H. C. OF A. 1916.

BRUCE v. TYLEY.

Gavan Duffy J.

assistance of the person entitled to sue, though of course that person may lend his name if he chooses, as Mr. Tyley did here. The result is that when Mrs. Tyley invokes the assistance of the Statute she is met by the answer that her case is not within its provisions, and that, if either of the plaintiffs is entitled to judgment, it is her husband and not herself.

Appeal allowed. Judgment appealed from set aside and judgment entered for defendant.

Solicitor for the appellant, *F. Villeneuve Smith.*

Solicitors for the respondents, *McLachlan, Napier & Browne.*

B. L.

[HIGH COURT OF AUSTRALIA.]

RUSSELL AUBREY ROGERS . . . APPELLANT;
DEFENDANT,

AND

GEORGE ALBERT ROGERS AND OTHERS RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1916.

SYDNEY, *April* 6, 7.

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

Will—Interpretation—Absolute gift—Gift over—Cutting down absolute gift—Remoteness—Res judicata.

By his will a testator gave all his property real and personal to his three named sons, whom he appointed his executors and trustees, with directions for payment of his debts and certain legacies and for the carrying on of his business, and a direction as to the amount of the drawings thereout by the youngest of such sons until he attained the age of 25 years. He then declared that the residue of his estate "is to become the property of" the same three

sons equally and that they "become the owners absolutely undertaking to discharge all existing liabilities at the time of my decease." He next directed that should any of those three sons die unmarried one-half of his share should remain to capital account for the benefit of the other two sons, and that the other half should be paid at the convenience of the remaining trustees to those interested in the deceased son's will, if any, and if he left no will then that the whole of his share should go to capital account. He further directed that if any of those three sons should die married with issue, the eldest son of such son might have the option of being educated for filling a commercial position by the remaining trustees until he should reach the age of 16 or 17 years, after which he might with the sanction of the remaining trustees commence his commercial training with a view of fitting himself for filling his father's position with half the interest of the other trustees after he should have reached the age of 25 years and applied himself to the business to the satisfaction of the remaining trustees. The testator also directed that during the widowhood of such deceased son's wife his trustees should pay her a weekly sum for the support of herself and her other children, if any.

Held, that the absolute gift to the testator's three sons of the residue was not cut down by the subsequent provisions of the will, and therefore that they were absolutely and indefeasibly entitled to the residue.

The three sons of the testator named in the will survived him, but the second of them died before the youngest attained the age of 25 years. On an originating summons before the death of the second son an order was made declaring that upon the youngest of the three attaining the age of 25 years the three would become absolutely and indefeasibly entitled to the residue and that the gifts over "on the death of the sons of the testator are applicable in the event of their death before the said period but no longer."

Held, that the order did not operate as *res judicata* to preclude the determination on a subsequent originating summons of the construction of the will in reference to the gifts to the three sons.

Decision of the Supreme Court of New South Wales (*Simpson* C.J. in Eq.), affirmed.

APPEAL from the Supreme Court of New South Wales.

Charles Rogers died on 17th May 1909, having made a will dated 21st February 1908, by which he gave, devised and bequeathed "according to conditions hereinafter set forth all my property both real and personal . . . unto my three sons George Albert Rogers now of age Norman Rogers now of age and Russell Aubrey Rogers not yet of age whom I appoint executors and trustees of this my will and I give them power to act in all matters relating to my property or in connection with my business as now carried on

H. C. OF A. 1916.

ROGERS v. ROGERS.

by me to the intent that they shall be able to act as fully and effectually in all respects as I myself could do if living and acting therein on trust . . . I direct that after my son Russell Aubrey becomes of age my three executors and trustees as aforesaid if living are to consult arrange and decide matters in general concerning the general management and supervision of the said business including matters of weekly cash drawings. And I direct that my youngest son Russell Aubrey is to receive twenty-five per cent. less per week than my two elder sons until he reaches the age of twenty-five years after which he is to be on equal terms conditionally that he gives his time and energy to the said business." Other material parts of the will and other facts are set out in the judgment of *Griffith* C.J. hereunder.

The testator left him surviving his widow, Agnes Rogers, and seven children including the three sons mentioned in the will, namely, George Albert Rogers, Norman Rogers and Russell Aubrey Rogers. The youngest of these three sons, Russell Aubrey Rogers, attained the age of 25 years on 20th November 1915. Norman Rogers died on 31st August 1915, leaving him surviving his widow, Olive Rogers, and an infant son, Geoffrey Norman Rogers.

On 25th October 1915 an originating summons was taken out by George Albert Rogers for the determination by the Supreme Court of the following question (*inter alia*) :—" Subject to the payment of the liabilities, legacies and annuities mentioned in the will of the testator Charles Rogers, for what persons, in what shares and proportions and for what estates and interests do the trustees of the will of the said Charles Rogers hold the real and personal estate of the said Charles Rogers ? " The defendants to the summons were Russell Aubrey Rogers, Agnes Rogers, Olive Rogers and Geoffrey Norman Rogers. The summons was heard by *Simpson* C.J. in Eq. who made an order declaring that subject to the payment of the liabilities, legacies and annuities (with certain exceptions) George Albert Rogers, Russell Aubrey Rogers and the personal representatives of the estate of Norman Rogers took absolute and indefeasible interests in the real and personal estate of the testator in equal one-third shares on the attaining by Russell Aubrey Rogers of the age of 25 years.

From that decision Russell Aubrey Rogers now appealed to the High Court.

Flannery (with him *Davidson*), for the appellant.

Clive Teece, for the respondent Olive Rogers.

Betts, for the respondent Geoffrey Norman Rogers.

R. K. Manning (with him *Harriott*), for the respondent Agnes Rogers.

[During argument reference was made to *Hancock* v. *Watson* (1) ; *Hawkins on Wills*, 2nd ed., p. 309 ; *Peter* v. *Shipway* (2) ; *Lassence* v. *Tierney* (3) ; *In re Williams* ; *Williams* v. *Williams* (4).]

GRIFFITH C.J. The testator was a storekeeper who carried on business in a large way at Goulburn. By his will, dated 21st February 1908, he gave, devised and bequeathed all his property real and personal to his three sons George Albert, who was of age, Norman, who was also of age, and Russell Aubrey, who was not then of age, whom he appointed the executors and trustees of his will. He gave various directions for carrying on his business on the apparent assumption that he had power to do so for an indefinite period. Then he gave some legacies, including one of £2,000 to his wife to be paid by monthly instalments of £25 during her life if she should so long live. Then came the following directions on which the question to be decided depends :—" I direct that due provision must be made by my executors and trustees for the payment of probate duty together with all other liabilities and payments as herein set forth or which may occur after my decease after which I declare that the residue of my estate both real and personal as it then stands is to become the property of my three sons as aforesaid with equal interests and they my three sons as aforesaid viz. George Albert, Norman and Russell Aubrey become the owners absolutely undertaking to discharge all existing liabilities at the

(1) (1902) A.C., 14 ; (1901) 1 Ch., 482.
(2) 7 C.L.R., 232.
(3) 1 Mac. & G., 551.
(4) (1907) 1 Ch., 180.

H. C. OF A. 1916.

ROGERS v. ROGERS.

Griffith C.J.

time of my decease." When he used the words "the property of my three sons" and "the residue of my estate" he means, of course, the residue after discharging the liabilities and satisfying the obligations to which he has just referred. The will then continued:— "I direct that my business shall be carried on under the name and style of Charles Rogers and Company as at present. I direct that should any of my said sons herein set forth die unmarried one half of his share and interest shall remain to capital account for the benefit of my remaining two sons and that the remaining half be paid at the convenience of my remaining executors and trustees to those interested in such said son's will if any should however such said son die without leaving a will then the whole of such son's share shall go to capital account as aforesaid. I direct that should any of my said sons as aforesaid die married according to law constituting a legal marriage with issue his eldest son if any may have the option of being educated for filling a commercial position by my remaining executors and trustees until he reaches the age of sixteen or seventeen years after which with the sanction of my remaining executors and trustees he may commence his commercial training with a view of fitting himself for filling his late father's position with half the interest of that of the other executors and trustees after he has reached the age of 25 years and applied himself to the business to the satisfaction of my remaining executors and trustees. And I direct that during the widowhood of such deceased son's legal wife my executors and trustees pay to her the sum of three pounds per week for the support of herself and remaining children if any." The third possible contingency, that of a son dying married without leaving an eldest son was not provided for. The testator died on 17th May 1909, leaving him surviving his wife, the three sons named in the will, two other sons and two daughters. Norman attained the age of 25 years, and died on 31st August 1915, leaving a son, Geoffrey, and having made a will of which his brothers George Albert and Russell Aubrey are executors and his widow Olive is executrix. Russell Aubrey attained the age of 25 years on 20th November 1915, that is, after the death of Norman. The plaintiff in the suit was George Albert Rogers, and the defendants were Russell Aubrey, Agnes, who is the testator's widow, Olive, and

Geoffrey, his infant son. The plaintiff asked for an answer to the question "Subject to the payment of the liabilities, legacies and annuities mentioned in the will of the testator Charles Rogers, for what persons, in what shares and proportions and for what estates and interests do the trustees of the will of the said Charles Rogers hold the real and personal estate of the said Charles Rogers?" The surviving sons of the testator contended that they are absolutely and indefeasibly entitled to the whole estate to the exclusion of Norman's representatives. The defendant Olive contended that the gifts to the three sons were absolute. The learned Chief Judge in Equity accepted this contention, and held that the surviving sons and Norman's personal representatives took absolute and indefeasible interests in the estate on the attaining by Russell of the age of 25 years. Russell, whose case is supported by the respondent George Albert, appeals from this order.

The rule as to cutting down a gift which is in its terms absolute is laid down in *Randfield* v. *Randfield* (1). Lord *Campbell* L.C. said (2):—"If there be a clear gift, it is not to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down." Lord *Wensleydale* stated the rule in slightly different language (3):—"The gift being in terms absolute cannot be cut down, unless there is a sufficiently clear indication of an interest" (intention) "to defeat it by the subsequent clause." Lord *Kingsdown* put it thus, speaking of the will in question (4):—"The original gift is clear, and I think there is not sufficient certainty in the subsequent words to restrict it."

In the present case the first gift was in these words: "I declare that the residue of my estate . . . is to become the property of my three sons as aforesaid with equal interests and they . . . become the owners absolutely." These terms are clear and unambiguous. I proceed to examine the clauses of defeasance by which they are said to have been cut down.

The clauses of defeasance are to take effect, in one case, if any of the three sons "dies" unmarried and, in the other case, if any of them "dies" married leaving an eldest son. The term "dies"

(1) 8 H.L.C., 225.
(2) 8 H.L.C., at p. 235.
(3) 8 H.L.C., at p. 238.
(4) 8 H.L.C., at p. 241.

H. C. OF A. 1916.

ROGERS v. ROGERS.

Griffith C.J.

must refer to some period, probably that appointed for distribution of the estate. It is very difficult to say what period the testator meant.

Whatever the provision as to defeasance in the event of any of the three sons dying married and leaving an eldest son may mean, it is not disputed that if it operated as a gift of corpus to the eldest son of the deceased son it would be void for remoteness. The rule applicable in such cases was laid down by the House of Lords in *Hancock* v. *Watson* (1), and is stated in the head-note as follows :— " Where there is an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin as the case may be." In terms, that decision dealt only with the case of an absolute gift having a trust imposed upon it, which trust has failed. The same rule applies in the case of a gift subject to a defeasance or condition subsequent which fails, from whatever cause. In the same case before the Court of Appeal (*In re Hancock* ; *Watson* v. *Watson* (2)) *Rigby* L.J. stated the rule in slightly different language. He said :— " I think there is to be gathered from the general line of authority one clear principle—that if a gift is absolute in the first instance, and the provisions that follow are a mere settlement of that gift, then the settlement, if it is effectual, will have operation, reducing what appears to be an absolute gift to a life estate only. If, however, the settlement for any reason fails, then, in so far as it fails, there is no intestacy, but an interest in the nature of a reversion to the person who is the object of the previous absolute gift." That is to say, the same rule applies whether the defeasance fails because the event does not happen or because the law says that the gift over is invalid.

There are other difficulties in the construction of this proviso or defeasance. If its effect is to make a gift to Geoffrey of a share in the corpus of the estate and that gift is void for remoteness, an interesting question might arise as to whether the failure of that gift of corpus would affect the directions as to the education of

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

(2) (1901) 1 Ch., 482, at p. 498.

Geoffrey and the payment of £3 a week to the widow of Norman for the support of herself and her remaining children. Another interesting question would arise as to the fund out of which the £3 a week and the cost of the education of Geoffrey ought to be paid. Should they be paid out of Norman's share, or out of the corpus of the estate of the testator? There are strong reasons for thinking that they should be paid out of the former; and so the learned Judge has held, and no appeal has been brought from his decision on that point. In that view the direction to the trustees of the will to pay would be rejected for repugnancy. Moreover the gift, if any, which fails for remoteness as well as the other gifts to Geoffrey depends upon the will of the trustees. Geoffrey is only to begin his commercial training with their sanction, and he is only to have an interest in the estate if he applies himself to the business to their satisfaction. It is almost impossible to conjecture what the testator meant. Probably he did not know himself. So that we are left in the position that the original absolute gift to the testator's three sons is clear and there is not sufficient certainty in the subsequent words to restrict it. On that point, therefore, I think that the learned Judge was right.

Another point is taken by the appellant. He contends that the parties are bound by an order of the Supreme Court made on 13th October 1909 in a suit in which George Albert Rogers and Norman Rogers were plaintiffs, and the wife of George Albert Rogers and Russell Aubrey Rogers, who was then an infant, and Bruce Rogers, who also was an infant, were defendants, and relating to the same will. The Court declared that "upon the true construction of the said will the plaintiffs, George Albert Rogers and Norman Rogers, and the defendant Russell Aubrey Rogers will become absolutely and indefeasibly entitled upon the attainment by the defendant Russell Aubrey Rogers of the age of twenty-five years to the whole of the real and personal estate of the said testator as tenants in common in equal shares subject to the payment of the liabilities legacies and annuity mentioned in the said will and that the gifts over contained in the said will on the death of the sons of the said testator are applicable in the event of their death before the said period but no longer." I apprehend that the words "the said

H. C. OF A. 1916.

ROGERS v. ROGERS.

Griffith C.J.

period" mean the attainment by Russell Aubrey Rogers of the age of 25 years, which happened on 25th November 1915. It will be observed that the order contains a declaration *in futuro*, namely, that the three sons will become absolutely and indefeasibly entitled upon the attainment by the youngest of them, Russell Aubrey, of the age of 25 years. No reason for fixing this as the date of vesting has been offered to us. Before that event happened Norman died, and the order is said to be based on the assumption that all three brothers would be living when Russell Aubrey attained 25. The order went on to say that "the gifts over contained in the will on the death of the sons of the said testator"—that is, in this case, the alleged gift over for the eldest son of Norman—"are applicable in the event of their death before the said period but no longer." Nothing is said as to the construction of the language by which those gifts are given or as to their validity. We are now called upon to construe the language, and in my opinion we are not precluded by the previous order as *res judicata* from determining the matter for ourselves. I have expressed my opinion that they do not operate to cut down the preceding clear absolute gift of the corpus to the three sons of the testator.

For these reasons I think that the appeal fails.

BARTON J. I agree and have very little to add. I should like to quote a passage from the judgment of *O'Connor* J. in *Peter* v. *Shipway* (1). The learned Judge cited the following passage from *Moran* v. *Attorney-General of New South Wales* (2):—"'Where there is a clear gift in a will it cannot afterwards be cut down except by something which with reasonable certainty indicates the intention of the testator to cut it down. It need not (as sometimes stated) be equally clear with the gift. You are not to institute a comparison between the two clauses as to lucidity: *per* Lord *Campbell*, *Randfield* v. *Randfield* (3). But the clearly expressed gift naturally requires something unequivocal to show that it does not mean what it says.' In other words, a divesting clause must be construed strictly." Then *O'Connor* J. added:—"That is really only

(1) 7 C.L.R., 232, at p. 247.
(2) 5 S.R. (N.S.W.), 142, at p. 145.
(3) 8 H.L.C., 225.

another way of stating a principle of interpretation applicable to the construction of all documents where the intention of the writer is to be gathered from what he has written, namely, that a document must be construed as a whole, and it will not be taken without strong compelling words that the writer intended one portion of it to be contradictory of another portion."

Now, it seems to me that the gift to the three sons of the testator is an absolutely clear gift as contended for by Mr. *Teece*. As to the subsequent clause relied upon to cut it down, I think that so far from being unequivocal it is extremely difficult to interpret and is on the whole so uncertain and ambiguous, that the principle I have stated applies.

Then, as to the other branch of the question of interpretation, in the case of *In re Hancock*; *Watson* v. *Watson* (1) Lord *Alverstone* C.J. said :—" Mr. *Levett* has very fairly admitted that by this will there is an absolute gift in the first instance, but says that the gift must be construed as qualified by the subsequent trusts. I think when we examine the authority on which he so much relied—*Lassence* v. *Tierney* (2)—that is clearly an example of the cases in which there has been no absolute gift. On the other hand, *Ring* v. *Hardwick* (3) is an example of the cases in which there has been an absolute gift; and that case shows that the mere general intention of the testator to cut down the gift, so that the subject of it shall be disposed of in a certain event which fails, cannot be regarded as conclusive that the original absolute gift cannot take effect."

Here, if the subsequent clause or passage in the will shows an intention of the testator to cut down the gift, that intention is to dispose of the subject matter in a certain event which failed, and the clause cannot be regarded as conclusive that the original absolute gift cannot take effect. On that ground also I think the appeal fails.

I do not propose to add anything more, beyond stating my general agreement with what has been said by the learned Chief Justice.

Isaacs J. The appellant's contention, as I understand it, is two-fold. First, he says in effect that, when the will is properly construed,

(1) (1901) 1 Ch., 482, at p. 497. (2) 1 Mac. & G., 551.
(3) 2 Beav., 352.

H. C. OF A. 1916.

ROGERS v. ROGERS.

Isaacs J.

the direction with regard to corpus in the event of the son dying unmarried, leaving an eldest son before the primary gift vests indefeasibly, constitutes a limitation of the primary gift, and is not in the nature of a condition subsequent or defeasance. And, next, he says, varying the position somewhat, that, if that direction be properly regarded as a defeasance, the only consequence of its avoidance for remoteness so far as it is too remote is to leave the corpus of the son's share undisposed of, the primary gift being nevertheless divested.

As to the first contention, I am unable to agree with it. The words of the primary gift are clear, emphatic and unambiguous, and, unless qualified by the directions which follow, confer an absolute interest in one-third of the whole estate after providing for duties, liabilities and payments specified. The manifest object of the testator was to make a complete disposition of all his property, and therefore the Court, seeing that, will endeavour to so construe the will as to prevent an intestacy as to any part of it (*per Parker* V.C. in *Taylor* v. *Frobisher* (1)). The comprehensiveness of the word "estate" in the primary gift is not only not cut down by anything elsewhere found, but is emphatically maintained by the succeeding clause. The words of the subsequent direction itself which are relied on do not indicate any special sense in which the testator has used his primary words, or that their effect is to be interfered with except in the manner expressed in the direction itself. Nor do I think the direction to the trustees and executors to educate commercially the grandson at his option, up to 16 or 17, sufficient to overcome the clear and positive words of the primary gift, even if it can be considered as separable from the rest. The learned primary Judge has decided that it can, and, as this is not appealed from, nothing I say is to be regarded as in derogation of that decision or of its necessary consequences. The direction in my opinion is a defeasance, and has all the effect of a condition subsequent whatever that may be.

The second contention then raises the question of what is the effect of the defeasance so far as it relates to the corpus. It is well established law that "If a condition subsequent which is to defeat

(1) 5 De G. & Sm., 191, at p. 199.

an estate, is against the policy of the law the gift is absolute" (*per Cotton* L.J. in *In re Moore*; *Trafford* v. *Maconochie* (1)). In *Taylor* v. *Frobisher* (2) *Parker* V.C. held a gift expressed to be subject to a gift over, which was found to be void for remoteness, was indefeasible. The same principle has been applied by the Court of Appeal, in *Goodier* v. *Johnson* (3), to a gift with void gift over; and by the Court of Appeal and the House of Lords to an analogous case, in *Hancock* v. *Watson* (4), where a gift made subject to a trust held to be void for remoteness was declared to be free from the trust. See *Gray on Perpetuities*, 3rd ed., pp. 370 *et seqq.*, with cases there cited.

I regard the decree of 1909 as binding, but, even so, it leaves the present question open, and therefore, for reasons I have stated, I am of opinion that the executrix of Norman is entitled to the beneficial interest in the share, and that the appeal should be dismissed.

GAVAN DUFFY J. I agree that the appeal should be dismissed.

RICH J. I also agree.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of testator's residuary estate.

Solicitor for appellant and respondents, *P. J. Meyer*, Goulburn, by *Laurence, Son & Macdonald.*

B. L.

(1) 39 Ch. D., 116, at p. 129.
(2) 5 De G. & Sm., 191.
(3) 18 Ch. D., 441, at p. 446.
(4) (1901) 1 Ch., 482; (1902) A.C., 14.