HIGH COURT OF AUSTRALIA.]

FRANCIS PAUL SMIDMORE . . . APPELLANT;
PLAINTIFF,

AND

BLANCHE ROSE LENNON SMIDMORE, JOSEPH SARSFIELD SMIDMORE AND OTHERS . . . . . RESPONDENTS,
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *Dec.* 14, 15, 19.

Griffith C.J., Barton and O'Connor JJ.

Will—Construction—Restriction on alienation—Gift for life with remainder to children or remoter issue—Power to trustees to pay income during life to wife on attempted alienation—Rule against perpetuites—Uncertainty—Modification of words of will—Intention of testator.

A testator by his will gave a share of his residuary real estate to trustees on trust for each of his sons absolutely. By a codicil, after reciting that he was desirous of making further provision for his wife, and of rendering inalienable as far as possible the shares of his sons, and of making other provisions, he directed his trustees to pay the income only of each son's share to the son until he should attempt to alienate it, in which case they were to pay the income to the persons who would have been entitled to it in case that son had died, with a discretionary power, in case the son whose share became so forfeited was married, to pay the income for the residue of the son's life to his wife, and after each son's death as follows: "That my said trustees or trustee shall stand seized and possessed of the said respective shares in my real and personal estate to which such sons respectively were entitled upon trust for such child or children of my said sons respectively as shall attain the age of twenty-one years and such child or children of each of my said sons respectively dying under the age of twenty-one years as shall *attain that age or* die under that age leaving issue and if more than one in equal shares and proportions as between brothers and sisters, but so that the child or children collectively of any deceased child of my said sons respectively shall take such share only as their parent would have taken if living."

Held, that the power given to the trustees to pay the income to the wife in the event of attempted alienation was good; and that the words "attain that

age or" should be rejected as having been inserted by inadvertence, and that under the remaining words there was a valid gift in remainder after each son's death to his children attaining the age of twenty-one years or dying under that age leaving issue, and that, in accordance with the principle laid down by *James* L.J. in *In re Bywater*, 18 Ch. D. 17, at p. 24, this, being a clear gift, was not cut down or controlled by the subsequent use of doubtful words apparently implying that there had previously been a gift to great-grandchildren in remainder.

Where a direction in a will appears to have been taken from a common form, with the omission of certain words, which, if they had been inserted, would have rendered the direction void under the rule against perpetuities, the Court, in construing the will, will not read it as if those words had been inserted unless the direction is otherwise wholly unintelligible. Where a direction contains words which are apparently inconsistent with provisions elsewhere clearly expressed in the will, but are not sufficiently clear to control them, the Court should either discard the words, or, if possible, modify them in such a way as to carry out the intention of the testator as revealed by the whole of the will.

Towns v. *Wentworth*, 11 Moo., P.C.C., 526, applied; *Lassence* v. *Tierney*, 1 Mac. & G., 551; and *Hancock* v. *Watson*, (1902) A.C., 14, distinguished.

Decision of *A. H. Simpson* C.J. in Eq.: *Smidmore* v. *Smidmore*, (1905) 5 S.R. (N.S.W.), 492, varied, and affirmed as varied.

APPEAL from a decision of *A. H. Simpson*, Chief Judge in Equity, New South Wales.

The testator, Thomas Smidmore, died in January, 1861, having made his will and several codicils, of which the third, dated 23rd October, 1860, is the only one material to this appeal.

By the will the residue of the real estate was devised to trustees upon trust to divide it into four equal shares, one of which was to go to each of his four sons absolutely. By the third codicil the testator, after reciting that he was desirous of rendering inalienable as far as possible the shares of three of his sons, that is to say, the appellant Francis Paul Smidmore, the respondent Joseph Sarsfield Smidmore, and Albert Murray Smidmore, proceeded to direct that the income only of each son's share should be paid to him during his life or until attempted alienation, in which event the trust in the son's favour should cease and the annual income be paid to the person or persons who would have been entitled to it, by virtue of trusts subsequently declared, in case of the son's death, and, in case the son should at the time of

H. C. OF A. 1905.

SMIDMORE v. SMIDMORE.

forfeiture be married, the trustees should have power to pay the income from the son's share during his life to his wife, and from and after the son's death to his issue upon certain remainders which are particularly set out in the judgment, and upon which the dispute in this litigation mainly turned.

The property in question was resumed by the Minister for Public Works, and the compensation money paid into Court under the *Public Works Act* 1900.

On 4th April, 1905, in a suit by the executors of Albert Murray Smidmore, one of the sons, it was held by the Chief Judge in Equity that upon the true construction of the will and codicil the estates limited in remainder to the issue of the son failed either for uncertainty or as infringing the rule against perpetuities, and that the share in the residuary real estate devised to that son belonged absolutely to his estate and passed to his personal representatives.

The appellant, in order to establish his claim to his share of the resumption moneys, took out an originating summons for the determination of the following questions:—Whether upon the true construction of the will and codicil the appellant was absolutely entitled to the real estate devised to him by the will, whether the estate in remainder in the real estate devised to the appellant expectant on the appellant's death was effectually disposed of by the testator, and whether there was a valid trust in favour of the wife or issue of the appellant under the forfeiture clause in the third codicil. The learned Chief Judge by his order declared that there was no valid trust in favour of the children or remoter issue of the appellant in respect of the real estate devised to him by the will, that the power given to the trustees by the third codicil to pay the annual income and produce of the real estate devised to the appellant to any wife of the appellant during the remainder of his life in case of attempted alienation was valid, and that therefore the appellant was not absolutely entitled to the real estate devised to him by the will.

It was from the second of these declarations, relating to the discretion given to the trustees to pay the income to the wife, that the present appeal was brought. At the hearing of the appeal it was agreed that the declaration that there was no valid

trust in favor of the children or remoter issue of the appellant should be treated as subject to a cross-appeal by the respondents.

The material portions of the will and codicil appear in the judgment.

Knox (with him *Harvey*), for the appellant. Assuming that the gift over in remainder after the death of the appellant is bad, as was held by the Chief Judge in Equity in a previous suit for construction of the same direction, the appellant is entitled to the fee simple. First, there is an absolute gift by the will. Then, for the purpose of preventing alienation, certain trusts in remainder are imposed upon the absolute gift. They having failed, the remainder disappears and leaves the absolute gift, subject only to the trust in favour of the wife for life. But that trust is repugnant to and inconsistent with the absolute gift already given, and therefore fails: *Lassence* v. *Tierney* (1); *Hancock* v. *Watson* (2). *In re Wolstenholme*; *Marshall* v. *Aizlewood* (3) is indistinguishable from the present case. The appellant gets, not the remainder which the testator attempted to give the descendants, but the estate given by the will, which revives. The codicil, so far as it deals with the provision for the wife, must be read not as indicating a change of mind on the testator's part, but as an attempt to do something inconsistent with what he has already done earlier in the same document. By the rules of construction the first statement of intention prevails: *In re Dugdale* (4); *Jarman and Bythewood's Conveyancing*, 5th ed., p. 882.

[GRIFFITH C.J. referred to *Brooke* v. *Pearson* (5).]

The provision cannot be divided so as to make it good in part and bad in part, any more than in cases under the rule against perpetuities. If part of the limitation is bad the whole must go. The remainder either goes back to the life estate, or there is an intestacy as far as the codicil is concerned.

[GRIFFITH C.J.—You must look at the whole will together, not at one part first and then at another. Cannot the whole will be

(1) 1 Mac. & G., 551.
(2) (1902) A.C., 14.
(3) 43 L.T., 752.
(4) 38 Ch. D., 176.
(5) 27 Beav., 181.

H. C. OF A. 1905.

SMIDMORE v. SMIDMORE.

read as an attempt by the testator to divide the estate into two, one to the son for life subject to certain conditions, and the second after the son's death to his representatives ?]

Together they make up an absolute gift. Where an absolute estate is cut down for certain purposes only, and those purposes fail, then the absolute estate remains. That is the case here. The condition imposed is void for repugnancy. It is not a case of revocation, with a substituted disposition. The life estate is treated all through as existing, and the attempt to cut it down by the limitation in remainder has failed.

The decision of the Chief Judge in Equity as to the remainder was right. If the words of the limitation are left as they stand they are nonsensical. At any rate they do not sufficiently indicate which class the testator intended to take in the event of attempted alienation, or at the death of the son. There has evidently been an omission of certain words from a common form, "any child or children of" before the words "each of my said sons," and, if they are inserted, the limitation infringes the rule against perpetuities. It is therefore void either for uncertainty as it stands, or as infringing the rule as to perpetuities if the missing words are inserted. [He referred to *Seaman* v. *Wood* (1); *Jarman and Bythewood's Conveyancing*, 3rd ed., p. 549, and 5th ed., p. 340.] There is therefore no class to take in the event of forfeiture, the restriction upon alienation is bad, and the original gift remains. The words "but so that" &c., at the end of the provision show that some words have been left out, because they import a reference to great-grandchildren, and unless the words that were apparently omitted are read in, there is no mention of such descendants in the earlier part of the provision.

Langer Owen, for the respondents other than J. S. Smidmore. The intention of the testator was to substitute for the absolute estate given in the will, a life estate liable to forfeiture in case of attempted alienation, with a provision for assisting the wife and children, and a valid remainder after the son's death. It is not an attempt to give an absolute estate and at the same time impose conditions repugnant to that estate, as in *In re Dugdale*

(1) 22 Beav., 591.

(1), and *Re Wolstenholme* (2), but a clear change of disposition. The result is a valid life estate to the son, subject to the restriction upon alienation, with remainder to the son's children or remoter issue. Even if the remainders over are bad, they only go back to the son, and his personal representatives are entitled to them, but the provision for the wife is still good. The original estate is cut down by the codicil to the extent to which the codicil can operate. There is a dependent relative revocation. The modification is to be adopted so far as it is good, and so far as it is bad the life estate is left surviving. [He referred to *Norman* v. *Kynaston* (3), and *Hancock* v. *Watson* (4).]

The limitations in remainder are good. First there is a gift to those grandchildren whose parents attain the age of twenty-one, and then to those whose parents do not attain the age of twenty-one but who themselves attain that age or die under that age leaving issue. That may be a capricious provision but it is not nonsensical. The words said to have been omitted may have been purposely omitted to avoid offending against the rule as to perpetuities. The Court should not hold the provision uncertain if it has any intelligible meaning, although the class designated may be a strange one. As to the words at the end, "but so that," &c., which imply a reference to great-grandchildren, if, having regard to the whole of the will, and the intention of the testator as therein revealed, they are superfluous, the Court may strike them out: *Towns* v. *Wentworth* (5). Striking out those words there is a class sufficiently clearly designated, at any rate the Court cannot say that there is such uncertainty as to defeat the testator's intention. There would then be no conflict with the rule against perpetuities. Even if all the words are left in, and the words said to be omitted are inserted, there is a class to take during the life of the son in case of forfeiture, and it does not matter what may happen during the future. The rule against perpetuities in its extreme form, that a provision which by reason of the rule is bad in part fails altogether, will not be extended so as to apply to cases which do not clearly come within it, *e.g.*, to

(1) 38 Ch. D., 176.
(2) 43 L.T., 752.
(3) 3 DeG., F. & J., 29.
(4) (1902) A.C., 14, at p. 23.
(5) 11 Moo. P.C.C., 526, at p. 543.

H. C. OF A. 1905.

SMIDMORE v. SMIDMORE.

prevent the distribution of income where there are persons in existence who can take. It is not a case of tying up the corpus. The Court will lean against applying the rule, and will not insert words which would result in bringing the provision within it; but, taking the words as they stand, will endeavour to construe them in such a way as to carry out the intention of the testator, and, if necessary, will modify them for that purpose.

The respondent, *J. S. Smidmore*, appeared in person to submit.

Harvey in reply. The whole of the words, including the provision in question, should be looked at, in order to discover the intention of the testator, and then the rule applied. The Court should not, in order to escape from holding the provision bad, say that, as the testator did not intend to give it to persons who could not take, they must look for someone other than the persons apparently designated, in order to give it to them. [He referred to *Dungannon* v. *Smith* (1).] The words themselves "but so that" &c., point out clearly the persons who were intended, and show that in the earlier part words were left out which would have designated great-grandchildren. Words similar to the words suggested were inserted in *In re Wise*; *Frith* v. *Wilson* (2). This construction is more natural than that proposed by the respondents, which would render the words "but so that" &c., wholly nugatory. The Court should have no *à priori* reluctance to adopt any particular construction, merely because it might conflict with the rule. The first step is construction, the next the application of the rule. The estate may not be divided in order to escape the application of the rule: *Hancock* v. *Watson* (3). Nor should the words of the testator, "as far as is possible," influence the Court in construing the provision. In any case, that expression only has reference to rendering the son's shares inalienable, not to the provision for their descendants. [He referred to *Theobald on Wills*, 6th ed., p. 585; *Jarman on Wills*, 5th ed., pp. 230, 241.]

Cur. adv. vult.

The judgment of the Court was delivered by

(1) 12 Cl. & F., 546, at p. 599.
(2) 74 L.T., 302.
(3) (1902) A.C., 14, at p. 22.

GRIFFITH C.J. The testator made his will in the year 1856, and by it he directed his trustees to divide the residue of his real estate into four parts, and then disposed of those parts separately, giving one of them to each of his sons absolutely. The plaintiff, appellant, is one of the sons. By a codicil, the third, which he made in October, 1860, he recited that he was desirous of making further provision for his wife and of rendering inalienable, as far as possible, the shares of his sons except that of his son Thomas, and "of making other the provisions hereinafter contained." He then made a further bequest to his wife and directed that with regard to the share of each son except his son Thomas, whether in real or personal estate, his trustees for the time being should stand seized or possessed thereof respectively upon trust to receive the income arising from the respective shares, and to pay the same to the sons respectively until they should do or suffer anything which, but for the provision then made, would have the effect of vesting the right to receive the annual income payable to them respectively, or any part of it, in any other person whomsoever, and that, upon any son doing or suffering any such thing, the trust in his favour should cease, and the annual income subject to such trust should be paid to or applied for the benefit of the person or persons who would have been entitled to it by virtue of the trusts subsequently declared in case such son had died. Then he declared that in the event of such a forfeiture occurring the trustees might pay the income during the residue of the life of the son whose share was forfeited to that son's wife or any future wife he might have, and, as to the destination of the share after the death of the son, he made this provision: "I direct and declare that my said trustees or trustee shall stand seized and possessed of the said respective shares in my real and personal estates to which such sons respectively were entitled upon trust for such child or children of my said sons respectively as shall attain the age of twenty-one years and such child or children of each of my said sons respectively dying under the age of twenty-one years as shall attain that age or die under that age leaving issue and if more than one in equal shares and proportions as between brothers and sisters, but so that the child or children collectively of any deceased child of my said sons respectively

H. C. OF A. 1905.

SMIDMORE v. SMIDMORE.

shall take such share only as their parent would have taken if living."

The difficulty arises upon the provision which I have just read. One view of the construction of that provision is that the intention of the testator was to divide the estate amongst such children of his sons as attained the age of twenty-one, and such children of any son's children dying under twenty-one as should attain the age of twenty-one, or should die under that age leaving issue. If that is the true construction it is admitted to be an infringement of the rule against perpetuities. But in order to arrive at that construction it is necessary to insert certain words in the direction, so as to make it read thus: "Upon trust for such child or children of my said sons respectively as shall attain the age of twenty-one years and such child or children of *any child or children of* each of my said sons respectively dying under the age of twenty-one years as shall attain that age or die under that age leaving issue," inserting the words "any child or children of." There are, no doubt, cases in which words may be inserted in a will, if necessary, to give effect to the intention of the testator. But if these words are inserted the whole provision is rendered void. Another construction has been suggested. It is said that, if one approaches the construction of this will without any preconceived ideas as to what the testator meant to do, it is possible to read it without infringing the rule against perpetuities. A third view is that it is impossible to say which construction is the correct one, and that, as it stands, it is altogether uncertain what the testator meant, and therefore we should hold the direction void on that ground. We are informed also that in a previous suit in which the construction of this same will was involved, the Chief Judge in Equity came to the conclusion that either on the ground of infringement of the rule against perpetuities or on the ground of uncertainty the provision was void, without determining which construction was the proper one, and the decision now under appeal to us was based upon that conclusion. But, although no direction was asked for by the appellant or the respondents on this point, it appears upon the originating summons, and is admitted on both sides to be before us for determination.

On the assumption that this direction was void it was contended

for the appellant, that if it is void, then the absolute estate given by the original will remains. As an authority for that we were referred to the case of *Hancock* v. *Watson* (1).

There is no doubt about the rule; and, although it is clear that in one sense the testator intended to revoke the original gift to his sons, yet it is equally clear that he did not intend to revoke it except so far as he could give effect to the new disposition contained in the codicil, that is to say, that he intended something analogous to what is called in Probate proceedings a dependent relative revocation. In that view the result would be that there was substituted for the original absolute gift, a gift of the income for life until attempted alienation, in which case the income was to go over to the persons named, and a gift after the death of the son to his representative. It was contended for the appellant that such a provision in effect made a single estate, and that any condition against alienation of any part of it was void. But there is no authority for that proposition. There is no reason that we can see why a testator, if he pleases, should not divide the whole interest in his real estate into two parts, one for life and another in remainder, nor why he should not give them successively to the same person. It is clear that in creating a life estate a testator may direct that the income be paid to the devisee for life until he attempts to alienate, with a gift over if that should happen. Upon the construction which for this purpose we assume to be correct, the testator has attempted to give the estate in remainder to the same person. There is no reason of common sense why a testator should not make such a disposition if he likes, and there is no rule of law to the contrary with which we are acquainted. The only rule which approximates to it is the rule in *Shelley's case* (2). But that is a technical rule only to be followed where certain technical words are used. There is, therefore, no reason why the testator should not have given this property to his son for life until attempted alienation, with a direction for the payment of the income during the son's life to other persons in case of such attempted alienation, and a gift in remainder to the son himself after his death. That is the conclusion to which the learned Judge came, and so far we agree with

(1) (1902) A.C., 14.

(2) 1 Rep., 93*b*.

H. C. OF A. 1905.

SMIDMORE v. SMIDMORE.

him. In that view the income would, in the event of an attempt to alienate, be payable to the son's wife during the son's life subject to the discretion of the trustees, and, subject to that, it would go to the persons to whom it was given under the direction which I have read. It is not disputed that, so far as that direction relates to the life estate, it is not void as infringing the rule against perpetuities. The decision of the learned Judge, therefore, on that point is correct. But we are called upon to say whether the learned Judge was right in holding that the last direction was void either as contravening the rule against perpetuities or as being unintelligible. We proceed to consider the words of the provision from that point of view.

The duty of the Court in construing a will is to ascertain, if possible, what the testator meant, without preconceived ideas as to his meaning, and to give effect as far as possible to his intention as declared in the will. In the present case we know what he desired to do, because he has told us. He wished to dispose of his property amongst his sons in such a way as to prevent an intestacy, and to render the gifts inalienable as far as possible. It appears that it was present to his mind that there were limits beyond which the law would not allow that intention to be carried out. He therefore gives the real estate upon trust for such child or children of his sons respectively as should attain the age of twenty-one years. So far there was a vested estate to the child or children of a son attaining twenty-one years. Then he goes on: "And such child or children of each of my said sons respectively dying under the age of twenty-one years," indicating that it was his intention to deal with another class, that is to say, the children of his sons who did not attain the age of twenty-one years. Then came the words "as shall attain that age or die under that age leaving issue." That cannot stand of course, because if a child dies under twenty-one, he does not attain that age. It is a well known rule that, where words in a will are otherwise not sensible, or seem to be incongruous or irreconcilable with plain provisions, they may be rejected. The rejection of the words "attain that age or" would be entirely in accordance with that rule. If we leave them out we get this: "For such child or children of my said sons respectively as shall attain the age of

twenty-one years and such child or children of each of my said sons respectively dying under the age of twenty-one years as shall die under that age leaving issue." If there were no rule against perpetuities, and no difficulty arising in the application of the suggested rule, there would be little doubt, if that were all that was in the will. There could be little doubt that there was a gift to the children of the sons attaining the age of twenty-one years or dying under that age leaving issue, although, it is true, that might have been expressed in shorter words. Bnt the fact that the testator made use of cumbrous and voluminous expressions to express his intention is no reason for declining to give effect to the words he has used.

It is contended for the appellant that, if the language is to be modified at all, the words "any child or children of" should be inserted before the words "each of my said sons respectively." If those words are inserted we have the result that the gift is void. Why then should they be inserted? If the whole of the context shows that there must be some words inserted the Court may insert them. There have been instances in which Courts have done so. But it is a consideration that must not be left out of mind, that the testator's intention was only to tie up the land as far as the law allowed him to do so. The will was evidently drawn up by a conveyancer, or by some one acting under the instructions of a conveyancer, and, if the words inserted are read in, it would have been merely a copy of a common form to be found in the books of precedents, the effect of which would have been to defeat the intention of the testator. And when we find a conveyancer has taken a common form, and has struck out of it the words which if left in would have rendered the provision bad, surely we are not justified in saying that they were struck out by accident rather than for a purpose. If they were left out on purpose, then the Court would be doing a very strong thing in saying that although the testator, having his attention called to the fact that the retention of these words would make the disposition void, struck them out, we should nevertheless reinsert them. That certainly ought not to be done unless the Court is compelled to do it, and as the words are intelligible without the insertion of the words suggested, it seems to us that we ought to read them as

H. C. OF A. 1905.

SMIDMORE v. SMIDMORE.

they stand. On that subject I will read a passage from the judgment in *Towns* v. *Wentworth* (1): "When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions cannot be discarded or modified; and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will, sufficiently declared." So far then, if there were nothing more in the will, we are of the opinion that it should be read as a gift to the children of the sons attaining the age of twenty-one years or dying under that age leaving issue, and that the words "attain that age or" should be rejected, as having crept in by accident or inadvertence.

But another difficulty is raised by the concluding words, "but so that the child or children collectively of any deceased child of my said sons respectively shall take such share only as their parent would have taken if living." Those words seem to assume that the issue of all grandchildren dying under 21 years would otherwise take by an original gift, and to say that this should not be so, but that the children of each son should take his parents share in substitution for him. Now, there is a well-known rule of construction that a gift given in clear words cannot be cut down by a subsequent ambiguous one. Whether the first gift is clear or not is in each case a matter of opinion. If it is sufficiently clear to enable the Court to give effect to it, then the rule applies, although its application may be somewhat difficult under the words in the later part of the will. The principle was clearly stated by Lord Justice *James* in the case *In re Bywater*; *Bywater* v. *Clarke* (2) where he said: "My view is this, that this is not a case of two inconsistent gifts, a gift of something in one clause and a different gift of the same thing in another clause, in which case, no doubt,

(1) 11 Moo. P.C.C., 526, at p. 543. (2) 18 Ch. D., 17, at p. 24.

the rule is that the latter clause, if a Judge can find nothing else to assist him in determining the question, is to prevail, as being the last expression of the testator's wish. This does not appear to me to be a question of that kind. It is not a question of difference between two gifts, but there is a gift and a direction how that gift is to be paid, which direction is inconsistent with the language of the gift itself. The question is whether that which is a mere direction as to the mode of payment is not to be struck out as a superfluous inconsistency and an inaccuracy, because the giving effect to it would alter entirely the nature of the gift and make the gift itself totally different from that which it purports to be." Of course that case and this are different, but the principle is applicable to the present case. A similar rule is stated in *Jarman on Wills*, 5th ed., p. 449: "It is to be observed, too, that a devise of lands, in clear and technical terms, will not be controlled by expressions in a subsequent part of the will, inaccurately referring to the devise, in terms which, had they been used in the devise itself, would have conferred a different estate, if the discordancy appear to have sprung merely from a negligent want of adherence to the language of the preceding devise." Those are not the exact words of any Judge, but they appear to us to lay down a sound rule of construction. So that if these words are construed by applying the rule that a clear gift is not cut down by subsequent ambiguous words or by words used inaccurately or from want of attention, the gift to the children of sons dying under twenty-one years is not cut down by the passage with which we are now dealing. Another reason may be given why we should not hold that the original gift is cut down by these words so as to produce an uncertainty or failure of the gift. It is possible to construe these words as really giving a gift by substitution to the issue of the children who die under twenty-one years, by treating the word "only" as surplusage, and reading "so that the child or children collectively of any deceased child of my said sons respectively shall take such share as their parent would have taken if living." That would be a substitutional gift to them, and would clearly be good. Whether that is the true construction or not may be a question for discussion if and when any child dies under twenty-one years and leaves issue, and the question

H. C. OF A. 1905.

SMIDMORE v. SMIDMORE.

arises whether the child's share goes to his representatives or to his issue. But the time at present is not ripe for considering that point. On the whole will we can see no sufficient ground for saying that this provision is uncertain or unintelligible, nor can we see any sufficient reason for interpolating the words suggested so as to make the provision invalid, or for refusing to give effect to the plain *primâ facie* meaning of the words in which the gift is contained.

The result is that in our opinion the testator has succeeded in what he tried to do, *i.e.*, in giving an estate to his sons for life with a valid gift over in the event of attempted alienation. The question which the learned Judge decided does not, in that view, really arise. The result, so far as relates to the payment of the money out of Court, which is the object of the present proceedings, is that the appellant fails. But, holding the view we do of the construction of the will, the questions must be answered in a different manner. The first declaration in the order was that there is no valid trust in favour of the children or remoter issue of the plaintiff in respect of the real estate devised to him. That must be varied by declaring that there is a valid trust in favour of the children or remoter issue of the plaintiff. That, we think is all that it is necessary for us to order.

Harvey for the appellant asked that the decree might be reformed in accordance with the Court's decision.

GRIFFITH C.J. The declaration will be that the plaintiff had an estate for life determinable on attempted alienation, with remainder to his children or remoter issue. We do not make any declaration as to who are the members of the class of persons entitled. The costs of this appeal should come out of the share of the appellant.

Order varied accordingly.

Solicitors, for the appellant, *Makinson & Plunkett.*

Solicitors, for the respondents, other than J. S. Smidmore, *Makinson & Plunkett.*

J. S. Smidmore solicitor in person.

C. A. W.