[HIGH COURT OF AUSTRALIA.]

SMIDMORE . . . . . APPELLANT;
DEFENDANT,

AND

MAKINSON AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 13, 14.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Will—Construction—Gift of income—Direction that maintenance only shall be paid until twenty-five—Accumulations.

A testator gave, subject to an annuity to his wife for life, the income of his real and personal estate to trustees upon trust for his two children in equal shares, "but so that up to the age of twenty-five years it shall be employed as far as necessary for their maintenance, and after that age to pay it to them for life," and after their death, the whole estate to the children's issue in certain shares.

Held, that there was an absolute gift of the income to the children in equal shares, and each child was absolutely entitled, on attaining the age of twenty-one, to the accumulations of the balance of rents and profits arising from half the estate over and above what had been expended on his or her maintenance.

Gosling v. *Gosling*, (John., 265), applied.

Order of *A. H. Simpson* C.J. in Equity varied.

APPEAL from a decision of *A. H. Simpson* C.J. in Equity upon an originating summons.

A testator by his will gave his real and personal estate to trustees upon trust out of the income thereof to pay an annuity to his wife, and subject thereto as to the income of his real and personal estate as follows:—"Upon trust for my two children

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Albert and Vera in equal shares but so that up to the age of twenty five years it shall be employed so far as necessary for their maintenance and after that age to pay it to them for life. And after the death of each of my children I give one-half of my real and personal estate to his or her children as he or she may by deed or will appoint and in default of appointment in equal shares, or if he or she shall have no issue then to such person or persons as he or she may by deed or will appoint. If either of my children die without issue and without exercising these powers of appointment then his or her share shall go to increase the share of the other and his or her issue." Then followed provisions for failure of issue and default of appointment. The child A. having attained the age of twenty-one claimed to be then entitled to the accumulations of the balance of the rents and profits arising from one-half of the estate over and above what had been expended or applied for his maintenance.

The trustees took out an originating summons for the determination of the questions:—(1) whether upon the true construction of the will the children were entitled to the balance of rents and profits of the residuary real and personal estate of the testator over and above what was necessary for their maintenance respectively or whether the same should be added to the corpus of the estate; (2) whether the trustees were bound to pay to Albert Smidmore the accumulations of rents and profits arising from one-half of the estate over and above what had been expended for his maintenance before he attained the age of twenty-five years; and (3) a question as to the duty of the trustees in regard to the investment of the accumulations of the share of the other child Vera until she attained the age of twenty-one.

Upon the summons coming on to be heard, *A. H. Simpson* C.J. in Equity declared that the children were only entitled respectively to so much of the income as was necessary for their maintenance until they respectively attained the age of twenty-five years, and that the balance of the income unexpended should be accumulated and added to the capital of the estate.

The declaration as to the duty of the trustees in answer to the third question submitted is not material to this report.

From this decision the present appeal was brought to the High Court.

Cullen K.C., *Rich* and *Sheppard*, for the appellant. The appellant, having reached the age of twenty-one, is entitled to the accumulations of income from his share of the estate. The will makes no provision for giving them to any other person, and consequently there is an absolute gift to him: *Gosling* v. *Gosling* (1); *In re Couturier*; *Couturier* v. *Shea* (2); *In re Williams*; *Williams* v. *Williams* (3); *In re Johnston*; *Mills* v. *Johnston* (4); *Montgomerie* v. *Woodley* (5); *Wharton* v. *Masterman* (6); *Saunders* v. *Vautier* (7); *In re Sanderson's Trust* (8) is distinguishable. It was clearly the intention of the testator that there should be equality in the shares of the two children, but, if the accumulations are allowed to go into the corpus to be divided when the children become entitled, there will be inequality. There being an absolute gift of half the income to each child, the provision as to maintenance should be regarded merely as a direction as to the manner in which part of the shares is to be applied until the children reach the age of twenty-five, and there being no gift over of the balance, the attempt to postpone the enjoyment of each child's share beyond the age of twenty-one is inoperative, on the authorities cited. [They referred also to *In re Humphreys*; *Humphreys* v. *Levett* (9), and the *Trustee Act* (No. 4 of 1898), sec. 18.]

[HIGGINS J. referred to *In re Wells*; *Wells* v. *Wells* (10).]

The proper practice where one only of several defendants appeals is that the Court will make an order as to the rights of all who have had notice: *Bective* (*Countess of*) v. *Hodgson* (11); *Quick & Groom on Judicial Power*, p. 432; *In re Cavander's Trusts* (12); *Tasker* v. *Small* (13).

Knox K.C. and *Harvey*, for the respondents. No doubt a testator cannot postpone the enjoyment of an absolute gift after

(1) John., 265.
(2) (1907) 1 Ch., 470.
(3) (1907) 1 Ch., 180.
(4) (1894) 3 Ch., 204.
(5) 5 Ves., 522.
(6) (1895) A.C., 186.
(7) 4 Beav., 115; Cr. & Ph., 240.
(8) 3 Kay & J., 497.
(9) (1893) 3 Ch., 1.
(10) 43 Ch. D., 281.
(11) 10 H.L.C., 656.
(12) 16 Ch. D., 270.
(13) Coop. *temp.* Cott., 61.

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the beneficiary reaches the age of twenty-one, but upon the proper construction of this will, the intention of the testator was that until the children reached the age of twenty-five they were only to have such portion of the half-share as the trustees thought fit to allow them. There is no absolute gift of the income until the children reach twenty-five. The gift is to trustees with certain directions. The question is, what is the meaning of the whole sentence containing the provision? If it is fairly open to the meaning that the testator does not give the whole income, then the rule in *Gosling* v. *Gosling* (1) will not apply to defeat the obvious intention of the testator that the children are not to receive more than is necessary for their maintenance till they reach the age of twenty-five.

[GRIFFITH C.J. referred to *Saunders* v. *Vautier* (2).]

There there was an absolute gift in the body of the will, and an attempted modification of it in the codicil, whereas in the present case there is no such separation.

[HIGGINS J.—That construction may involve an intestacy, as there is no gift of the income until the children are twenty-five.]

There is no intestacy, as the gift of the real and personal estate after the death of the children will cover the accumulations of unapplied income. A future gift of the whole estate is a residuary gift and carries with it intermediate profits. [They referred to *In re Sanderson's Trust* (3); *Re Stanger*; *Moorsom* v. *Tate* (4); *Theobald on Wills*, 7th ed., p. 182.] The unapplied income should go to swell the corpus of the whole estate. The fair meaning of the words of the will is that until twenty-five the income should be pooled, and after that age given in equal shares. The other construction gives no effect at all to the words after "but so that."

As to the point of practice, the Court is bound to declare for the defendant who does not appeal if the appeal of the other defendant is allowed: *In re Rawlins' Trusts* (5).

Cullen K.C., in reply. Upon the respondent's construction

(1) John., 265.
(2) 4 Beav., 115; Cr. & Ph., 240.
(3) 3 Kay & J., 497.
(4) 64 L.T., 693.
(5) 45 Ch. D., 299, at p. 305.

there would be an intestacy, and that will always be avoided by the Court if possible.

GRIFFITH C.J.—We think that the third question would be better left unanswered, as it really involves matters of discretion.

The question for our determination is purely one of the construction of the words of a will, which are very brief. The testator gave his real and personal estate to trustees upon trust out of the income to pay an annuity of £800 per annum to his wife for life and subject thereto as to the income of his real and personal estate "upon trust for my two children" (Albert and Vera) "in equal shares but so that up to the age of twenty-five years it shall be employed so far as necessary for their maintenance . . . . and after the death of each of my children I give one half of my real and personal estate to his or her children as he or she may by deed or will appoint and in default of appointment in equal shares, or if he or she shall have no issue then to such person or persons as he or she may by deed or will appoint," and so on.

The question arises whether under these circumstances one of the children who has attained the age of twenty-one years is entitled to the accumulations of income of his share since the death of the testator. The trustees submit to the Court the question whether they are justified in paying the accumulations to him or whether the true construction of the will is that they should only pay him until he attains the age of twenty-five years such sum as they think proper for his maintenance up to that age. The learned Judge whose decision is appealed from took the latter view. We have not been favoured with the reasons for his decision, but as we differ from his conclusion I will state briefly my reasons.

It appears to me that the case is covered by authority. In the case of *Gosling* v. *Gosling* (1) of which nobody disputes the authority, *Wood* V.C. expounded the doctrine thus: (I read from the speech of *Lord Herschell* L.C. in *Wharton* v. *Masterman* (2)). "'The principle of this Court has always been to recognize the right of all persons who attain the age of twenty-

(1) John., 265, at p. 272.

(2) (1895) A.C., 186, at p. 192.

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one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:—unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full as soon as they attain the age of twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that as to the previous rents and profits there has been an intestacy—the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.'" I may remark that the case of *Gosling* v. *Gosling* (1) laid down the principle in very wide terms, much wider than the precise occasion called for. Lord *Herschell* went on thus (2):—"The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had some other destination of the income during the intervening period.

"It is needless to inquire whether the Courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognized that it would not be proper now to question it." In the same case Lord *Davey*, referring to the case of *Saunders* v. *Vautier* (3), which was to some extent the foundation for the decision of *Wood* V.C., after referring to the attempt to postpone the enjoy-

(1) John., 265.

(2) (1895) A.C., 186, at p. 193.

(3) 4 Beav., 115; Cr. & Ph., 240.

ment of the gift, said (1):—"This being so, the principle of *Saunders* v. *Vautier* (2) would at once be applicable if this were the case of a gift to an individual. That principle is this: that where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit. The principle is stated, as well as elsewhere, by Lord *Hatherley* in the passage from his judgment in *Gosling* v. *Gosling* (3), which was read by *Lindley* L.J. in the Court of Appeal. . . . The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest."

The words relied upon in the present case have been read. It is suggested that they mean that until the children attain the age of twenty-five years the trustees are to determine how much of the income they will give them for maintenance. Probably it was the intention of the testator that they should do so. But what has he done with respect to the rest of the income? Giving the fullest effect to his meaning, as suggested, he must either have intended that when the children respectively attained the age of twenty-five years, the accumulations should be paid to them, or he has made no disposition at all on that subject, in which case they must fall into and become part of his estate, with the result that either there is a partial intestacy, or the accumulations of each child's share will be added to the total estate and divided equally between the two, which would produce an inequality. If the view that an intestacy resulted were taken, that might result in a provision for the same or different persons. Now the Court always leans against an intestacy, and the Court in this case, I think, is bound to say that the testator did not intend that there should be inequality. The estate is said to be a very valuable

(1) (1895) A.C., 186, at p. 198. (2) 4 Beav., 115; Cr. & Ph., 240.
(3) John., 265.

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one, so that the savings out of each child's share may be very large. Upon the alternative construction contended for, the brother, who first reached twenty-five years, would get half of the savings out of his sister's share. But the dominant words of the gift are "upon trust for my two children . . . . in equal shares." I think, therefore, that any construction that leads to such a result is directly excluded.

The only other construction is that the testator intended that the surplus should be accumulated until the child attained the age of twenty-five years. If that is the true construction it is not disputed that the rule in *Gosling* v. *Gosling* (1) applies.

For these reasons I think that the proper answer to the question is that upon the true construction of the will Albert is entitled to the balance of the rent and profits of his share with the accumulations at once, and Vera to the balance and accumulations of hers when she attains the age of twenty-one years.

O'CONNOR J. I am of the same opinion. I think it is impossible to give effect to the construction for which Mr. *Knox* contended without violating the dominant idea of the will, that is to say, that there should be equality in the distribution of this income from the time of the testator's death. There can be no doubt, I think, about the testator's intention as gathered from the words he has used. His intention was that this income should be given from the time of his death to the two children in equal shares, but that the trustees should not hand it over finally until each child attained the age of twenty-five years, and in the meantime should allow them only so much as should be necessary for maintenance in the judgment of the trustees. That seems to me a perfectly reasonable and sensible provision. It is also beyond question that, if the rule expounded by *Wood* V.C., in *Gosling* v. *Gosling* (1), applies, law will not allow the testator to carry out an intention of that kind to its full extent, though he may carry it out to the extent of leaving a discretion to the trustees as to the amount each beneficiary is to receive until he attains the age of twenty-one. I see nothing in the circumstances or terms of the will to take the case out of the rule in

(1) John., 265.

Gosling v. *Gosling* (1). There is therefore only one way of construing the provision, that is, that the accumulations of income shall be paid over to each child at the age of twenty-one. I, therefore, agree in the answer suggested by my learned brother the Chief Justice.

ISAACS J. I am of the same opinion. There is no rule or question of law involved in this case at all. Both sides agree that, once the proper construction of the direction is arrived at, a certain legal result must follow. In regard to the construction of the will, I read it to mean this, so far as is material to the present case, that the primary intention of the testator was to benefit his children equally ; and, having done that, he proceeded further to prescribe, so far as he could, what he thought a most careful mode of limiting the enjoyment of the property he had given. Well, if that is the true result, and I think it is, of the will in its proper construction, then it follows inevitably and admittedly that *Gosling* v. *Gosling* (1), applies. I see nothing more in the case, and for these reasons I agree in what has been said by the Chief Justice as to the answers that must be given to the questions submitted.

HIGGINS J. I am of the same opinion. The question in this case has arisen because the son has reached the age of twenty-one and wishes to have the whole of his half-share paid to him, in place of such sum as may be allowed him for maintenance.

Two questions are involved, one as to the construction of the will, and the second as to the law. As I understand counsel for the respondent trustees, the learned Judge has not disputed the rule of law to which my learned brother the Chief Justice has referred. But the construction of the will was certainly open to debate. The question was this, does the will merely give to each child a sum sufficient for its maintenance until the age of twenty-five, or does it give the whole income to these children, with a direction that they are only to receive the benefit of so much as is required for their maintenance until the age of twenty-five. The cases referred to by the Chief Justice show that a direction to that effect would be invalid.

(1) John., 265.

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With regard to the question of construction, after looking at the will, I have no hesitation in coming to the conclusion that the provision in question is a gift of the whole income to the children. It gives the whole of the real and personal estate to trustees upon trust to pay a certain annuity to the testator's wife, and subject thereto as to the whole income upon trust for his two children in equal shares. That would be a substantive gift of the income but for the words that follow. What is the effect of those words? Do they simply prescribe the manner in which the trustees are to give the income in equal shares? I think that the words, "but so that up to the age of twenty-five years it shall be employed so far as necessary for their maintenance" &c., do not qualify the gift of the income, but merely prescribe the manner in which that income is to be enjoyed. That is the meaning which I gather from a consideration of the whole will. But, if that is the meaning, it is a direction which the law will not allow to have effect. Further, I agree that, if the construction the respondents have put upon the direction were allowed to take effect, it would result in either an intestacy or inequality. I agree, therefore, that the first and second questions should be answered in the affirmative.

GRIFFITH C.J. Question (1) will be answered that the defendants mentioned are entitled to the balance of rents and profits of the estate over and above what is necessary for their maintenance respectively; question (2) that the plaintiffs are bound to pay to the defendant Albert Smidmore the accumulations of rents and profits arising from one half of the estate over and above what has been expended for his maintenance before he attains the age of twenty-five years. Question (3) the Court does not think it necessary to answer.

Order appealed from varied accordingly. Costs of all parties as between solicitor and client to come out of the estate.

Solicitors, for the appellant, *Curtiss & Barry.*

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

C. A. W.