Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Arthur Gilbert Hordern and another v. *Samuel Hordern, from the Supreme Court of New South Wales; delivered the 15th December*, 1908.

Present at the Hearing:

LORD ROBERTSON.
LORD ATKINSON.
LORD COLLINS.

[*Delivered by Lord Atkinson.*]

This Appeal has been taken from so much of a decretal order, dated the 20th September 1907, of the Chief Judge in Equity of the Supreme Court of New South Wales as declares that the Respondent, as trustee of the will, dated the 8th October 1878, of one Anthony Hordern, deceased, late of George Street, Sydney, in that Colony, was not, under the terms of that will and the codicil thereto of even date, in the events which have happened, then bound (after providing for the annuities to the testator's daughters in the will mentioned) to divide the residue of the testator's estate between his two sons, Albert Gilbert and Anthony, the Appellants.

Thus, the only question for decision turns upon the construction of two clauses in the will, as modified by the codicil.

The testator died on the 17th September 1886, leaving him surviving his wife, Mary Elizabeth Hordern, and five children, two sons and three daughters, all of whom are still alive. The youngest of these children, Freda Elsa Hordern, attained the age of 21 years on the 25th

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April 1907, some 17 days before the institution of this apparently somewhat friendly suit.

The testator by his will devised and bequeathed to his executor and trustee all the property, real and personal, of which he should die possessed, in trust to convert it into money, to pay thereout his debts and funeral and testamentary expenses, and to invest the residue in certain securities therein named, with power to vary the same from time to time, and out of the annual income of these investments he directed his trustee to pay to his wife Mary Elizabeth the sum of 200*l.* for and during her natural life, provided she should so long continue his widow. The will then proceeds thus :—

> "And shall pay to each of my children the sum of one hundred pounds a year to be applied towards their maintenance and education until the youngest of my children shall attain the age of twenty-one years and upon the youngest of my children attaining the age of twenty-one years I direct my said trustee (subject to such payments to my wife as aforesaid) to settle the sum of two hundred and eight pounds a year upon each of my daughters for life [and] to divide all the residue of my said trust moneys stocks funds and other securities and effects then in his hands belonging to my estate (after the payment of all expenses incurred) equally between my sons then living share and share alike."

It was not, and indeed could not be, disputed that, according to the clear intention of the testator as expressed in this clause, two things would occur on the attainment of the majority of his youngest child, (1) his two sons, if alive, would become absolutely and indefeasibly entitled to the residue of his estate, share and share alike; (2) the obligation imposed on his executor and trustee to divide and pay over to them their respective share of this residue would become operative. The will, however, left three contingencies unprovided for: (1) The annuity of 200*l.* per annum might prove to be

an inadequate provision for his widow; (2) his two sons might, before his youngest daughter attained 21 years of age, die without leaving issue, when there would be an intestacy as to the residue, and the same would be divisible amongst his wife and daughters as his next-of-kin; and (3) all his daughters might die without issue before the same period, the majority of the youngest, had arrived.

In their Lordships' opinion the testator, by his codicil, endeavoured to provide for the first and last of these contingencies, and these alone, leaving the law to provide for the second. He accordingly authorized his trustee, at any time or times, in his discretion, to pay to his wife a further sum in addition to the annuity bequeathed to her, and then declared as follows:—

> "In the event of all my children dying without leaving lawful issue, then all my estate and effects I devise and bequeath unto my brother Samuel Horden his heirs executors administrators and assigns."

In neither the will nor the codicil is there any express bequest of the residue, or any part of it, to any of the testator's daughters. In the event of the second contingency arising, since there would have been a complete conversion of his real estate into money, one third of his residue would go to his widow, and two thirds to his other next-of-kin. The testator was apparently content that this should be so, as he made no provision against it, but, if the contention of the Respondent be well founded, the testator's wife and children would not become absolutely and indefeasibly entitled to their distributive shares of his assets coming to them under the Statute of Distribution till the death of the survivor of the three daughters, inasmuch as the provision in the codicil is that, in the event of all his children dying without leaving lawful issue, all his residuary

estate is to pass to the Respondent—a somewhat strange and unnatural result to have been intended by him.

The argument addressed to their Lordships on the Respondent's behalf is that there is such an antagonism between the provisions of the will and the codicil that they cannot stand together, and that the former must therefore be taken to have been *pro tanto* revoked by the latter. Such an argument appears to their Lordships to be fallacious. There is, in truth, no conflict between the provisions of these two instruments. The provisions of the codicil are supplementary to, and in harmony with, those of the will. By the codicil it is not sought to substitute new provisions for those contained in the will, but merely to deal with two contingencies left untouched by the will. The bequest to the sons remains one of the dominant dispositions of the will. It is not revoked, cut down, or made contingent by the codicil. Their Lordships are, therefore, of opinion that on the true construction of these instruments the gift of the residue to the testator's two sons became on the 25th April 1907 (the day when their youngest sister came of age) absolute and indefeasible. This is in accordance with the decision in *O'Mahoney* v. *Burdett* (L.R. 7 H.L. 388), inasmuch as there is, in their Lordships' opinion, on the face of the will a clear expression of the testator's intention that the bequest of the residue should so operate and have effect.

Since the death of the testator the trustee, with the sanction of the Court, has increased the widow's allowance to 4,000*l.* per annum. In exercise of the power given him by the will, he may, as it seems right to him in his discretion, increase or diminish this amount. And it is urged that the existence of this

power necessarily postpones the distribution of the residue till the widow's death. But the answer is, that she has agreed with her sons that a certain sum of money shall be set apart out of the residue (which is ample) to provide for her annuity of 4,000*l.* per annum, and that the balance of the fund shall (subject to the payment of the annuities to her daughters being provided for) be divided between her sons. This arrangement, which the parties to it are quite competent to enter into, meets the difficulty. And the Respondent is not only justified in carrying it out, but, their Lordships think, is bound to do so.

Their Lordships will, therefore, humbly advise His Majesty that the Appeal should be allowed, and that the Order below should be varied by striking out the words "not at the present time," but otherwise confirmed.

The costs of all parties as between solicitor and client will be paid out of the estate.