[HIGH COURT OF AUSTRALIA.]

REID . . . . . APPELLANT;
DEFENDANT,

AND

EARLE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1914.

MELBOURNE, *March* 19, 20; *June* 26; *Sept.* 8.

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

Will—Gift to class—Remoteness—Rule against perpetuities—Period of distribution.

By his will a testator gave the residue of his property to his trustees with directions for conversion and to invest during the life of his widow and upon her death or second marriage, "hereinafter termed the time of distribution," to convert all investments into money and after payment of the expenses of conversion to divide the residue of the moneys into three equal parts, to which he afterwards referred as "such three original parts." He directed one of the three original parts to be further divided into six equal shares, two of which he directed to be invested and "the resulting income accumulated for the children of" R. "and his present wife who shall attain the age of 25 years the share of each child to be paid to him or her upon his or her attaining that age and should no child of" R. "attain that age I direct that such two shares be equally divided among" certain institutions. By a later clause the testator authorized any of the beneficiaries under his will "who may not at the time of distribution be entitled to receive his or her share by reason of his or her being under the age of 25 years" to dispose of it by will before attaining that age. At the date of the will R. and his then wife had seven children, three of whom had attained the age of 25 years before the testator's death, and the others of whom attained that age before the death of the testator's widow, which occurred twelve years after the death of the testator. Mrs. R. was 57 years of age at the testator's death. R. was an executor of the will and had been a partner of the testator.

Held, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that the gift to the children of R. was a class gift, the attainment

H. C. OF A. 1914. REID v. EARLE.

of the age of 25 years being a condition of membership of the class, and that the gift was void under the rule against perpetuities, for, looking at the circumstances as they existed at the date of the testator's death, the gift would not necessarily vest in the class within the period limited by the rule.

Decision of the Supreme Court of Victoria (*Hodges* J.): *In the Will of Deane*; *Earle* v. *Deane*, (1913) V.L.R., 272; 34 A.L.T., 207, on this point affirmed.

APPEAL from the Supreme Court of Victoria.

An originating summons was taken out by William John Earle, the surviving trustee of the estate of James Deane, deceased, to obtain the determination by the Supreme Court of a number of questions, including the following:—"As to the two shares by the will directed to be invested and the resulting income accumulated for the children by his then wife of Hugh Ronald Reid (now deceased) who should attain the age of twenty-five years, who is now entitled thereto? And particularly is such direction void for remoteness, and should the said share consequently be dealt with as under an intestacy of the testator or how otherwise?"

The testator made his will on 26th October 1898, and died on 27th February 1900. The material provisions of the will were as follow:—After giving certain immediate legacies to his wife he directed his trustees to convert the residue of his property within two years from his death, and after payment of certain further legacies to invest the residue of the moneys in their hands during the life of his widow, and upon her death or second marriage, "hereinafter termed the time of distribution," to convert all investments into money, and after payment of the expenses of conversion to divide the residue after conversion into three equal parts. As to one of such parts he directed that it should be divided into six equal shares "and that two of such six shares shall be invested and the resulting income accumulated for the children of the said Hugh Ronald Reid and his present wife who shall attain the age of twenty-five years the share of each child to be paid to him or her upon his or her attaining that age and should no child of the said Hugh Ronald Reid attain that age I direct that such two shares be equally divided among the said six institutions hereinafter named." The will subsequently contained the following provision:—"And I authorize any of the

beneficiaries under this my will who may not at the time of distribution be entitled to receive his or her share by reason of his or her being under the age of twenty-five years to bequeath such share by will in case of his or her death before he or she shall attain the age of twenty-five years."

Hugh Ronald Reid and William John Earle were appointed executors and trustees, and to them probate was granted. H. R. Reid died on 11th March 1910, and the testator's widow died on 6th August 1912 without having re-married. At the date of the testator's death the wife of H. R. Reid was alive, being then 57 years of age. There were then living seven children of H. R. Reid and his wife, of whom three had then attained the age of 25 years, and the others had attained that age at the death of the testator's widow. No other children were born after the testator's death.

The originating summons was heard by *Hodges* J., who held that the gift to the children of H. R. Reid was void for remoteness, and that the two shares were distributable as on an intestacy: *In the Will of Deane*; *Earle* v. *Deane* (1).

From that decision Hugh Ronald Reid, the younger, on behalf of and as representing himself and all other the children of H. R. Reid, appealed to the High Court.

The appeal was first argued before *Griffith* C.J. and *Barton*, *Isaacs* and *Gavan Duffy* JJ. on 27th February and 2nd and 3rd March, and was now by order of the Court re-argued before the same four Justices and *Rich* J.

The nature of the arguments appears in the judgments hereunder.

Schutt, for the appellant.

Weigall K.C. (with him *àBeckett*), for the respondent trustee.

Starke and *Sproule*, for the respondent Elizabeth Pryce, as representing the next of kin.

During argument reference was made to *Jarman on Wills*, 6th ed., vol. II., pp. 1661-1672; *Lill* v. *Lill* (2); *Bortoft* v. *Wads-*

(1) (1913) V.L.R., 272; 34 A.L.T., 207. (2) 23 Beav., 446.

H. C. OF A. 1914. REID v. EARLE.

worth (1); *Lewin on Trusts*, 12th ed., p. 884; *Gillman* v. *Daunt* (2); *Smidmore* v. *Makinson* (3); *In re Stephens*; *Kilby* v. *Betts* (4); *Theobald on Wills*, 7th ed., p. 306; *Elliott* v. *Elliott* (5); *Kevern* v. *Williams* (6); *In re Dawson*; *Johnston* v. *Hill* (7); *Hale* v. *Hale* (8); *Pearks* v. *Moseley* (9); *Picken* v. *Matthews* (10); *In re Barker*; *Capon* v. *Flick* (11); *In re Turney*; *Turney* v. *Turney* (12); *Ker* v. *Hamilton* (13); *In re Hume*; *Public Trustee* v. *Mabey* (14); *Coventry* v. *Coventry* (15); *Kingsbury* v. *Walter* (16); *In re Dawes' Trusts* (17); *Browne* v. *Hammond* (18); *In re Canney's Trusts*; *Mayers* v. *Strover* (19); *In re Mervin*; *Mervin* v. *Crossman* (20); *Blight* v. *Hartnoll* (21); *In re Norton*; *Norton* v. *Norton* (22); *In re Eve*; *Edwards* v. *Burns* (23); *Judd* v. *Judd* (24); *Vawdry* v. *Geddes* (25); *Dodd* v. *Wake* (26); *Porter* v. *Fox* (27); *Leake's Digest of the Law of Property in Land*, 2nd ed., p. 326.

Cur. adv. vult.

June 26.

GRIFFITH C.J. (whose judgment was read by *Barton* J.). The question raised in this appeal arises upon the same will that was under consideration in the case of *Brownfield* v. *Earle* (28). The testator, who died on 27th February 1900, by his will, dated 26th October 1898, after certain directions for conversion and payment of legacies, directed his trustees to invest the residue of the moneys in their hands until his wife's death or second marriage, and upon her death or second marriage, "hereinafter termed the time of distribution," he directed his trustees to convert all investments into money and after the payment of the expenses of conversion to divide the residue of the moneys into

(1) 12 W.R., 523.
(2) 3 Kay & J., 48.
(3) 6 C.L.R., 243.
(4) (1904) 1 Ch., 322.
(5) 12 Sim., 276.
(6) 5 Sim., 171.
(7) 39 Ch. D., 155.
(8) 3 Ch. D., 643.
(9) 5 App. Cas., 714.
(10) 10 Ch. D., 264.
(11) 92 L.T., 831.
(12) (1899) 2 Ch., 739.
(13) 6 V.L.R. (Eq.), 172; 2 A.L.T., 69.
(14) (1912) 1 Ch., 693.
(15) 2 Drew. & Sm., 470.
(16) (1901) A.C., 187.
(17) 4 Ch. D., 210.
(18) John., 210.
(19) 101 L.T., 905.
(20) (1891) 3 Ch., 197.
(21) 19 Ch. D., 294.
(22) (1911) 2 Ch., 27.
(23) (1909) 1 Ch., 796.
(24) 3 Sim., 525.
(25) 1 Russ. & M., 203.
(26) 8 Sim., 615.
(27) 6 Sim., 485.
(28) 17 C.L.R., 615.

three equal parts, of which he afterwards spoke as "such three original parts." He directed one of the three original parts into which he had directed his residuary estate to be so divided to be further divided into six equal shares, two of which he disposed of as follows:—"I direct . . . . that two of such six shares shall be invested and the resulting income accumulated for the children of . . . Hugh Ronald Reid and his present wife who shall attain the age of twenty-five years the share of each child to be paid to him or her upon his or her attaining that age and should no child of the said Hugh Ronald Reid attain that age I direct that such two shares be equally divided among the said six institutions hereinafter named."

By a later clause the testator authorized any of the beneficiaries under his will "who may not at the time of distribution be entitled to receive his or her share by reason of his or her being under the age of twenty-five years" to dispose of it by will before attaining that age. This power assumes, of course, that the beneficiary has attained 21.

At the date of the will Mr. and Mrs. Reid had seven children, three of whom had attained the age of 25 before the testator's death. The others attained that age before the death of the testator's widow, which occurred in 1912, so that the youngest was at his death not less than 16 years of age. Mrs. Reid was at the testator's death 57 years of age. Mr. Reid was an executor of the will, and, we were told at the Bar, was the testator's business partner. It may be reasonably inferred that the testator was acquainted with the state of the Reid family, and approximately with Mrs. Reid's age.

The learned Judge held that the gift failed on the ground that it was a gift to a class, or a class gift, as to which it was at the death of the testator impossible to say that all the persons to take under it must necessarily be ascertained within 21 years after the expiration of a life in being, that is, his widow, since the class included any children who might be born to Mr. and Mrs. Reid after his death and before the death of his widow, and who might at her death be under four years of age. He thought he was bound to assume the possibility of future children being born to Mrs. Reid. I venture to think that the question whether in such a

H. C. OF A. 1914. REID v. EARLE. Griffith C.J.

gift a testator's reference to the children of a lady of advanced age should not, in a state of facts such as the present, be construed as a reference to the children of whom he knows, may some day be reconsidered. (See *In re Eve*; *Edwards* v. *Burns* (1)). But I will deal with the case on the assumption made by the learned Judge.

Was, then, the gift in question a class gift in the sense in which that term is used with reference to the rule against perpetuities? I take the definition of a class gift from the judgment of *Fry* J. in *Bentinck* v. *Duke of Portland* (2): "Where there is a time fixed at which a fund is to be divided into separate shares, and that time is not obnoxious to the rule against perpetuities, there, as I conceive, each share stands separate from the others, and will take effect or not according as the dispositions of that share do or do not violate the rule against perpetuities; and I conceive it to follow that the valid gift of one share will not be made void by the invalid gift of another share, or of a portion of another share, to the donee of that first share. Further, I conceive it to be clear from the authorities that the case is quite different where the gift is what is called a class gift; and I conceive that it is a class gift where the total and ultimate amount of the share to be taken by any one donee cannot be ascertained until all the persons who are to take, and the ultimate proportions in which they are to take, are finally ascertained." To the same effect is the language of Lord *Selborne* L.C. in *Pearks* v. *Moseley* (3). He said that when the rule against perpetuities is set up the real question to be determined is "whether . . . you can or cannot sever the shares, whether you can, within proper limits of time, ascertain the whole number of the class—which is the same thing as the whole number of the shares—and whether it is, . . . 'in effect, a gift of a legacy to be divided into as many shares as there are children.' If that were so it would be good, because the children must necessarily be ascertained within due limits of time; and, as I said before, it would not signify what afterwards became of any particular share."

(1) (1909) 1 Ch., 796. (2) 7 Ch. D., 693, at p. 698.
(3) 5 App. Cas., 714, at p. 722.

In the present case it may be conceded that the words "the resulting income (shall be) accumulated for the children of the said Hugh Ronald Reid and his present wife who shall attain the age of 25 years," if standing alone, should be construed as a class gift. It is contended for the respondents that this is conclusive. But this contention offends against the first principles of construction, which require that regard shall be had to the whole will in order to see whether the *primâ facie* meaning of the words standing alone is qualified by the context or other parts of the will. The case of *Leake* v. *Robinson* (1), so much relied upon by the respondents, shows, as pointed out by the learned editors of *Jarman on Wills*, that it is not the description of the legatees as children that constitutes them a class, but the mode and conditions of the gift.

The question for determination, therefore, depends upon whether the words I have just read are qualified by the direction that at the time of distribution the whole of the investments were to be converted into money and the share of each child paid to him on attaining 25, coupled with the implicit assertion, made in the later clause of the will, of the testator's intention that the attainment of 25 should be the sole condition of the right to immediate payment, and the power conferred upon each child to deal with his or her share by will before attaining 25.

Neither in *Bentinck* v. *Duke of Portland* (2) nor in *Pearks* v. *Moseley* (3), nor, indeed, in any of the numerous cases cited, were there any similar provisions. The case of *Porter* v. *Fox* (4), in which there was a direction for immediate payment on attaining 25, is most like the present, but that case cannot be relied upon as establishing any principle. An appeal was brought from the decision, and was compromised. It is, at most, a decision on the construction of a particular will, and there is ground for thinking that the learned Vice-Chancellor did not pay sufficient attention to the rule, which was not perhaps then so firmly established as it now is, that the meaning of the testator is to be ascertained in the first place without any regard to the rule against perpetuities.

(1) 2 Mer., 363.
(2) 7 Ch. D., 693.
(3) 5 App. Cas., 714.
(4) 6 Sim., 485.

H. C. OF A. 1914. REID v. EARLE. Griffith C.J.

The case of *Kingsbury* v. *Walter* (1), in which the nature of a class gift was under discussion, is an instance of a case in which words that did not *primâ facie* import a class gift were, nevertheless, upon a consideration of the whole will and the surrounding circumstances construed as a class gift. The converse result is, of course, equally possible. In that case Lord *Davey* said (2):—"My Lords, another principle which is, I think, established in this branch of the law is, that all the interests of members of the class must vest in interest at the same time." It follows that if the testator's expressed intention is that the interests are not all to vest at the same time the gift is not a class gift. The word "vest" is, no doubt, used in different senses, but in whatever sense it is used the time of vesting cannot be later than the time at which the taker is entitled to immediate payment of his share. I think that it cannot, for the purposes of the rule, be later than the time at which he is entitled to dispose of his share.

In this case the testator has, in my opinion, manifested his intention that at the appointed time of distribution the whole fund should be turned into cash and distributed as far as then possible, and that the three children who had attained 25 at his death and any others who had attained that age in the meantime should receive their "shares" forthwith, and should not have to wait for another period of, possibly, 25 years before receiving anything from his bounty.

If this was his meaning it follows that the gifts to the children were not all to vest at the same time, but were to vest successively on their respectively attaining the age of 25.

It is said, however, that this construction cannot be accepted because the exact amount of the "share" cannot be ascertained until the number of takers is finally known. Here there seems to be some confusion of thought arising from the introduction of the rule against perpetuities, which, at this stage of the inquiry, is irrelevant. The question is what the testator meant by "share." In cases where the rule against perpetuities is not in question no difficulty arises as to the meaning of a "share" to be paid on attaining a prescribed age. For instance, in the case of a gift to

(1) (1901) A.C., 187. (2) (1901) A.C., 187, at p. 194.

all the children of A who shall attain 21, the share of each to be paid to him on attaining that age, the number of takers is closed when the first of them attains 21, because, as pointed out by *Wood* V.C. in *Gillman* v. *Daunt* (1), the child who has attained 21 cannot be kept waiting for his share, and when you have once paid it to him you cannot get it back. What he is then entitled to receive is an aliquot part of the fund divided into as many parts as there are children then living. If any of them does not live to attain 21, the eldest will on the death of that other receive a further benefit. In such a case the amount which will be ultimately payable to each child is not finally ascertained until the last taker receives his share or dies, but it has never been suggested that there is any difficulty in such a case in ascertaining what is the "share" of which he is entitled to immediate payment on attaining 21. It is, of course, immaterial whether the age be 15 or 21 or 25. As a matter of construction the word "share" means the same thing in every case.

In *Browne* v. *Hammond* (2) *Wood* V.C. thus stated the rule of the Court as to vesting in the case of gifts to children as a class, distributable at the death of some other person:—"According to the view at present taken by the Court, the rule is, that a devise or bequest to children as a class, distributable at the death of some other person, vests in all children in existence at the death of the testator; the gift, however, opening so as to let in such after-born children, if any, as may come into existence before the period of distribution."

This rule of construction is quoted in the text books, and is referred to by *Eve* J. in *In re Canney's Trusts*; *Mayers* v. *Strover* (3). I do not know that any doubt has ever been thrown upon its correctness. Whether knowledge of it is to be imputed to the testator or not, his language must be interpreted as if he had known it. The reason of the rule is, of course, not limited to the case of gifts to children *simpliciter*, but applies also to a gift to children who fulfil a prescribed condition. In such a case the bequest vests in all objects of the gift who at the testator's death have already fulfilled the condition, but the gift

(1) 3 Kay & J., 48.

(2) John., 210, at p. 212 (n.).

(3) 101 L.T., 905.

H. C. OF A. 1914.

REID v. EARLE.

Griffith C.J.

opens in the same way to let in such other children born before the period of distribution as may afterwards fulfil it. The rule in *Andrews* v. *Partington* (1), as expounded by *Buckley* J. in *In re Stephens*; *Kilby* v. *Betts* (2), is only another application of the same principle. In such a case it appears obvious that the vesting is not simultaneous, but successive.

Applying these principles to the present case, it follows that the number of possible takers was closed at the death of the widow. It also follows that what the testator meant by "share" in the direction to pay was an aliquot part of the fund ascertained by dividing it by the number of possible beneficiaries, which would comprise all the children who had survived him and had not died under 25, and the representatives of any such survivor who had died after attaining 25, or had died after attaining 21 having disposed of his or her share by will.

Assuming that these provisions of the will are of themselves insufficient to indicate an intention to make separate gifts, and not a single class gift, the effect of the testamentary power conferred upon each child to dispose of his share by will on attaining 21 remains to be considered.

This power must be construed as a proviso or qualification annexed to the gift to children who shall attain 25, enlarging the class so as to make it include any child who, having attained 21, should die under 25 leaving a will disposing of his share.

If before the death of the widow a supposed after-born child had died after attaining 21 but before attaining 25, leaving a will by which he disposed of his share in the fund, it is clear that the legatee under his will would be entitled to the share, and no objection could be raised under the rule against perpetuities.

The validity of the gift is, of course, to be ascertained as at the death of the testator, and regard is to be had to the events then possible and not to subsequent actual events. It was, no doubt, possible that a possible after-born child might attain 21 and die without making a will. If the power had been to make a settlement the principle would be the same. In my opinion the creation of a power to make a will or settlement of a share, which power must necessarily arise within the permitted time, is

(1) 3 Bro. C.C., 401. (2) (1904) 1 Ch., 322.

a sufficient segregation of that share from the rest of the fund within the doctrine laid down in the case of *In re Russell*; *Dorrell* v. *Dorrell* (1), and the cases referred to in that case. For this purpose the existence of the power, and not its execution, is the governing fact. I do not know of any authority binding me to hold that the possible failure of a beneficiary to exercise a power which is conferred upon him and the exercise of which is necessary to perfecting his right to a share is a possibility to be taken into consideration in determining at the testator's death whether a gift is obnoxious to the rule against perpetuities. On principle I think it is not such a possibility.

In the present case, looking forward at the testator's death, it would appear that the number of possible takers would be closed at the death of the testator's widow, and that the youngest possible taker must therefore necessarily have attained 21 within the permitted period. Within that period, therefore, not only would the whole number of possible takers be necessarily ascertained, but with respect to each share there would be a person in existence entitled under the words of the will either to receive it or to dispose of it by will. The effect which would follow from the exercise of this testamentary power is not material for the purpose of construction.

The testator, therefore, indicated in the plainest manner his intention that, at this period, if not earlier, the fund should be separated into shares. The case falls, in my opinion, exactly within the words of *Fry* J. in *Bentinck* v. *Duke of Portland* (2) as a case "where there is a time fixed at which a fund is to be divided into separate shares, and that time is not obnoxious to the rule against perpetuities," and within the words of Lord *Selborne* L.C. in *Pearks* v. *Moseley* (3) as a case in which "you can, within proper limits of time, ascertain the whole number of the class—which is the same thing as the whole number of the shares."

It is true that no case has been found in which a separation of a fund into distinct shares has been held to be effected by words precisely identical with those used in the present case. But I

(1) (1895) 2 Ch., 698.
(2) 7 Ch. D., 693, at p. 698.
(3) 5 App. Cas., 714, at p. 722.

H. C. OF A. 1914.

REID v. EARLE.

Griffith C.J.

humbly conceive that such a separation may be effected by a testator by the use of any words which sufficiently express his intention.

The contrary construction seems to me to give no effect either to the express direction for payment to the children as they successively attain 25, or to the power of disposition by will on attaining 21, and so to offend, as I said at the outset of this judgment, against the first principles of construction.

In my judgment the appeal should be allowed.

BARTON J. I concur.

The judgment of ISAACS and GAVAN DUFFY JJ. was read by

ISAACS J. The first question is the proper construction of the gift.

In our opinion it is a class gift. Its terms show the testator's intention that in the fund he calls a "share" there shall be included as equal participants all children who should be born at any time of Hugh Ronald Reid and his wife and who should attain the age of 25. Notwithstanding the provision for payment of the respective shares to each child at 25—a provision as to enjoyment—the words of the gift make the attainment of the age of 25 a condition of membership of the class, in other words, a provision as to interest.

Except by first ascertaining the total number of participants in the "share" it is evident that the individual interest of each participant is impossible of ascertainment. A child, who at the testator's death, had attained 25, could not possibly say what his *quantum* would be. That would depend on events still undetermined and conditions still unfulfilled, because at the death of the widow there might be one child under 4 years of age.

Lill v. *Lill* (1), *Bortoft* v. *Wadsworth* (2) and the note to *Browne* v. *Hammond* (3) have no bearing on a case like the present where the condition of attaining a certain age is inserted.

Elliott v. *Elliott* (4) is not a safe case to rely on as a guide in

(1) 23 Beav., 446.
(2) 12 W.R., 523.
(3) John., 210, at p. 212 (n.).
(4) 12 Sim., 276.

any event. But the observation of *Shadwell* V.C. upon that case, made only about eight years after its decision, is probably correct. He said in *Mainwaring* v. *Beevor* (1) that the construction adopted was on the principle that that is preferred which will render the will valid. But he added:—"The rules of construction cannot, however, be strained to bring a devise or bequest within the rules of law."

And it must be remembered that the rule against perpetuities is a rule of law, and so cannot come into competition with a rule of construction.

The present bequest does not, in our opinion, admit of a construction which would treat the attainment of the designated age as otherwise than a condition of vesting.

Without the aid of the doctrine of *Andrews* v. *Partington* (2) the eldest would as a matter of construction have to wait until the youngest attained 25 or died. That construction flows from the actual words of the gift, but it is strongly emphasized by the terms of the gift over, which is to take effect only in the event of *no* child of Hugh Ronald Reid attaining the required age.

If the aid of *Andrews* v. *Partington* (2) is invoked that is necessarily because the gift is a class gift.

In *Bentinck* v. *Duke of Portland* (3) *Fry* J. said:—"It is a class gift where the total and ultimate amount of the share to be taken by any one donee cannot be ascertained until all the persons who are to take, and the ultimate proportions in which they are to take, are finally ascertained."

Leake v. *Robinson* (4) distinctly lays it down that it is not permissible to split up a general class bequest into separate individual gifts.

The gift being then clearly, in our opinion, a class gift, the position resolves itself without difficulty.

First we look at the circumstances as they existed at the testator's death: *Pearks* v. *Moseley* (5); *Williams* v. *Teale* (6); and *In re Fane*; *Fane* v. *Fane* (7).

And one principle must here be borne in mind, as enunciated

(1) 8 Ha., 44, at p. 48.
(2) 3 Bro. C.C., 401.
(3) 7 Ch. D., 693, at p. 698.
(4) 2 Mer., 363, at p. 390.
(5) 5 App. Cas., 714, at p. 722.
(6) 6 Ha., 239.
(7) (1913) 1 Ch., 404, at p. 412.

H. C. OF A. 1914.

REID v. EARLE.

Isaacs J. Gavan Duffy J.

by Lord *Davey* in *Kingsbury* v. *Walter* (1), that all the interests of members of a class must vest in interest at the same time.

Looking at the circumstances as at the date of testator's death, and reading the will as if no rule of perpetuities existed (*Speakman* v. *Speakman* (2); *Heasman* v. *Pearse* (3); *Pearks* v. *Moseley* (4)), we have to ask as at that point of time whether the bounty necessarily vested in the class within the required period. If it did, the gift to the whole class is good; if not, the gift is totally void (*Pearks* v. *Moseley* (5)). It cannot be good as to some and void as to others, because the share of each is not independent of the rest but is determined by the total number of the class. Unless at the testator's death you can ascertain the whole share of a beneficiary he is within the decisions (6).

During the course of the argument, the question assumed importance whether any case could be found supporting the view that the rule we have stated applied to a beneficiary who personally at the testator's death complied with all the conditions of the gift. *In re Russell*; *Dorrell* v. *Dorrell* (7), in our opinion, is such a case. There the testator bequeathed personalty to all the daughters of his niece Mary who should attain 21 or marry under that age. He added a proviso (which must not be confused with the gift itself to his grandnieces) by which he directed a settlement of the shares of his grandnieces in favour of their children. The question was as to the effect of the proviso. It was pointed out by the Court in the first place that the plaintiff, who was a grandniece, took on the testator's death a vested interest, subject to partial divesting in the event of any sister of hers living to attain 21, or marrying under that age. Two observations must here be made: first, "a vested interest" means there only the vesting of "a benefit" (8), and not the final and ultimate share; and, secondly, the partial divesting was only to take place if another sister attained the conditions set, namely, 21 or marriage. And, further, it is to be noted, this effect of vesting was held to be that of the will and codicil on their true construction, that is to say, the effect intended by the testator

(1) (1901) A.C., 187, at p. 194.
(2) 8 Ha., 180, at pp. 185-186.
(3) L.R. 7 Ch., 275, at p. 283.
(4) 5 App. Cas., 714, at pp. 719-733.
(5) 5 App. Cas., 714, at p. 724.
(6) 5 App. Cas., 714, at p. 726.
(7) (1895) 2 Ch., 698.
(8) (1895) 2 Ch., 698, at p. 702.

quite apart from any consideration of the rule against perpetuities. That being the gift to the grandnieces, then came the question as to the proviso, and it was held as a matter of construction that the proviso related only to the grandnieces' shares taken separately, and the direction as to one was not dependent on that as to the other. Two passages in the judgment make the matter clear. One is this (1):—"Looking at the state of things at his" (the testator's) "death, it was then clear that the plaintiff must take either the whole or a share, and other daughters of Mary Dorrell might come in and take shares. Assuming them to do so, yet the share of the plaintiff and the shares of such other daughters would be perfectly separate and distinct, and completely ascertained and separated within the limits of vesting allowed by the law." This shows that, notwithstanding the will by its mere construction purported to vest a benefit in the plaintiff, who was 21 at the testator's death, yet if, looking at the state of things then, the "share" of the plaintiff would or might not have been "completely ascertained and separated within the limits of vesting allowed by the law"—as, for instance, if the age condition were 25—the plaintiff herself, notwithstanding her personal qualifications and in spite of the declaration of the will that a benefit should vest in her at the testator's death, would have been entitled to nothing. Then as to the proviso, the Court says (1):—"The proviso in no way mixes them up, but operates separately upon each share. . . . If, indeed, there had been a proviso which could only operate upon all the possible shares, if it operated at all, the case would have been different." Again, therefore, the Court indicates that if the ultimate and complete share of the plaintiff had been dependent on or bound up with any other share, or interest invalidly directed, it must have fallen with such other share.

The present is an even clearer case, as the fund—that is, the first original share—is not formed until the death of the widow.

Russell's Case (2), therefore, is a distinct recognition that the rule of law laid down in the other cases cited applies here notwithstanding the attainment at the testator's death by one or

(1) (1895) 2 Ch., 698, at p. 702. (2) (1895) 2 Ch., 698.

H. C. OF A. 1914.

REID v. EARLE.

Isaacs J. Gavan Duffy J.

more intended beneficiaries of the required qualifications for his bounty.

Now, the state of things at the testator's death was this, that his wife and both the Reid parents were living, and there were seven Reid children, of whom three were 25.

The two testamentary conditions of vesting—namely, the widow's death and the attainment of the age of 25 by some children born or to be born—left the gift, as a whole, one which possibly might exceed the legal period.

The doctrine of *Andrews* v. *Partington* (1) could not at that point of time avail because of the requirement as to the period of distribution, until which time no child could call for his share: *Gillman* v. *Daunt* (2), and *In re Emmet's Estate*; *Emmet* v. *Emmet* (3). When, however, that later time arrived there might be a Reid child only a year or two years old, and so at the critical moment, viz., the testator's death, the rule of perpetuities was infringed: See *In re Haygarth*; *Wickham* v. *Holmes* (4).

In *In re Barker*; *Capon* v. *Flick* (5) the gift was to children living at the testator's death, or their issue. As to the Read gift in that case, one possible beneficiary had at the testator's death fulfilled the conditions entitling him to share, and the rule of convenience closed the class, so that only lives in being were included, and the gift was good. As to the Johnson Capon gift, on the other hand, no child had then fulfilled that condition, because none had attained the age of 25; and so the rule of convenience could not be applied. This left the class open to include after-born children who were to attain 25, and the whole gift was bad.

The authority to bequeath inserted near the end of the will deserves reference. That authority is a mere modification of the preceding direction of forfeiture in the event of any beneficiary attempting to alienate, charge or encumber his or her share or interest or presumptive or contingent share or interest. Even if "share," unaccompanied by any qualifying word such as "pre-

(1) 3 Bro. C.C., 401.
(2) 3 Kay & J., 48.
(3) 13 Ch. D., 484.
(4) (1912) 1 Ch., 510, at p. 518.
(5) 92 L.T., 831.

sumptive" or "contingent," means an absolute vested share, it does not assist the appellant.

The authority on that construction does not profess to apply to all beneficiaries, whether absolute, presumptive or contingent, but only to such as have a vested share; and so before it can be applied to any particular beneficiary the question must first be answered independently whether that beneficiary has a vested share.

In the result, we are of opinion that the judgment appealed from should as to this bequest be affirmed.

RICH J. read the following judgment:—I agree in the conclusion arrived at by my brothers *Isaacs* and *Gavan Duffy*.

I desire to add a few words on the construction of the gift, which should precede the question whether the gift infringes the rule against perpetuities. In construing a will one must not speculate as to the testator's intention, but ascertain it from the actual words of the whole will. In *Gorringe* v. *Mahlstedt* (1) the *Earl of Halsbury* said that he believed that "half the difficulties have arisen by adopting some words that learned Judges have used on another occasion with reference to another will as if it was a canon of construction for all wills."

Now, in the will under consideration the testator has directed that upon the death of his widow the investments of his estate were to be converted into money and the net residue divided into three equal parts. The testator then proceeds to deal with these "three original parts." The last part is bequeathed in these words:—"And I direct that the last of the said original three parts shall be divided into six equal shares and that two of such six shares shall be invested and the resulting income accumulated for the children of the said Hugh Ronald Reid and his present wife who shall attain the age of twenty-five years the share of each child to be paid to him or her upon his or her attaining that age and should no child of the said Hugh Ronald Reid attain that age I direct that such two shares be equally divided among the said six institutions hereinafter named."

I gather from the words of the will that the testator intended

(1) (1907) A.C., 225, at p. 226.

H. C. OF A. 1914.

REID v. EARLE.

Rich J.

to make a gift to all the children of H. R. Reid and his then wife who should attain the age of 25 years. This constitutes a gift to a class which *primâ facie* could be ascertained on the death of H. R. Reid or his wife. But when the widow died some members of the class might have been, and in fact were, ready to ask for their shares, and under what has been called the rule of convenience they would then be entitled to demand that the class should be closed. "The time to which the rule applies, and at which the class is to be definitely ascertained, is not the period of vesting, but the period of distribution (of course they *may* coincide). It is the time when some one member of the class first acquires the right under the terms of the gift to demand payment of his share": *Pilkington* v. *Pilkington* (1).

When in the present case the class was closed at the widow's death there might have been included in it a child of H. R. Reid and his wife who would not attain the age of 25 years within the period allowed by the rule against perpetuities.

For these reasons I think that the gift fails.

Appeal dismissed. Trustee to have his costs as between solicitor and client out of estate. Appellant to pay costs of appeal of next of kin but limited to costs of first argument. Trustee to pay costs of second argument out of fund in question on the appeal.

Solicitors, for the appellant, *J. M. Smith & Emmerton.*

Solicitors, for the respondents, *Hedderwick, Fookes & Alston*; *Westley & Walker.*

B. L.

(1) 29 L.R. Ir., 370, at p. 376.