it be sold in her lifetime. If she were not entitled to receive that annuity during any period between her ceasing to reside at Huonden and a sale of Huonden in her lifetime, the word " increase " and the reference to " such sum payable to her " would be entirely inappropriate if such a period eventuated. In that event the sale of Huonden would not involve the increasing of a sum then payable to her but the arising of a new right to a new and different annuity —perhaps after an interval of many years during which no annuity at all was payable. In such an event it would be impossible to say, except in a highly artificial and unreal sense, that the trustee, commencing to pay the new annuity, was " increasing the sum payable to her ". But this is not all. Clause 8 of the will goes on to dispose of the " remaining income " of the estate during the lifetime of the wife. Clause 8 follows immediately on the provision for annuities for the wife which is contained in cl. 7. The expression " remaining income " appears to us to reveal the testator as contemplating and intending that one annuity or the other will be payable to the wife during her lifetime. It cannot, of course, be said that the words are entirely inappropriate if there should be a period during which no annuity is payable. But, if such a period were contemplated, one would expect different language to be used. As it is, cl. 8 is conspicuously and closely associated with cl. 7, and the natural meaning of the words " remaining income " is whatever is left after providing for whichever annuity may happen to be payable.

These considerations carry weight to our minds. They appear to us to be quite sufficient to justify the conclusion that, when the testator directs the annuity of £1,000 to be paid " while ' Huonden ' remains unsold and my wife resides there ", he is describing a period during which that annuity is to be paid, but is not finally defining the terminal point of the period of the annuity. What follows indicates sufficiently that that terminal point is reached if and when, and only if and when, Huonden is sold in the lifetime of the wife.

It is possible, of course, that what actually happened is that in the drafting or engrossing of the will some words were accidentally omitted. The framework of cl. 7 suggests that the testator may have set out to describe the period for payment of £1,000 per year

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by reference to the continuance of a state of affairs the converse of that in which the sum payable is to be £1,150 per year, and by so doing to explain why the difference between these two states of affairs is to be matched by a difference of £150 in the annuity. He may then have inadvertently omitted to complete his description by adding after " and my wife resides there " some such expression as " or is entitled to the net rental thereof ". But, however this may be, we think that the real intention is sufficiently disclosed by the clause read as a whole and in its context.

The appeal should, in our opinion, be allowed. The question with which we have dealt above is the subject of question 2 (i) (b) in the originating summons. The notice of appeal challenged also the answer given by *Green* J. to question 3 (a) in the originating summons. With regard to this question, however, agreement has been reached by the parties interested, and we were asked by them simply to discharge the answer to this question. The order of *Green* J. should, therefore, be varied by discharging the answer to question 3 (a), and by substituting for the answer given to question 2 (i) (b) the answer :—" The testator's widow is entitled to receive the annuity of £1,000 while ' Huonden ' remains unsold, whether she resides there or not ". The costs of all parties of the appeal should be paid out of the residuary estate of the testator, those of the trustee as between solicitor and client.

Appeal allowed. Order of Green J. of 3rd November 1952 varied (1) by substituting for the answer given to question 2 (1) (b) in the originating summons the answer " The testator's widow is entitled to receive the annuity of £1000 while ' Huonden ' remains unsold whether she resides there or not " ; and (2) by discharging the answer given to question 3 (a). The costs of all parties of the appeal to be paid out of the residuary estate of the testator, those of the trustee as between solicitor and client.

Solicitors for the appellant Perpetual Trustees Executors & Agency Co. of Tasmania Ltd., *Clerk, Walker & Stops.*

Solicitors for the appellant Daisy May Walker, *Crisp & Wright.*

Solicitors for the respondents, *Finlay, Watchorn, Baker & Solomon.*

M. G. E.