[HIGH COURT OF AUSTRALIA.]

RILEY . . . . . APPELLANT;
DEFENDANT,

AND

FRASER AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1913.

MELBOURNE, *March* 16, 17.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Will—Interpretation—Direction to accumulate in certain event—Intestacy.

A testator by his will gave certain real estate to trustees upon trust to pay the net rents and profits to his wife during her life, and after her death to pay the net rents and profits to his daughters "so long as the present wife of my son . . . shall live or remain his wife and on the death of my said son's said wife or her ceasing to be his wife or if she shall predecease my wife then to accumulate the said rents for a period of five years from the time of her death or of her ceasing to be my said son's wife whichever event shall first happen if she survive my wife or from my wife's death if my said son's wife shall predecease her," and he then directed what was to be done with the accumulations at the end of five years. At the time of the testator's death his son was living with a woman as his reputed wife, having gone through the ceremony of marriage with her. The marriage was invalid because she was already married, and this fact was discovered after the testator's death, but before the death of the testator's wife.

Held, that the person referred to in the will as "the present wife" of the testator's son was his reputed wife, that she ceased to be his wife, within the meaning of the will, when the fact of her previous marriage was discovered, that the accumulations should begin on the death of the testator's wife, and that there was no intestacy in respect of such accumulations.

Decision of the Supreme Court of Victoria (*Madden* C.J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Joseph Riley, who died on 27th October 1898, by his will, dated 3rd October 1898, gave to his trustees his farm at Spring-

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mount, near Creswick, Victoria, "Upon trust to pay the net rents and profits thereof to my wife during her life and after her death to pay the net rents and profits of the said property to my said daughters Margaret Annie and Jessie so long as the present wife of my son Joseph shall live or remain his wife and on the death of my said son's said wife or her ceasing to be his wife or if she shall predecease my wife then to accumulate the said rents for a period of five years from the time of her death or of her ceasing to be my said son's wife whichever event shall first happen if she survive my wife or from my wife's death if my said son's wife shall predecease her and if at the end of the said period of five years my trustees shall be of opinion that my said son has conducted himself soberly and steadily during same Then to pay him the said accumulations of rents and also so long as he shall live the net rents and profits to be derived from the said property thereafter and on his death to hold the said property for children in equal shares as tenants in common but if they should be of opinion that he has not during the said period conducted himself soberly and steadily then as to the accumulations of the rents during that period and the said property In trust for his children in equal shares as tenants in common and in case there should be no children of my said son and as to future rents and profits of the said property until any shall be born to him in trust for my said daughters Margaret Annie and Jessie in equal shares as tenants in common."

It appeared that at the date of the death of the testator and for over three years prior thereto his son Joseph Riley and one Katherine Hourigan, who was the person referred to in the will as "the present wife of my son Joseph," had lived together ostensibly as man and wife, although they had never been legally married, and that they continued to live together as man and wife until some time in the early part of 1904, when they separated, and from that time lived apart; that it was not known whether Katherine Hourigan was still living; that the testator's wife died on 30th November 1906; and that Joseph Riley was unmarried and had no children.

An originating summons was taken out by Alexander Fraser

and Margaret Riley, the executor and executrix, to obtain the determination of the following question (*inter alia*) :—

"In regard to the rents of the said farm accrued since the death of the widow of the testator and with regard to the future rents of the said farm or any of such rents, did the testator die intestate ?"

The summons was heard by *Madden* C.J., who answered the question in the negative.

From this decision Joseph Riley, who was one of the defendants to the summons, now appealed to the High Court.

Schutt, for the appellant. The existence of the actual relationship of husband and wife between the appellant and his reputed wife was a condition precedent to the accumulation of the rents and the gift over to the testator's daughters. If the period at which the gift was to operate could never happen the gift is inoperative. [He referred to *In re Boddington* ; *Boddington* v. *Clairat* (1) : *Leake on Property in Land*, 2nd ed., p. 168.]

[ISAACS J. referred to *In re Hammond*; *Burniston* v. *White* (2).]

Pigott, for the respondents. The person designated in the will as the appellant's wife was the woman who was living with him as his reputed wife, and she ceased to be such wife as soon as it became known that she was not his wife. As that fact became known before the death of the testator's widow, the direction for accumulation came into operation on the death of the widow, and was perfectly valid.

Schutt, in reply, referred to *In re Moore*; *Trafford* v. *Maconochie* (3).

GRIFFITH C.J. The testator, who died in 1898, by his will gave a farm to trustees in these terms: "Upon trust to pay the net rents and profits thereof to my wife during her life and after her death to pay the net rents and profits of the said property to my said daughters Margaret Annie and Jessie so long as the present wife of my son Joseph shall live or remain his wife and on the death of my said son's said wife or her ceasing to be his wife

(1) 25 Ch. D., 685.
(2) (1911) 2 Ch., 342.
(3) 39 Ch. D., 116.

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or if she shall predecease my wife then to accumulate the said rents for a period of five years from the time of her death or of her ceasing to be my said son's wife whichever event shall first happen if she survive my wife or from my wife's death if my said son's wife shall predecease her," and he then directed what was to be done with the accumulations at the end of five years. The life estate of the testator's wife took precedence of everything, and continued until the year 1906. At the time of the testator's death his son Joseph Riley had living with him a woman whose name is said to have been Katherine Hourigan, and who was his reputed wife. In my opinion the words "the present wife of my son Joseph" mean Katherine Hourigan. We know now that she was not Joseph Riley's wife. That, in my opinion, is *falsa demonstratio.* So that the words "so long as the present wife of my son Joseph shall live or remain his wife" mean so long as Katherine Hourigan lives and remains Joseph Riley's wife. The subsequent words show that "or" in that sentence should be read "and." It is not known whether Katherine Hourigan is alive or dead, but she was alive when the testator died. The interest given to the daughters therefore vested at once, although possession was postponed until the termination of the life estate of the testators's widow. Having vested, it was to continue until it was terminated either by the death of Katherine Hourigan or by her ceasing to be the wife of Joseph Riley. We do not know whether she is dead. During argument I put the possible case of a will made in similar terms where there had been what was supposed to be a valid marriage of the son to a reputed wife, and it turned out after the death of the father that the reputed wife had been married before, so that her marriage with the son was invalid. It turns out according to the affidavits not printed in the record, that those are the exact facts of this case. It seems to me that under those circumstances the reputed wife ceased to be Joseph's wife within the meaning of the will as soon as those facts were discovered. I think, further, that even if the facts were not so, she ceased to be his wife within the meaning of the will as soon as it became manifest that the reputed relationship between them was not the true one. I think, therefore, that the time for accumulation would have begun as

soon as she ceased to be Joseph Riley's reputed wife, which was in 1904. But at that time the testator's widow was still living, and, as her life estate took precedence, the accumulation could not actually begin until her death, nor could it, in my opinion, be notionally antedated.

The learned Chief Justice's opinion that there was not an intestacy as to the accumulations of the rents is therefore right, and the appeal should be dismissed.

BARTON J. It is impossible to give a confident opinion upon a will of this kind, but I think that, on the whole, the construction put upon it by the Chief Justice of the Supreme Court is correct, especially in view of the presumption against intestacy.

ISAACS J. I also think that the order made by the Chief Justice of the Supreme Court was quite right. I think the words "present wife" point to a definite person, Katherine Hourigan, and I think that the words "remain his wife" and "ceasing to be his wife" were used for the same reason, viz., that she was designated his wife, and so have to be applied to the circumstances of the case. Being so applied, I agree that in the events that have happened Katherine Hourigan has ceased to be the wife of Joseph Riley.

GAVAN DUFFY J. Had it not been for the unanimous opinion of the other members of the Court, I should have been disposed to think that the testamentary dispositions we are considering failed because Joseph Riley and Katherine Hourigan were not in fact husband and wife. I am not, however, so confident on that point as to feel justified in dissenting from the judgments which have already been delivered.

Appeal dismissed with costs.

Solicitors, for appellant, *Fink, Best & Hall.*

Solicitor, for respondents, *A. Phillips* for *Pearson & Mann*, Ballarat.

B. L.