IN THE HIGH COURT OF AUSTRALIA.

THE BALLARAT TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED.

V.

McGERGOR AND OTHERS.

ORIGINAL

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on THURSDAY, 18th MARCH, 1943.

H. J. Green, Govt. Print., Melb.
C.2774

THE BALLARAT TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED

V.

McGregor and Others.

O R D E R

Appeal allowed. Order of the Supreme Court varied by deleting the answers to questions 1,2,5,6 and 7 and substituting the following answers:-

1 and 2. Until the youngest son attains 23 years.

5. Subject to the rights of the widow, in the case of the first and second sons when the eldest son attained the age of 25 years and in the case of the other sons when they respectively attained or attain the age of 23 years.

6 and 7. The annuity of £1,000 in favour of the widow of the testator so long as she lives is charged upon "the remainder of the rest and residue" of the testator's estate. The charge is enforceable against the proceeds thereof. The six sons of testator should as between themselves bear the said annuity in equal shares out of their several shares in such remainder of the rest and residue of the testator's estate.

Order of the Supreme Court otherwise affirmed. Liberty to apply. Costs of all parties of the appeal as between solicitor and client out of the estate.

THE BALLARAT TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED.
Appellant.

v.

MARY ISOBEL McGREGOR AND OTHERS.
Respondents.

REASONS FOR JUDGMENT. LATHAM C.J.

THE BALLARAT TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED.
Appellant.

v.

MARY ISOBEL McGREGOR AND OTHERS. Respondents.

REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal from a judgment of the Supreme Court of Victoria (Mann C.J.) relating to the construction of the will of John McGregor deceased, who died on the 23rd November, 1925. The will is difficult and obscure in its terms. The most important questions relate to the determination of the period during which the executors are empowered by the will (1) to work and use testator's landed property, livestock and plant, to use and borrow capital and to let testator's land; and (2) to purchase additional properties and use and borrow any capital necessary for that purpose. The provision in the will conferring these powers is introduced by the words "I empower my trustees until my eldest son attains the age of twenty-five years or until the shares of my younger sons vest in them to work my landed property, etc.".

The eldest son attained the age of twenty-five years on the 2nd July, 1934. There are five other sons, the youngest of whom is now nineteen years old. There is also a daughter who is now twenty-seven years of age. The learned Chief Justice held that the shares of the younger sons vested when the eldest son became twenty-five, so that the two alternative periods relating to the powers to work the testator's property, etc., were really one and the same period and he accordingly held that these powers expired when the eldest son attained the age of twenty-five years. It is contended for the appellant that the learned Judge should have held that the powers in question continued at least until the youngest son attained twenty-three years of age, and

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possibly also until the testator's widow died, if she died after the youngest son had attained that age.

The answers to the questions which arise depend upon the meaning, in the whole context of the will, of the words "or until the shares of my younger sons vest in them". It is necessary, therefore, to consider the provisions of the will with respect to the shares of the younger sons.

After providing for payment of income to the testator's widow until the eldest son attains the age of twenty-five years, the will provides with respect to the shares of the sons as follows: "On my eldest son attaining the age of twenty-five years ..... the remainder of the rest and residue of my estate shall be ..... divided equally amongst my six sons (named) subject to my said six sons paying in equal shares to my said wife so long as she lives an income of £1000 per annum the share of each of my sons who have not attained the age of twenty-three years being paid to him on his attaining that age". (I have omitted words referring to gifts of £2000 to each daughter and other words referring to a valuation of the estate.) The share of each son is given by the words directing division on the event happening of "my eldest son attaining the age of twenty-five years". That event has happened. Then there is a direction to pay the share on each son attaining twenty-three years of age. If the will contained no other provisions relating to the shares of the sons there would be no doubt that the share of each son would become vested in interest when the eldest son attained twenty-five years of age, though payment of the share would be postponed, in the case of any son who had not attained the age of twenty-three years, until he attained that age. The learned Chief Justice held that this was the true result, other provisions in the will being rejected as repugnant to the gift made by the provision already quoted.

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These other provisions relate to a gift over of the children's shares. They are contained in the following words: "Should any of my children pre-decease me or die before the death of my said wife or before attaining the age of twenty-three years or before my eldest son attains the age of twenty-five years leaving issue then such issue shall receive and if more than one in equal shares the share which the parent would have received if living but should any of my children so die without issue then the share of such deceased child shall be divided equally amongst my aforesaid six sons or the survivor or survivors of them". This clause of the will provides that in any one of four events the share of a child (including a daughter's share - though this circumstance is not important in the present case) is to go over either to the issue of that child, or if the child should die without issue, to the six sons, or the survivor or survivors of them. The four events are:-

(1) any child pre-deceasing the testator,

(2) any child dying before the death of testator's wife,

(3) any child dying before attaining the age of twenty-three years,

(4) any child dying before the eldest son attains the age of twenty-five years.

The first provision in this clause is really directed to the case of lapse and not of gift over. If a child pre-deceases the testator, that child necessarily takes no interest under the will and the provision that if the child leaves issue the issue is to take, or if the child dies without issue, the sons are to take, is a provision for an original gift to the issue or sons. There is nothing in this provision which is repugnant to the gifts to the sons. The second provision in the clause deals with the death of a child before the death of the testator's wife. This is a divesting condition. There is no objection in law to a gift to a person subject to that gift being divested if the donee dies before the death of another person who is alive at the death of the testator. The third provision in the clause relates

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to the death of a child before attaining the age of twenty-three years. This again is a divesting provision and there is no objection in law to a disposition which provides for divesting in such an event. The fourth provision in the clause relates to death before the eldest son attains the age of twenty-five years. In this event no share would ever have become vested in the child who died and the effect of the clause is to substitute for him his issue or the surviving sons if the event in question happens. This is an ordinary case of a substitutional gift.

In my opinion there is no reason why full effect should not be given to this clause relating to the gift over without involving any repugnancy to the original gift to the children. It is true that, if the obligation of the sons to contribute equally to the income of £1000 a year to the mother is a personal obligation only to them, there are no words attaching that obligation to the issue of children who may take under the clause in question; but even if this be the case, although it may be unfortunate for the widow, it does not result in any repugnancy between the terms of the original gift and the terms of the gift over.

It is now possible to consider the meaning of the words "until my eldest son attains the age of twenty-five years or until the shares of my younger sons vest in them". Before enquiring whether these words do really provide for alternative periods, the meaning of the latter part of the provision should be determined.

In the first place the words "until the shares of my younger sons vest in them" should in my opinion be construed as meaning until the shares of <u>all</u> the younger sons vest in them. The object of the testator is to specify a point of time at which a period terminates, and not to specify several points of time, such as the various times at which the shares of the several younger sons may vest. There is no reason why the words should not

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be construed as a reference to the time when the shares of all the younger sons have become vested.

The word "vest" may be used in more than one sense. The strict legal meaning is vest in interest: Re Ware, 45 Ch.D. 269 at p.279. The meaning in a particular context will be affected by the context. Can the word "vest" in the sentence "until the shares of my younger sons vest in them" mean "vest in interest"? The shares of the younger sons vested in interest either at the death of the testator, or when the eldest son attained twenty-five. Upon the former view (which I do not think is a correct view) the result would be that a power to work the estate would be given to the executors until the death of the testator - an absurd result which obviously could not have been intended by the testator. If, on the other hand, it is held that the shares of all the younger sons vested in interest upon the eldest son attaining twenty-five years of age (which is the view which commends itself to me) then the second period (defined by the words "until the shares of my younger sons vest in them") is identical with the first period (defined by the words "until my eldest son attains the age of twenty-five years"). Such a construction attaches no meaning to the description of the second period. Thus, if the word vest is construed as meaning "vest in interest" the provision in its second limb becomes either absurd or meaningless.

The word "vest" is, however, capable of other meanings than "vest in interest". It may mean "indefeasibly vest". The conditions of such vesting are (1) in all cases the eldest son must have attained twenty-five; (2) in the case of the other sons they must have attained twenty-three; (3) and in the case of all sons they must survive their mother. If this meaning were adopted, the power to carry on the testator's business would continue until the testator's wife died, independently of the ages attained by the sons, and in spite of the provision that the share of each son should, if he lived until the eldest son attained twenty-five years of age, be paid to him when he attained the age of twenty-three years.

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There is, however, another meaning which may be given to the word "vest" in a particular context. A reference to a time of vesting may relate to the time when the shares of the beneficiaries fall into possession, that is, where the gift (as in the present case) is a share in the proceeds of conversion, when they become payable. The shares of all the younger sons have become vested in this sense when, the eldest son having attained twenty-five years of age, the youngest son has attained twenty-three years of age. In my opinion it is more probable that the testator intended that the power to carry on the business should cease in this event (when all the sons would presumably be capable of managing their own affairs) than that it should continue until the death of his widow - an event which would have no relation to the business capacity of his sons. I think that, on the whole, the weight of argument supports this view, and that the Court is justified in adopting it as preferable to the other possible view.

Upon this view a real alternative is expressed in the provision defining the period during which the executors are empowered to carry on the business of the testator. The provision should be held to mean that the executors are at liberty to work the estate during either of the periods mentioned, whichever period may be the longer, that is, (1) the period expiring when the eldest son attains the age of twenty-five years - a period which has already expired; or (2) the period expiring when the youngest son attains the age of twenty-three years. The first and second questions in the originating summons should therefore be answered by declaring that the powers in question continue until the youngest son attains the age of twenty-three years.

There is no appeal as to the answers given to questions 3 and 4 in the originating summons.

Question 5 is "At what date or dates were or are the six sons of the said deceased entitled to have their shares in the estate of the deceased transferred or paid to them respectively?" This question is answered as follows: "As to John Allister

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McGregor on the 2nd day of July 1934 and as to the remaining sons on their respectively attaining the age of twenty-three years."
It should be observed, however, that the second son, Malcolm Athol McGregor, attained the age of twenty-three years on the 12th April, 1934; but the gift to him, as in the case of all of the sons, was made only "on my eldest son attaining the age of twenty-five years", and this event did not take place until the 2nd July, 1934. The answer should, therefore, be amended so as to read "As to John Allister McGregor and Malcolm Athol McGregor on the 2nd July, 1934, and as to the remaining sons on their respectively attaining the age of twenty-three years."

This answer deals with the precise question asked, but it does not determine any question relating to the obligations of the sons, if any, with respect to the provision of the income of £1000 for their mother. Nor does the answer determine whether or not the executors are entitled to require any security to be given by the sons to meet the event of their failing to survive their mother.

Questions 6 and 7 relate to the rights of the widow with respect to the income of the estate. The widow was given by the will the right to receive so much of the income as she should desire until the eldest son attained the age of twenty-five years. Thereafter the right of the widow to receive any payment by way of income depended upon the effect of the provision that the residue of the estate should be divided between the sons "subject to my said six sons paying in equal shares to my said wife so long as she lives an income of £1000 per annum". I have the misfortune to differ from the other members of the Court with respect to the interpretation of these words. In my opinion they are not capable of creating any obligation, whether personal or by way of charge only, to pay a single sum of £1000 per annum to the widow. This provision does not give any income of the estate to the widow. The gift to the sons is not a gift subject to the payment to the widow out of the estate of £1000 per annum. It is a gift "subject to

my said six sons paying in equal shares to my wife £1000 per annum". Neither the trustees nor the sons jointly are bound to provide £1000 per annum for the widow. The words are apt only to impose six several obligations.

Further, the words of the will, in my opinion, require the sons personally each to pay to the widow one-sixth of £1000 per annum if they take the benefits given to them by the will. I agree with Mann C.J. that this case falls within the category defined in Gill v. Gill 21 N.S.W. S.R. 406, a decision of Harvey J. See Re Cowley 53 L.T. 494 for the distinction between a gift "subject to payment of debts" and a gift to a person "he paying the debts": the former words do not, but the latter words do, impose a personal liability if the beneficiary accepts the gift.

But, in some cases, in addition to creating a personal obligation in the donees upon their acceptance of the gifts, a provision of this character may also impose a charge upon or trust in relation to the property given. In the present case there are no words apt to create a trust. But substantially identical words have been held to be capable of creating a charge - Pearce v. Wright, 39 C.L.R. 16. In the case of Re Lester, Lester v. Lester 1942 1 A.E.R. 646, Simonds J. reached an opposite conclusion upon another substantially identical provision, but we should follow the decision of our own Full Court. In this case, just as the words impose not one, but six personal obligations, so also in my opinion they charge the interests of each son severally with the payment to his mother of £166:13:4 per annum. Upon this view the interests of the widow would be fully protected. Thus I agree with the answer given by Mann C.J. to the sixth question, but I would add a statement that the interests of the sons are each charged with the payment annually to the widow of the sum of £166:13:4.

Question 6 is in the following form: "To what income of the estate or what part of or interest in the estate of the deceased was the defendant Mary Isobel McGregor entitled after the 2nd day of July 1934?" This question was answered in the Supreme

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Court in the following way: "To no income of the estate and to no part of or interest in the estate. She was entitled to be paid by each of her six sons who accepted and received the legacy of one-sixth or any larger share of the residue the sum of £166:13:4 per annum during the remainder of her life." In my opinion this is a correct answer to this question, but (as I have said) I would add that the share of each son is charged with the payment of the said sum in favour of the widow.

Question 7 is as follows: "In what manner is the annuity of £1000 per annum to the Defendant Mary Isobel McGregor to be secured or provided for in the event of the distribution of the estate of the said testator?" The learned Chief Justice indicated an opinion that this question was really premature, but gave the following answer: "Security for payment of (?by) each legatee of the sum mentioned in the answer to question 6 cannot be demanded as of right. The Court has power if it thinks right upon the facts of any particular case so to do to make an order for security to be given by the legatee. The obligation to pay the sum mentioned will be enforced by the Court." The question is directed to the subject of whether or not some security should be given (that is by the children beneficiaries) in the event of the distribution of the testator's estate. That event has not taken place, but, upon the view which I have expressed, it should take place at an early date, and the question need not be regarded as premature. I agree with the answer given by the Supreme Court.

There is a provision in the will which states the desire of the testator that his Balquhidder homestead property should be included in the share of his eldest son. It is impossible so to include the property upon an equal division and the learned Chief Justice held that the division should be made by sale of the estate and division of the proceeds. Against this decision no appeal is brought. The eldest son, however, in the proceedings before the Chief Justice formally abandoned any right or claim in or to the property known as Balquhidder, other than such right as he possessed in common with the other sons of the deceased. The Court has been asked to include a reference to this arrangement in the order of the

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Court and a recital should be introduced to the effect stated. The parties agree in asking this Court to vary the order made in the Supreme Court by expressly reserving liberty to apply. This should be done.

There is litigation between the parties in the Supreme Court in which the action of the trustees in working the estate after the eldest son attained the age of twenty-five years is challenged as a breach of trust. The originating summons was issued in pursuance of a suggestion by the learned Judge who was dealing with this litigation that the construction of the will should be determined in proceedings by way of originating summons. It is from a judgment given in those proceedings that this appeal is brought. The trustees are therefore defending their own interests in relation to the principal questions asked upon the summons. If they had failed upon the appeal, there would have been no reason why they should not bear their own costs and also pay the costs of the other parties. As, however, they have succeeded, and as the questions which have been determined arise out of the confused terms of the will, it is proper to confirm the order of the Supreme Court as to costs whereby all parties receive their costs as between solicitor and client out of the estate and to make a similar order as to the costs of the appeal to this Court.

THE BALLARAT TRUSTEES EXECUTORS AND AGANCY COMPANY LIMITED

V.

McGREGOR AND OTHERS.

JUDGMENT

MR JUSTICE RICH.

As I venture to differ in some matters from the decision under consideration I shall state my reasons briefly. The relevant facts are already in the statement. We were told that the will in question was not the work of a lawyer and its obscurity illustrates the well known tag Ne sutor ultra crepidam. It is an example of the case where one spells out the intention of the testator from the context and decisions are of little or no assistance. The chief concern of the appellant in the proceedings is to ascertain what limitation of time is imposed on its power "to work the landed property" of the testator. Most of the argument, however, was directed to the interpretation of those provisions of the will which deal with the gifts to the sons and their obligations to their mother. Counsel considered that these provisions threw light on the provisions relating to the executors' power to carry on. There is no express gift to the sons. It is implicit in the direction to divide from which a power to sell is also to be implied. As realty vests in executors like personalty there is no difficulty in implying a power of sale in order to carry out a direction

to divide realty. The precatory trust with regard to the devise to the eldest son may be disregarded. Upon the eldest son attaining 25 each son takes a vested interest in his several portion the possession or enjoyment of which is deferred until each son other than the eldest arrives at the age of 23. The word "vest" is not used in any technical sense. The context shows, I think, that it means payable. So far as the widow is concerned she becomes entitled when the eldest son attains 25 to a charge on the residue. The question whether a personal obligation or a charge or both are created depends upon the construction of the provisions of the particular will. Here, I think, no personal obligation attaches to the sons. The will directs a division which necessitates a sale of the residue. Provision is also made for the widow by giving her "an income of ~~£1,000~~ £1,000 per annum so long as she lives" charged upon the converted residue in lieu of the gift to her of income of the estate until the eldest son attained 25. The proceeds after conversion are divisible among the six sons but at the same time these proceeds are charged with the payment of an income of "£1,000 per annum" to the widow so long as she lives the burden of

which should I think be borne equally by the respective interests of the sons in the proceeds of the conversion. I think the view I have expressed that the provisions of the will create a charge on the proceeds in favour of the widow is confirmed by the consideration that what might for convenience be called the gifts over on the death of sons before attaining the age of 23 would, if they were to take effect, destroy the obvious intention of the testator that his widow should receive "an income of £1,000 per annum so long as she lives". The power to work the property appears to depend upon alternative limitations which cannot be reconciled. Accordingly I think that the rule of construction should be adopted in such a case which gives effect to a later expression in a will. I answer the questions as follows:-

1 and 2. Until the youngest son attains 23 years

5. Subject to the rights of the widow, in the case of the first and second sons when the eldest son attained the age of 25 years and in the case of the other sons when they respectively attained or attain the age of 23 years.

6 and 7. The annuity of £1,000 in favour of the widow of the testator

so long as she lives is charged upon "the remainder of the rest and residue" of the testator's estate. The charge is enforceable against the proceeds thereof. The six sons of testator should as between themselves bear the said annuity in equal shares out of their several shares in such remainder of the rest and residue of the testator's estate.

Order of the Supreme Court otherwise confirmed. Liberty to apply. Costs of all parties of the appeal as between solicitor and client out of the estate.

THE BALLARAT TRUSTEES EXECUTORS AND AGENCY CO. LTD.

V

McGREGOR AND OTHERS.

JUDGMENT STARKE J.

Appeal from a determination of the Supreme Court of Victoria upon originating summons of several questions arising upon the will of John McGregor. They depend solely upon the construction of that will and not upon any rule of law or of construction.

The first and second questions raised by the summons which are the subject of appeal are as follows:-

"1. Up till what date were the plaintiff and the defendant Mary Isobel McGregor (hereinafter called the said Trustees) empowered by the said will to work the landed property of the deceased and to that end to use his landed property live stock and plant and to use or borrow any capital necessary for that purpose.

"2. Up till what date were the said Trustees empowered by the said will to purchase any additional properties deemed advisable and to use or borrow any capital necessary for that purpose".

These questions depend upon the construction of the following clause in the will:-

"I empower my Trustees until my eldest son attains the age of 25 years or until the shares of my younger sons vest in them to work my landed property and to that end to use my landed property my live stock and plant and use or borrow any capital that may be necessary

for that purpose or my Trustees may let my landed property if in their discretion they deem it advisable and may give any terms or conditions they may think necessary I empower my Trustees to purchase any additional properties which they may deem advisable and I authorise them to use or borrow any capital necessary for that purpose".

Preceding clauses of the will had directed that on his eldest son attaining the age of 25 years, which event happened, his daughter or daughters should each be paid a named sum and the remainder of the rest and residue of his estate should be valued and divided equally amongst his six sons subject to a provision in favour of his widow which is the subject of another question, the share of each of his sons who have not attained the age of 23 years being paid to him on his attaining that age. Each son thus became entitled to his share on the eldest son attaining 25 years but not to payment until he attained the age of 23 years. So it is argued that the words "until the shares of my younger sons vest in them" necessarily refer to the time when his younger sons became entitled to their shares, namely, when the eldest son attained 25 years of age and not to the time when the shares of the younger sons became payable to them.

The time when the eldest son attained 25 years is specifically dealt with, so in their context the words "or until the shares of my younger sons vest in them" prima facie refer to some other point of time which the provisions of the will itself suggest, namely, when all his younger sons are entitled to payment of their shares, namely, when the youngest son attains the age of 23 years. The gift over which the will contains throws but little light upon these questions though I see no reason to doubt its validity. The questions should be answered that the powers continue until the youngest son attains the age of 23 years.

The next question the subject of appeal is that numbered

5 in the originating summons:-

"5. At what date or dates were the six sons of the said deceased entitled to have their shares in the estate of the deceased transferred or paid to them respectively".

The will provides that the remainder of the rest and residue of the testator's estate shall be divided equally amongst his six sons subject to his six sons paying in equal shares to his wife "so long as she lives an income of One thousand pounds per annum the share of each of my sons who have not attained the age of 23 years being paid to him on his attaining that age". And there is a gift over in certain events, one of which is, should any of his children die before the death of his wife. The testator's widow is still alive, and, so far, all the children of the testator are alive.

It is unnecessary now to determine the destination of a child's share in the case of death before his mother, but it may be that the provision refers to death before the time of payment prescribed by the will, that is, before his sons respectively attain the age of 23 years. In my opinion, the question should be answered:- Subject to the provision in favour of the testator's wife in the will contained when the sons respectively attained or attain the age of 23 years.

The next questions the subject of appeal deal with provisions in the testator's will in favour of his wife:-

"6. To what income or what part of or interest in the estate of the deceased was the defendant Mary Isobel McGregor entitled after the 2nd day of July 1934.

"7. In what manner is the annuity of £1000 per annum to the defendant Mary Isobel McGregor to be secured or provided for in the event of distribution of the estate of the....testator".

The 2nd July 1934 is the date upon which the eldest

son of the testator attained the age of 25 years. The testator's wife before this date was entitled to all the income from the testator's estate if she so desired that income. But on his eldest son attaining the age of 25 years he directed, as already mentioned, that his daughter or daughters should each be paid a named sum and the remainder of the rest and residue of his estate should be valued and divided equally amongst his six sons "subject to my...six sons paying in equal shares to my said wife so long as she lives an income of £1000 per annum the share of each of my sons being paid to him on his attaining that age". And, as before mentioned, there is a gift over in case any of his children die before the death of the testator's wife. The gift to the sons is in the direction to divide, and that direction is subject to the payment to his wife of an income of £1000 per annum during her life. If those were the precise words of the will the annuity of £1000 per annum would doubtless be charged upon the residue of the testator's estate. But there are some additional words, namely, "my...six sons paying in equal shares," which it is said are conclusive that there is no charge of any sort but only a personal obligation upon the sons to pay an equal share of the annuity which Courts of Equity would enforce if the sons took their shares under the will. It is improbable that the testator deprived his widow of the income given to her until the eldest son attained the age of 25 years and then made no provision whatever for her out of his estate but simply laid a burden upon each of the sons personally in case he accepted the gift made to him under the will. Moreover that obligation would not attach to any son or anyone else in case the gift over in the will took effect before a son's share vested in him and possibly if a son never became entitled to payment of his share. Such an intention is, as I have said, improbable, and the words of the will do not compel that conclusion. The words to which I have referred indicate the aliquot share of the annuity which

the share of each son will bear, though if the residue were charged by force of the words used in the will the same result would have been reached in equity without the words referred to. See Pearce v Wright 39 C.L.R. 16.

In my opinion, the provisions of the testator's will create a charge in favour of the widow in respect of her annuity. And the charge, in my opinion, is laid upon the "remainder of the rest and residue" of the testator's estate mentioned in the will and is not six several charges laid upon each of the six shares of the sons in that residue. The direction is to divide the residue subject to the charge and not the respective shares of the sons subject to the charge. Finally I should add that the direction to the sons to pay the widow's annuity in equal shares does not create a personal obligation in aid of the charge but merely as I have said a direction that the shares given to the sons shall bear an aliquot part of the burden laid upon the "remainder of the rest and residue" of the estate by his will.

The 6th and 7th questions should be answered as follows:-

6 & 7. The annuity of £1000 in favour of the widow of the testator is charged upon "the remainder of the rest and residue" of the testator's estate and should be borne by the six sons of the testator in equal proportions in respect of the several shares of the sons in such remainder of the rest and residue of the testator's estate.

The costs of this appeal must come out of the testator's estate, but it is unnecessary to say whether the trustees would or would not have been personally required to pay the costs of the appeal if they had failed. The matter would be one for the discretion of the Court having regard to any peculiar difficulties created by reason of the will of a testator or his acts or the decision the subject of appeal.

THE BALLARAT TRUSTEES EXECUTORS & AGENCY COMPANY LIMITED.

v.

McGREGOR & OTHERS.

JUDGMENT. McTIERNAN J.

I agree with my brother Rich's judgment and answers to the questions which are the subject of the appeal and that the costs of all parties as between solicitor and client be paid out of the estate.