No. 7 of 1940 (6

IN THE HIGH COURT OF AUSTRALIA.

Feehan and others

V.

Templeton and others

REASONS FOR JUDGMENT.

Judgment delivered at Melbourne

on 27th June 1940

C.11235 H. J. Green, Govt. Print., Melb.

Order

Appeal allowed in part. Order appealed from varied as follows:-

For the answer to question 5 (c) substitute for the word "selection" the words " the death of the Testator".

For the answer to the sixth question in the originating summons substitute a declaration that the trustees ought to consider whether in all the circumstances there is any substantial risk of the fund now consisting in the investments selected by the widow proving insufficient to provide the legacies payable after her death mentioned in Cl. 6 of the will and if in the exercise of their discretion they think fit to do so they may for such time as they think proper retain the whole or some further part of the estate to answer any deficiency but otherwise with the leave of the Supreme Court the trustees may without any liability to themselves, distribute the residuary estate in accordance with the dispositions of the will and codicil without retaining, for the purpose of securing the legacies for the payment of which, after the widow's death, the bequest of £45,000 is applicable, any further assets over and above the investments selected by her under Cl.7 of the will.

For the answer to question 7 (b) substitute the answer Yes if giving due weight to the interests of the residuary beneficiaries as well as the Testator's widow they think fit to do so in the exercise of a proper discretion pursuant to Cl. 10 of the will.

For the answer to the twelfth question substitute the answer No.

For the answer to the thirteenth question substitute an answer that the excess should fall into residue.

Set aside the answer given to the fourteenth question and in lieu thereof declare that it ought not to be answered at the present time.

The costs of all parties to the appeal to be paid out of the estate, those of the trustees as between solicitor and client.

FEEHAN AND OTHERS v. TEMPLETON AND OTHERS.

JUDGMENT. MR. JUSTICE RICH.

JUDGMENT. MR. JUSTICE RICH.

This appeal is chiefly concerned with the answers to questions 1, 5, & 12. One must "take the will and codicil together as one testamentary disposition" Phipps v. Anglesey, 7 Brown P.C. 443 at p. 453 & ascertain the testator's intention from the words he has used as applied to subject matter and objects and not speculate as to what language he intended to use. There is no dispute as to principles of construction, rules or canons of law. Decisions which are valuable in these respects are of no use and should not be applied for the purpose of the interpretation of one will by the language used in another will in a different context and with different subject matter and objects. The argument centred on the construction of clauses 6 & 7 of the will which have given rise to the substantial difficulty which has caused this litigation. By clause 6 the testator bequeathed to his wife for life the interest or income to arise from a sum of Forty-five thousand pounds and on her death he directed that such sum of Forty-five thousand pounds should be dealt with by his trustees as in the will followed. The will proceeded to specify in lettered paragraphs a num-

ber of pecuniary legacies of fixed amounts to public institutions ending with a final sum of Eight thousand pounds to be applied at the discretion of his trustees in favour of charities. The amounts made up Forty-five thousand pounds exactly. Then clause 7 went on to provide that if the testator's wife should so desire he directed his trustees to set aside out of his estate to answer the aforesaid sum of Forty-five thousand pounds such investments representing at par or face value a sum of Forty-five thousand pounds as his said wife should select. There is a preliminary question upon paragraph 7 as to the meaning of the word "investments". Does it mean the investments of which the estate is composed at the date of the testator's death or at any later time, or does it refer to the authorised investments directed by the will after conversion? In my opinion it clearly includes the investments of what the testator died possessed such as stock, shares or the like. Indeed the purpose of the clause appears to me to be to enable the testator's wife to set aside such investments before conversion so that they are with-held from conversion because she thinks they are advantageous to her as life tenant. The main

question concerns the effect of the wife's selection of securities having a face value of Forty-five thousand pounds to be set aside by the trustees. She has in fact selected shares and securities of that face value but possessing a market value far exceeding in the aggregate Forty-five thousand pounds. Mann C.J. has decided that the effect of this exercise of her discretionary power is to appropriate the securities so that they constitute the fund representing the legacy of Forty-five thousand pounds. The consequence is that the investments take the place of the legacy; the widow receives the full actual net income from the investments during her life and ~~later~~ after her death according to the expressed decision of His Honour the institutions mentioned in paragraph 6 will obtain not the fixed sums named by the will but a proportion of the proceeds of the conversion of the investments, that is to say, a share of the proceeds bearing the same ratio to the total as the sum assigned to the institutions bears to the sum of Forty-five thousand pounds. In support of the appeal against this decision by the residuary legatees it was argued that the setting aside contemplated by clause 7 of the will was only for the purpose of securing the sum of Forty-five thousand pounds. It was said that the security was

only to make more certain the payment of the legacy - income and corpus - and had no influence or effect on the amount of income the wife would receive or the amount of corpus finally payable to the institutions. The argument was that the wife should obtain only that income which Courts of Equity would fix for a life tenant of a pecuniary legacy so segregated from a mixed fund of unconverted assets - that is a rate of 4 p.c. on the amount of the legacy. On the other side it was contended that the setting aside authorised by clause 7 was a real appropriation of assets to take the place exclusively and conclusively of the sum specified as the legacy. The rival arguments attribute to the testator one or other well known legal results each in its entirety. They do not take into account the possibility of the testator thinking for himself independently of legal or equitable categories. Having ~~stated~~ studied the terms of the will and codicil I have come to the conclusion that the testator did not contemplate one or other of the

two legal results ascribed to him. I think it is quite clear that he intended the institutions to receive payment on his wife's death of the sums set opposite their names no more and no less subject, however, to a power contained in the codicil - of which I shall say more later. But clause 7 was introduced into the will for the benefit of the wife. Clause 6 makes it clear that she is to receive the actual interest or income arising from the sum. The sum can only produce income if it is invested. Clause 7 gives her the right to say what shall stand as an investment of t the sum and allows her to take the face value of the investments equivalen to the sum without going through any process of valuation - a process which as no one knows better than the Court is as uncertain as it is misleading. Why is the widow as life tenant given such power? Obviously that she may make her choice of the investments which will give her the surest and at the same time the highest income. On the one hand it seems plain that she was intended to benefit as life tenant from the selection, and on the other it seems incredible that she was to find for good or ill the pecuniary legatees after her death. A life tenant's interests ~~only~~ are often opposed in the choice of investments to those of the persons entitled to

the corpus. The clause in the codicil to which I have referred makes it certain that the testator did not contemplate a proportionate distribution of assets amoung the institutions but understood that his will operated to give them an exact sum. The clause is as follows:-

"I direct that if at the death of my wife the sum of Forty-five "thousand pounds referred to in clause six of my Will shall be represented " wholly or partially by Australian Consolidated Treasury Bonds or Stock "which are according to the then quotations of the Stock Exchange of Melbourne worth less than their face value my Trustees shall have power to "satisfy any pecuniary legacy or legacies payable at the death of my wife "by handing to the legatee concerned any of such Australian Consolidated "Treasury Bonds or Stock (of any issue) equal in face value to the amount "of any such legacy".

The pecuniary legacies payable at the death of his wife are those now in question. The clause means that notwithstanding that under the will the institutions are to receive a legacy of fixed amount yet if Treasury bonds forming an investment of the Forty-five thousand

pounds are below par the trustees are empowered to satisfy the legacy by allowing to the legatee stock of the face value of the legacy. This is inconsistent with any idea of the division of an appropriated fund. It follows from what I have said that I agree with the answers given by Mann C.J. to the first and part of the fifth question but not with the answers given to the 12,13, and 14 questions. The widow is entitled to receive the income of the fund as from the testator's death. The fund is not in the same position as an ordinary pecuniary legacy. It is segregated from the estate and settled and by the power of selecting investments given to the widow she is authorised to transform it into some thing akin to a specific bequest; Marten, 1901 1 Ch. 370; re Woodin 1895 2 Ch. at pp, 314-5; re Rooke, 1933 1 Ch 970 at p. 972; Williams Exors. 11th. Ed. 1153, 1154.

A separate question arises from the fact that among the investments selected by the widow were 8,591 shares in the Broken Hill Pty.Co. Ltd. and that since the selection by the widow 5498 bonus shares have been alloted by the company in respect of the shares so selected. The question is whether these bonus shares form part of the investments set aside. In my opinion they form part of the produce of the investments set aside and must follow their fate. Similarly, "it would seem, that the specific "legatees of cows, mares, or ewes, are entitled to the brood fallen be- "tween the death of the testator and the assent of the executor to the "legacy: So also as to the wool (fleeces) of sheep shorn", Williams Exors., 11 Ed. p. 1154, cf. Wentworth Off. Ex. 445, 14th. Ed. The bonus shares are of course capital, and not income. There is a subsidiary question whether the widow is bound

at her own expense to maintain the gardens round the house at Mt Macedon of which the will gives her the use and enjoyment subject to her keeping the house and plant in good repair and insured against fire. On the peculiar words of the will I agree that the widow is not bound to do so. Clause 10(f) of the will is wide enough to authorise the trustees to do so if they think fit. Theirs is the discretion, but I am far from suggesting that they ought to spend money in any way or to any extent which would add to the amenities of the tenant for life, without tending to preserve or improve the property of the remaindermen.

In my opinion the questions to the summons should be dealt with as follows:-

(1). The affirmative answer given by Mann C.J. should stand.

(2). His Honour's refusal to answer this question should be affirmed.

(3). His Honour's answer to this question should be affirmed.

(4). Ditto.

(5). Para. (c) should read "as from the death of the testator. The rest of the answer should be affirmed.

(6). In place of the negative answer to this question it should

be declared that the trustees should consider the need of retaining a further provision but if they think it unnecessary and obtain the leave of the Court to distribute residue they will not be bound to set aside any additional sum and will be under no liability.

(7). His Honour's answers ~~shall~~ should be affirmed.

(10). Ditto

(11). Ditto.

(12). The answer should be No

(13). No. Surplus forms part of residue.

(14). Set aside so much of the order as answers 14 and declare that no answer ought to be given.

Costs of all parties out of the estate those of the trustees as between solicitor and client.

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at her own expense to maintain the gardens round the house at Mt Macedon of which the will gives her the use and enjoyment subject to her keeping the house and plant in good repair and insured against fire. On the peculiar words of the will I agree that the widow is not bound to do so. Clause 10(f) of the will is wide enough to authorise the trustees to do so if they think fit. Theirs is the discretion, but I am far from suggesting that they ought to spend money in any way or to any extent which would add to the amenities of the tenant for life, without tending to preserve or improve the property of the remaindermen.

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Costs of all parties out of the estate those of the trustees as between solicitor and client.

FEEHAN'S WILL.

FEEHAN AND OTHERS V TEMPLETON AND OTHERS.

JUDGMENT. STARKE J.

By his will, John Sylvester Feehan, hereafter called "the testator", bequeathed (Clause 6) to his wife for her life the interest or income to arise from a sum of £45,000 to be paid to her by such periodical payments as to his trustees should seem most convenient for her and on the death of his wife, the testator directed that the sum of £45,000 should be dealt with by his trustees as follows:-

(a) To the University of Melbourne £10,000 to be used in such manner in all respects as the Council of the University should think fit for the advancement of the study of scientific research.

A similar gift of the sum of £5,000 was made to the Brisbane University Queensland.

(b) To the Lord Mayor's Fund of the City of Melbourne the sum of £5,000.

Seven other gifts of various sums were made in the same terms to various institutions or orders.

(k) To my trustees the sum of £8,000 the income from which is to be applied at their discretion for the benefit of such charities in Australia as they may from time to time think fit.

The testator directed (Clause 7), if his wife so desired, that his trustees should set aside out of his estate to answer the aforesaid sum of £45,000 such investments representing at par or face value a sum of £45,000 as his wife should select; All the residue of his real and personal estate the testator devised and bequeathed to his trustees upon trust to sell and convert and to stand possessed of the net moneys to arise from such sale and conversion (referred to as his residuary estate) upon trust, after payment of funeral and testamentary expenses and debts, probate estate and other duties, to pay certain sums to sisters cousins nephews and nieces and the balance

remaining for the children of his late brother John living at his death and the children then living of any deceased child of his brother as being male attained the age of 21 years or being female attained that age or married under that age the children of the deceased child taking the share only which their parent would have taken had he or she survived the testator.

The testator died in the year 1939. His wife selected Consolidated Treasury Bonds and shares in public companies, pursuant to this clause, of a face value of £45,000 but which about the time of the selection had a market value of about £62,000. But the trustees have not yet, I understand, set aside the investments so selected by the wife.

An Originating Summons was issued by the trustees out of the Supreme Court of Victoria for the determination, without administration, of several questions arising in the administration of the testator's estate. The Summons was heard before the learned Chief Justice of that Court and several of his determinations on that summons are the subject of appeal to this Court.

Several questions were discussed on this appeal.

1. The main one was whether the directions in the testator's will as to the sum of £45,000 constituted a specific fund impressed with a trust as to the income to the wife for her life and after her death for the named beneficiaries. As I understood the argument, the terms of the testator's will required the trustees to set apart such a fund in investments selected by his wife or failing such selection then that the trustees should set apart and invest a fund to carry out the provision made by the testator. In either case the argument concluded that his wife was entitled to the income actually arising from the investments of the fund and on her death that the fund should be distributed amongst the named beneficiaries proportionally accordingly to the rise or fall in the market value of the investments. Various authorities were brought to

the attention of the Court upon the subject of appropriations to answer legacies. Fraser v Murdoch 6 A.C. 865 was much relied upon. All the important cases are collected in Theobald on Wills 9th. Edition pp.387-389. It is important if any general rule of construction has been established that the Court should not depart from it but no such rule has been established. No principle whatever is involved in the case except to ascertain the testator's intention from the words of his will. Now the bequest in favour of the wife is of the interest or income to arise from a sum of £45,000 and it is that sum also which is to be dealt with after her death. No doubt the sum must be invested if any income or interest is to arise. And the testator directs that his wife may select "such investments" if she so desired. It is to the setting aside of investments to secure the bequest that the testator is addressing himself and not to a setting aside of the bequest itself or in other words establishing a specific fund upon trust for the wife for life and after her death for the other beneficiaries. The investments so set apart would accordingly remain part of the estate of the testator but set aside to secure the bequest. But the wife is nevertheless entitled to specific enjoyment of the investments set aside to secure the bequest because the bequest is of the income to arise from the sum of £45,000 which of necessity and in the contemplation of the testator must be invested. One form of investment is "such investments" as his wife selects.

A subsidiary question arises as to the proper construction of these words "such investments" as the wife is authorised to select.

The investment clause in the will does not cover shares in public companies. But the residuary clause which directs the conversion of all his residuary real and personal estate and the power (Clause 10(a)) to postpone the sale and conversion of

his estate or to retain the same as an investment all indicate that the object of Clause 7 is to enable his wife to select investments which the testator held on the day of his death and is not confined to investments authorised by the investment clause.

A suggestion was made that the wife was not authorised to select investments until the executors of the testator had performed their executorial functions. The argument is untenable if the testator's wife is authorised, as I think she is, to select investments which the testator held at his death. The selection however does not, if I am right in my view, withdraw the investments from the testator's estate. Consequently, if it became necessary in a due course of administration to realise the investments, the executors might do so and apply the proceeds to discharge the liabilities of the testator and otherwise to carry out the directions of his will. But such an untoward event could only arise if the estate of the testator proved insufficient to discharge the liabilities in the manner directed by his will.

2. Another question is from what date is the wife of the testator entitled to income under the will? General legacies are payable and carry interest from the end of a year from the testator's death Tatham v Drummond 2 H. & M. 262; Lord v Lord L.R. 2 Ch. at p. 789; Walford v Walford 1912 A.C. at p.663. Similarly under a bequest of £1,000 upon trust to invest the same upon mortgage and pay the interest as the same should arise to the testator's wife during her life but so long only as she should remain chaste and his unmarried widow and after her death or marriage again or becoming unchaste in favour of the children of a former marriage it was held that interest did not become payable to the widow except from the end of a year from the testator's death; re Whittaker, Whittaker v Whittaker 21 Ch. D. 657. So in the present case it would follow

I should think, if Clause 6 of the will stood alone, that the wife of the testator was only entitled to the interest or income to arise from a sum of £45,000 from the end of the first year after the testator's death.

But it is suggested that the testator contemplated by Clause 7 of his will the setting apart of the sum of £45,000 from the rest of the testator's estate for the benefit of his wife and other beneficiaries, consequently that the testator's wife was intended to have the interest on that sum from the date of his death. Dundas v Wolfe Murray 1 H. & M. 425, and see cases collected by Theobald 8th. Edition at p.195.

But I doubt whether a sufficient intention has been shown in Clause 7 to take the case out of the general rule. The direction to set aside in that clause is conditional upon the testator's wife so desiring and in any case the direction could not, I should think, be compelled before the time allowed to an executor to inform himself of the state of the testator's property namely a year from the death of the testator.

The terms however of the residuary clause (8) afford perhaps a better indication of the testator's intention. The testator devises and bequeaths all the residue of ~~the~~ his real and personal estate upon trust to sell and convert ~~xxxxxxx~~ and Clause 10(a) provides that notwithstanding the trust for sale and conversion his trustees might postpone such sale and conversion of all or any part of his estate and retain the same as an investment without considering the question of sale and conversion for so long as his trustees should think fit. It may ~~perhaps~~ be inferred from these provisions that the testator intended his wife to have the specific enjoyment of the income from the sum of £45,000 whatever its form of investment at the time of his death. Cf. Alcock v Sloper 2 My. & K.699; re Rogers, Public Trustee v Rogers 1915 2 Ch.437. Accordingly I concur in the view that the testator's wife is entitled to the income on the investments selected by her from the time of the testator's death.

3. A further question was whether a new issue to the trustees of 5498 shares in the Broken Hill Proprietary Company Limited should be set aside by the trustees pursuant to and for the purposes of Clause 7 of the will in addition to the shares selected by the testator's wife. It appears that the Company had accumulated a large sum of money being premiums paid by shareholders upon shares subscribed for in cash and issued at a premium. In the year 1940 the Company resolved to capitalise this amount and issued fully paid shares to shareholders in respect thereof in the proportion of 64 shares for every 100 shares held by shareholders. The necessary steps to achieve this end were adopted and accordingly the Company issued to the trustees 5498 new shares fully paid up. The effect of the new issue was to reduce the market value per share of the Company's shares but the combined value of the old shares and the new shares was greater on the day of their issue than the value of the old shares, But owing to the war the combined value of the shares is falling and may become less than the value of the old shares. The new issue of shares is capital and not income of the estate of the testator. The new issue of shares was made to holders of the old shares but I cannot think that they can be described in law as the fruit of the tree or as an accessory to or incident of those shares. It is true that the owner, legal or equitable, of the old shares would by reason of such ownership be entitled to the new shares but his right would be based upon ownership and not because the new shares were attached to or because they were an incident of ownership in the old shares. In my opinion the selection by the wife of the old shares does not attract the new shares to the investments set aside pursuant to Clause 7 to answer the sum of £45,000.

But it is still the trustee's duty to see that sufficient assets or investments are retained to answer the sum of £45,000.

The trustees might not be personally responsible for distributing residue if reasonable care was exercised in providing for the sum of £45,000, whether liability to refund could or might be enforced against the residuary beneficiaries. Re Hall 1903 2 Ch. at p.233; re Salaman 1907 2 Ch. at p.50; re Hurst 67 L.T. at p.99. The selection of investments by the wife pursuant to Clause 7 would, in normal circumstances, afford the trustees a solid basis for the argument that such care had been exercised. But in abnormal circumstances such as in the present case - the issue of these new shares and the present war- it is the duty of thetrustees to consider whether sufficient assets or investments are retained to answer the sum of £45,000 and other legacies. And according to their reasonable judgment and discretion so they will act.

4. The form in which assets may be retained was the subject of another question as follows:- Does the power or discretion contained in Clause 10(j) of the will in the words "with liberty to change any investments at their discretion for any other or others of the kind prescribed" apply or extend to investments set aside under Clause 7 of the said will and/or to accretions (if any) to such investmants or have the trustees otherwise power to change the said investments or accretions thereto? Already I have expressed the opinion that the investments selected by the wife pursuant to Clause 7 remain part of the estate of the testator and do not form a specific trust fund. Consequently the powers of the trustees to change investments apply to the investments selected by the wife. The new form of investment would take the place of the selected investments and the income and interest arising therefrom be dealt with in the same manner as the interest and income from the selected investments, The duty of the trustees is to consider the safety of those investments not only as regards the wife but also as regards the remaindermen and the residuary

beneficiaries. Any new investments should, I think, be authorised investments. If I am right in thinking that the new shares in the Broken Hill Proprietary Company Limited cannot be regarded as part of the investments selected by the wife, then the only authority in the will to retain them in that form of investment is contained in Clause 10(a) of the will. Subject to that power the new issue shares should be sold and the proceeds invested in authorised securities.

5. A further question was whether the trustees would be justified in setting aside any and what sum to provide for the contingency of the proceeds from the investments set aside by the trustees pursuant to the said clause proving insufficient to pay in full the legacies bequeathed by Clause 6 of the will. In my opinion it is neither desirable nor prudent to answer this question specifically. In general, as already appears, it is the duty of the trustees to consider whether sufficient assets or investments have been set aside or retained to answer the sum of £45,000. It is a matter for the exercise by the trustees of their reasonable judgment and discretion upon all the facts and circumstances of the case including the present state of war. No opinion can be expressed by the Court, with any propriety, upon the materials brought to its attention.

6. Other questions discussed were whether the wife of the testator is under an obligation to keep up and maintain the gardens and/or grounds of the property known as "White Lodge" and whether the trustees are authorised or entitled to make any and if so what payments from time to time out of the income of the residuary estate of the testator in or towards the upkeep and maintenance of the said gardens and/or grounds. By his will, the testator devised his country residence known as "White Lodge" at Macedon upon trust that his trustees should permit his wife the use and enjoyment thereof and of any live stock or plant belonging to him which should be on the property at the time of his death rent free during her life. Upon the death of his wife

the property or the proceeds if sold in the meantime pursuant to certain provisions in the will contained falls into and becomes part of the testator's residuary estate. The trustees have wide powers under the will of the testator. They can manage all or any part of the testator's estate and improve cultivate work repair or make alterations in addition or ~~alterations~~ improvements to all or any part of his estate. The trustees, as "White Lodge" is vested in them, would be entitled under their power of management to save the property from destruction or injury but how the expenditure should be borne between the tenant for life and the residuary beneficiaries is another question. Apart from the provisions of the will, the testator's wife as tenant for life ought to pay the ordinary outgoings incident to the property of which she is tenant for life; for example, rates and taxes. Here the testator expressly provides that she shall keep the house in good repair but that obligation, on the strict language of the will, does not extend to the upkeep of the garden. But the upkeep of the garden is an ordinary amenity of occupation, and if the testator's wife is desirous of a garden, then she should herself provide for its upkeep, as no doubt she would. But if there is no obligation on the wife to maintain the garden still I see no reason why the trustees should intervene unless the property would thereby be threatened with destruction or injury or permanent depreciation in value. In that case the trustees might well intervene but it would then be upon terms that would be equitable as between the tenant for life and the residuary beneficiaries, See re Hotchkys 32 Ch.D. 408. It is the duty of the trustees to protect the interests of the residuary beneficiaries as well as that of the wife of the testator.

7. The only question remaining that I need mention is that in Question 14 of the Originating Summons. That question should not be determined in its present form or at the present time. My reasons for refusing to determine the question may be

stated shortly:-

(a). A deficiency may not occur.

(b). The rights of the parties may depend upon the action of the trustees or the parties in the future.

The answers I would give to the questions set forth in the Originating Summons are as follows:-

1. Yes.

2. Unnecessary to answer.

3. (a). The said 5498 shares are part of the capital of the estate of the testator.

(b). The said shares were and are not investments selected by the wife of the testator pursuant to the provisions of Clause 7 of the said will. But the trustees are entitled, if the investments set aside pursuant to the said Clause 7 are in their judgment insufficient to answer the sum of £45,000 mentioned in the said will, to set aside other authorised investments for that purpose.

4. No.

5. (a). Yes.

(b). Unnecessary to answer.

(c). From the day of the death of the testator.

6. The trustees may in the exercise of a proper discretion, if the investments set aside pursuant to Clause 7 are not in their judgment sufficient to answer the sum of £45,000 mentioned in Clause 6, set aside further or other investments for that purpose, having regard not only to the interests of the wife and the other beneficiaries in the sum of £45,000 but also of the residuary beneficiaries.

7. (a). No.

(b). Yes, such payment may be made if necessary to save the property from destruction injury or permanent depreciation but upon terms that are equitable as between the wife of the testator and the residuary beneficiaries.

8&9. Already disposed of by the order of the Supreme Court.

10. Yes, to the investments set aside under Clause 7 of the will. Subject to the power of the trustees under the will of the testator to postpone sale and conversion of all or any part of the testator's estate or to retain the same as an investment, the 5498 new shares issued by the Broken Hill Proprietary Company Limited and referred to in Question 3 of the Originating Summons should be converted into money and invested upon securities authorised by the will of the testator.

11. Yes.

12. No.

13. No, as to the first part of this question. The excess falls into the residuary estate of the testator.

14. The question should not be determined at present.

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v.

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JUDGMENT DIXON J.

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This appeal is a contest between residuary legatees and specific legatees. After giving his wife the use of his house at Macedon for life, the Testator bequeathed to her for life the interest or income to arise from a sum of £45,000 and on her death he directed that the sum should be dealt with by his trustees in the manner he set out. He then gave ten specific sums amounting to £37,000 to ten named charitable or educational institutions and a sum of £8,000 to his trustees to apply the income thereof in their discretion to charities in

Australia.

At his death the Testator held a considerable number of shares the market value of which was treble or almost treble the nominal value. He also held a quantity of Commonwealth bonds and stock. By a clause immediately following that bequeathing the £45,000 the testator directed his trustees, if his wife should so desire, to set aside out of his estate to answer the aforesaid sum of £45,000 such investments representing at par or face value a sum of £45,000 as his said wife should select. Some weeks after his death probate of his will was granted to the executors named therein, of whom his widow was one, and on that day she signified to the trustees her desire that

certain shares or stock of a face or par value of £45,000 should be set aside. The market value of the investments she selected was about £75,000.

The Testator had no children and subject to certain pecuniary legacies immediately payable, he devised and bequeathed the residue of his estate, to nephews and nieces, who are the appellants.

As residuary legatees they are interested in seeing that the residue is called upon to provide for pecuniary legacies no more than the will absolutely requires. They say that the effect of the widow's choice of investments cannot be

that, instead of a sum of £45,000, residue is called upon to provide assets of a value of £75,000, and it cannot be that the widow is entitled to receive the full net income produced by the assets of that value. They contend that the clause enabling her to select investments operates to give her a right to say what investments shall be retained to secure the sum of £45,000, but does no more. They deny that the exercise of the power given by the clause has any effect upon her right as the person entitled to the income of a fixed pecuniary sum forming an unsevered part of the general estate of the Testator or upon the rights of the institutions to receive on her death the named sums and the named sums only. On the other side the widow

adopts the view that the clause directs the trustees to appropriate the investments selected by her in satisfaction of the bequest of £45,000 so that the investments take the place of the money sum in all respects. As a consequence she would be entitled to receive the full net income produced by the investments from time to time. Another consequence, it is said, would be that instead of the institutions receiving on the widows death the respective amounts named in the will as their legacies, the investments selected or the securities by which they were then represented, would be sold and the net proceeds distributed among those entitled to receive such legacies in proportion to the specified amounts which aggregate to £45,000.

Not unnaturally the view adopted by the widow receives the entire support of the institutions.

Mann C.J., from whom the appeal comes decided that the widow was entitled to receive the full net income produced by the investments chosen by her and, with some doubt that the institutions were entitled on her death, not to the amounts named as their respective pecuniary legacies, but to a due proportion of the proceeds of the invested fund constituted by the widow's selection of securities.

On the second point, he said that question had given him most trouble.- His Honour said that he felt the difficulty of supposing that it was intended to give the widow a power over the

interests of remaindermen and residuary legatees not necessarily involved in the benefit conferred upon herself and that he recognised that an affirmative answer to the question did not necessarily follow from the view that the widow was entitled to the whole income. But, with some doubt he had come, he said, to the conclusion that the true result of the language of the two clauses of the will was to make an appropriation of the fund permanent for all purposes. It was not an appropriation of investments representing in a particular and artifical way a sum of £45,000 in which investments successive interests were declared.

The difficulties which the case presents do not arise from the general law nor from any obscurity in the grammatical

meaning of the express words of the will; they are caused by the necessity of finding in the will and codicil some means of determining which of three possible consequences of executing his ~~purposes~~ express directions to set aside investments, if selected by his widow, the Testator intended. The three possible consequences among which the choice must be made are, first, that neither the amount of the widow's income nor the amounts of the legacies payable at her death are to be affected by the setting aside which is to operate only to secure them; or, second, that the setting aside replaces the rights of the beneficiaries to income and corpus in respect of the fixed sum or sums by rights in respect of an invested fund fluctuating in amount according to the

value from time to time of the investments, or, third, that the widow is to become entitled to the actual net income of the invested fund but that on her death the fixed pecuniary sums only are to be paid out of that fund as a source, either ~~xfxxxkixxx~~ with or without recourse to the general estate if the invested fund happens to prove insufficient.

In my opinion the indications of intention discoverable in the will and codicil point to the third possibility as best according with the Testator's purpose, and I think that he wished to give his wife the actual income produced by the £45,000. Because this meant the investment of the legacy as a fund, he authorized her to pick out investments forming part of his

estate at his death, intending that she should exercise her right for her own advantage and fixing the face value of the securities chosen, and not their market value, as the test of their correspondence with the amount of the bequest.

Familiarity with the principles governing the appropriation of assets to satisfy legacies and settled funds might induce an expectation that the full consequences of a complete and final appropriation of investments as a separate fund held upon distinct trusts might follow. But the terms of the will and provisions of the codicil appear to me to make it clear that the Testator did not mean the setting aside to

result on his widow's death in payment of more than the amounts he specified, notwithstanding that he named sums adding up to £45,000 exactly.

During the argument a passage was cited from Jarman on Wills 7th. Ed. p. 1035 which illustrates the intention which I ascribe to the will and codicil in respect of the legacies to the institutions and the bequest of £8,000 for undefined charitable purposes. It is this. " Where a testator is "entitled to a fund which he estimates at a certain amount, and " bequeaths particular sums out of it to different people, the " total of which is equivalent to the stated amount of the fund, " the question arises whether the legatees take merely the sums " given them, or whether the testator intended to divide the

" fund, whatever it might be, among the legatees in proportion
" to the sums bequeathed to them. The notion appears formerly
" to have prevailed that such an intention can be implied from the
" fact that the sums bequeathed exhaust the estimated amount of
" the fund, but this doctrine has been exploded. If in such a
" case the fund realises more than the estimated amount, the
" surplus is undisposed of."

The Testator's intention to give his widow the actual net income from the fund appears, I think, from the terms of the clause containing the bequest. For he bequeaths to her " the income or interest to arise from a sum of £45,000" . Standing alone this would I think entitle her to insist that a sum of £45,000 should be raised, set aside and invested, or that securities of that value should be segregated from the general

estate. She would then be entitled to the net income earned by the fund. The clause authorizing her to select investments begins with the words " if my wife shall so desire". The investments are described as " such ..... as my said wife shall select". The conditions being fulfilled, then an imperative duty, not a discretion, is imposed upon the trustees to set aside the investments selected. It is evident that to benefit the widow is the main object of the clause. It is for that reason that face or par value and not market value is made the standard. I cannot agree that the words "set aside" and "answer" indicate that security only was intended. They are words carrying no implications, though it may be conceded that where it is intended

that a pecuniary legacy should be replaced by securities, " appropriate to satisfy" is the better, because less indefinite, expression. In the present case I do not think the full consequences were intended which would ensue prima facie from appropriation by way of satisfaction. It was intended, I think, that the £45,000 and the investments by which that amount was represented should form a source for the payment after the widow's death of the pecuniary legacies specified, but they are, and were meant to continue as, independent bequests of fixed amounts and not to assume the character of proportionate shares in an invested fund.

The form of the various gifts indicate this intention.

The direction of the trustees after the widow's death is that "such sum of £45,000 shall be dealt with..... as follows". Then the clause gives a list of bequests of named amounts. But what appears to me to establish the intention so indicated as the certain meaning of the will is the second provision contained in the codicil. The codicil makes two provisions only. The first relates to legacies payable at the Testator's death. It empowers the trustees to satisfy any such legacy/ies by handing the legatee treasury bonds, of the face value corresponding to the amount of the legacy, if at the time four per cent treasury bonds are quoted below par on the Stock Exchange. The second provision

relates to the bequest of £45,000. It deals with the possibility of that sum being, at the death of the widow, represented in whole or in part by Treasury bonds or stock quoted below par. In that case the Testator empowers his trustees " to satisfy any pecuniary legacy or legacies payable at the death of my wife by handing to the legatee concerned any of such Australian Consolidated Treasury Bonds or Stock(of any issue) equal in face value to the amount of such legacy." It is hardly necessary to say that this power applies through the widow has exercised her power of selecting investments.

Some of the investments selected might of course be much above par in market value, and it might well be that the

aggregate value of the investments representing the bequest of £45,000 was much above that amount, notwithstanding that some of the fund stood invested in the supposedly depreciated bonds.

On the other hand there might be such a fall in value in other investments that there was a considerable deficiency on the whole account, while Commonwealth bonds were only slightly below par. The power could not be fairly or sensibly operate in either of these contingencies except upon the footing that apart from the codicil nothing but the amounts specified for the institutions and charitable trust would be payable. If the net amount realized from the investments would be distributable in proportionate shares on the widow's death, the provisions

made by the codicil could have no just or sensible operation. Both in form of expression and in substance it is founded upon the assumption that only fixed monetary sums would be payable to the institutions and in respect of the trust for undefined charities.

Two points were made for the appellants against the attempt actually made by the widow to exercise her power of selection. First it was said that her power could not arise until the executors had assented to the legacy, after proceeding sufficiently with the administration of the estate. Secondly it was said that the widow was only empowered to select investments which under the power to invest were authorized

securities.

Both these points are in my opinion answered by the peculiar nature and purpose of the power conferred upon her. Its object was to enable her to require that securities forming part of the Testator's estate at his death should be set aside. An exercise of the power would preserve the investments selected from conversion except with her consent or unless the Testator's liabilities proved so large that it was necessary to resort to those investments to discharge them.

I am therefore of opinion that the widow's attempt to exercise her power was not premature and was effectual. It

operated to cause the setting aside of investments the full net income of which she is entitled to receive. But it does not confer upon the institutions to which the legacies are payable after her death any title to greater amounts than those named in the will.

A separate question arises from the circumstance that after the date of her selection one of the companies whose shares she chose capitalized funds representing premiums it had received upon shares issues, and made a distribution of bonus shares. The bonus shares were of course capital and not income as between life tenant and remainderman. But the question is whether they form part of the investments set apart or are free

to be dealt with at once as general residue. I think that the ordinary rule must be applied by which accfetions to property follow the property and become subject to the same incidents. Res accessoria sequitur rem principalem. The new shares must therefore be treated as part of the investments set aside.

Another question which has been raised is whether the widow is to receive the income arising from the investments she has selected as from the death of the testator or as from a year after his death. The question is of course governed by the testator's intention. But in the absence of indications to the contrary certain rules prevail. Interest on a general pecuniary legacy runs, prima facie, only from the end of a year

from the testator's death, within which time, "by a rule that "has been adopted for the sake of general convenience, the Court "holds the personal estate to be reduced into possession." per Sir W. Grant M.R., Wood v. Penoyre 1807 13 Ves 325 at p.333; 33 E.R. 316 at p. 319. If a legacy is given for life with remainder over, interest runs only from the end of the year. "It is only interest on the legacy and until the legacy is "payable, there is no fund to produce interest." per Lord Eldon in Gibson v. Bott 1802 7 Ves. 90 at p. 96, 32 E.R. 37 at p. 39 Roper on Legacies at p. 1253.

But a specific legacy of, for instance, interest bearing securities, carries income from the death of the testator;

and, what is an ahalagous case, a general legacy or fund which is, under the directions of the will or from its nature, severed or segregated from the rest of the estate as from the testator's death bears income from that time. "If £10,000 consols standing "in the name of the testator, and so described, is given to A (sel. passage). "on his attaining twenty-one, A, on attaining twenty-one, gets "the £10,000 consols as from the testator's death. That is "settled, because it is considered to be severed at the death "from the rest of the testator's estate. Indeed, as regards "general legacies, where there is a severance complete as from "the death, and not from the end of twelve months, on this "principle, that they are severed and taken away, and distinguish-"ed from the general property of the testator." per Jessel M.R. in Long v. Ovenden 16 Ch.D.691 at p. 694. of re Clements 1874 1 Ch 665 and 669

In the present case the testator gives the actual

income of the fund to his wife and shows that it is to be severed from the rest of the estate. But so far there is not enough to show that the severance is to be made earlier than the year allowed for administration. The clause authorizing the widow to select specific investments appears to me to have an operation under which she is entitled to income as from the testator's death. For it enables her to select specific parts of the estate existing at his death and to obtain the income therefrom as specific property. No doubt her selection could not prevail over the rights of creditors. But the clause has two effects. It allows her to give to a general pecuniary legacy some of the qualities

of a specific bequest. For it enables her to take specific securities. In the second place it indicates the time as from which the fund is to be considered severed. It does this because it shows that the testator regarded his widow as able to draw her income from specific assets if she chose. In my opinion her income runs from the testator's death.

Upon the view I have expressed the answers given by Mann C.J. to the twelfth and thirteenth questions in the originating summons ought not to stand. They should be replaced by negative answers.

The sixth and fourteenth questions are concerned with the possibility that the investments might on the death of the widow prove insufficient to provide the £45,000. Such an

event could not matter if the view adopted by Mann C.J. prevailed and the invested fund on the widow's death would be distributed among the institutions and the trustees for undefined charities, whether the investments did or did not realize more than £45,000.

But upon the assumption that only the named sums will ever become payable it may arise if the contingency occurs of a fall in the value of the investments representing the bequest for the time being. By the answer to the tenth question it has been declared that the power of changing investments applies to the bequest of £45,000 nowithstanding the exercise of the widow's power of selection and there is no appeal from

the declaration nor is it interdependent with any other matters under appeal.

The consequent existence of the power to change investments gives the trustees a means of avoiding ~~xxx~~ losses which otherwise might result from a steady depreciation of a particular kind of investment among those selected. Moreover at the time of selection the investments chosen so far exceeded the amount of £45,000 that it might then have seemed safe to authorize as a matter of administration the distribution of the residue without retaining any further assets to secure payment at the widow's death of the legacies amounting to £45,000.

The Court has jurisdiction to make an order authoriz-

ing such a course. But the times are not normal and securities may lose value more rapidly and to a greater extent than formerly might have been supposed possible.

I am disposed to the view that the legatees in respect of the £45,000 might be entitled to resort to the general estate, if there ever did prove to be a deficiency. But I am unwilling to decide this question in advance. In the very exceptional circumstances now obtaining, I think that the Court should make a declaration of an administrative nature by which the trustees may exercise a discretionary judgment upon the question what, if any, further funds ought to be retained. The question is one depending on conditions which obtain from time to time

being. In a more settled state of affairs they may form the opinion that there is no substantial danger of the invested fund proving insufficient.

An entirely separate matter is raised over the widow's use and enjoyment of the house at Macedon. The terms of the will place upon her the responsibility of keeping the house and plant in repair and insured, but nothing is said about the garden which is a large one. I do not think any duty is imposed upon her to keep the garden up. But on the other hand the - - - - - - - - - - - - -

discretionary powers given to the trustees to carry on and manage any part of the estate and to improve and cultivate any part of the estate are general powers which should be exercised upon a fair consideration of all interests. No doubt the trustees may be relied upon to exercise their discretion justly and it is enough to point out that primarily the care of the assets, so that they will not deteriorate in value or in substantial condition, is the purpose of such powers. That the powers apply to "the freehold property at Macedon" as much as other parts of the estate seems clear enough.

In my opinion the appeal should be allowed in part and the order appealed from varied as follows:-

For the answer to the sixth question in the originating summons substitute a declaration that the trustees ought to consider whether in all the circumstances there is any substantial risk of the fund now consisting in the investments selected by the widow proving insufficient to provide the legacies payable after her death mentioned in Clause 6 of the will and if in the exercise of their discretion they think fit to do so they may for such time as they think proper retain the whole or some further part of the estate to answer any deficiency, but otherwise, without any liability to themselves, the trustees may distribute the residuary estate in accordance with the dispositions of the will and codicil without retaining, for the purpose

of securing the legacies for the payment of which, after the widow's death, the bequest of £45,000 is applicable, any further assets over and above the investments selected by her under clause 7 of the will.

For the answer to the twelfth question substitute the answer No.

For the answer to the thirteenth question substitute an answer that the excess should fall into residue.

Set aside the answer given to the fourteenth question and in lieu thereof declare that it ought not to be answered at the present time.

The costs of all parties to the appeal should be

paid out of the estate, those of the trustees as between solicitor and client.

FEEHAN AND ORS. v. TEMPLETON AND ORS.

Reasons for Judgment — Evatt J.

I have had the opportunity of reading the judgment of my brother Rich, and agree with it.

I desire to refer specially to question no.3 in the originating summons which concerns the 5498 bonus shares in the Broken Hill Proprietary Co, Limited to which the executors became entitled by reason of the testator's shareholding of 8,591 shares in the said company.

Acting in pursuance of Clause 7 of the will, the wife of the testator exercised her right to direct the trustees to set aside the said 8,591 shares as an "investment"; notwithstanding the fact, expressly contemplated by Clause 7, that, at the time of such direction, each of such shares had a market value considerably in excess of its par or face value. In my opinion, the widow is entitled, by virtue of the exercise of her power under Clause 7, to the income from the bonus shares as well as the income from the 8,591 shares which represented the testator's "investment" in the Broken Hill Proprieatry Co. Limited. The very object of Clause 7 was to give the widow the benefit of what might be regarded by her as a specially good investment. The testator must have foreseen that the market value of the capital embarked in such "investments" would be of no importance or concern to his widow, but that the income proceeds of such investment would or might enable his widow to obtain an income considerably in excess of that otherwise to be derived from the £45,000 referred to in Clause 7. In substance, what the testator has said in Clause 7 is this: "I give my widow this opportunity to obtain an income in excess of that which she would obtain if she were restricted to the income produced by £45,000 worth of authorised trustee investments".

Applying this interpretation, the 8,591 Broken Hill Proprietary Co, Limited shares constituted an income producing investment which the testator intended his widow to enjoy during her life time. Although the issue of the bonus shares was subsequent to the widow's selection of her investments, these 5,498 bonus shares

should, I think, be regarded as part and parcel of the investment selected by her. Where bonus shares are held strictly as an investment, and not for the purpose of burning them over at a profit, the substantial result of the mere creation and issue of bonus shares is to make the company no poorer, and the shareholder no wealthier than before. Here, what the "investment" gained in capital value from the 5,498 bonus shares issued, it lost by the dilution in value of each of the 8,591 shares previously held. The income producing potency of the aggregate holding is in substance no different from that of the original holding. The testator in Clause 7 must have had in mind (inter alia) the income likely to be produced by the 8,591 shares, and it is certain that he did not intend that his widow should suffer a catastrophic reduction in such income because the "investment" turned out to be satisfactory enough to warrant the company's decision to water the stock. On the contrary, he must have intended his widow to retain the full benefit, in point of income receivable, from the investment. By her selection of such investment, she takes of course only the income from the bonus shares, and not the bonus shares themselves which are in no sense income of the original holding.

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JUDGMENT McTIERNAN J.

I agree in the reasons of Mr. Justice Rich and the order proposed.