[HIGH COURT OF AUSTRALIA.]

CARROLL . . . . . APPELLANT;
DEFENDANT,

AND

THE PERPETUAL TRUSTEE COMPANY LIMITED AND ANOTHER . . . } RESPONDENTS.
PLAINTIFFS AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 8, 11, 12, 21.

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

Will—Construction—Income—Accumulation—Limitation of period—Rule against perpetuities—"Vested," meaning of—Thellusson Act (39 & 40 *Geo.* III. c. 98)—*Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 23.

By her will a testatrix gave to her trustees certain leasehold property "to hold the same upon trust to manage the same generally until the youngest child of" A "shall attain the age of twenty-one years and upon the happening of that event to hold the same upon trust for all such one or more of the children of" A "as shall be living at the time of his decease in equal shares as tenants in common." At the date of the will A had eight children all of whom survived A, and of whom the eldest attained twenty-one in 1886 and the youngest in 1905. The testatrix died in 1892, and A died in 1914 not having had any more children.

Per Griffith C.J. and *Barton* J. (*contra, per Isaacs* and *Rich* JJ.): The *Thellusson Act* did not apply to the income of the property for the period beginning at the expiration of twenty-one years after the death of the testatrix and ending with the death of A, and therefore the income during that period was not undisposed of but followed the destination of the corpus.

The testatrix gave a leasehold property to her trustees upon trust to pay the income to B "during his life without power of anticipation and upon and after his decease upon trust for all the children" (except certain named children) "or any the child of" B "absolutely and if more than one in equal shares but so that the interest of such children or child shall not become vested until he or she attains the age of twenty-five years."

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Per Griffith C.J. and *Barton* J. (*contra, per Isaacs* and *Rich* JJ.): The gift was not obnoxious to the rule against perpetuities, for the word "vested" either meant "vested indefeasibly" or referred to the date at which actual payment of the income should begin.

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

APPEAL from the Supreme Court of New South Wales.

By her will dated 24th June 1890 Johanna White, who died on 24th February 1892, gave, devised and bequeathed to her trustees all her real and personal property "upon trust . . . as to my five cottages and two two-storey houses situate in Maclean Street Paddington to hold the same upon trust to manage the same generally until the youngest child of my said brother Thomas Bowes shall attain the age of twenty-one years And upon the happening of that event to hold the same upon trust for all such one or more of the children of the said Thomas Bowes as shall be living at the time of his decease in equal shares as tenants in common." She also declared that "as to the rest and residue of my real and personal estate . . . I give devise and bequeath the same unto my said trustees their heirs executors and administrators upon trust that my said trustees shall at such time or times and in such manner as they shall think fit sell call in and convert the same or so much as shall not consist of money into money and so that they shall have the fullest power and discretion to postpone the sale calling in or conversion of the whole or any part thereof during such period as they shall think proper without being responsible for loss And shall out of the moneys to arise from the sale calling in and conversion of or forming my said real and personal estate pay my funeral testamentary expenses and debts and legacies and shall divide the residue equally between and among the said Mary Ann Carroll and her five sons Mary Ellen Smyth Charles Bowes and Annie Bowes children of the said Edward Bowes . . . And I declare that if at any time any person entitled in expectancy to a share under this my will shall be under the age of twenty-one years and being a female shall be unmarried then and in every such case my trustees may apply the whole or any part of the income of

the expectant share of such minor for or towards his or her maintenance and education with the liberty to pay the same to the guardian or any of the guardians of such infant for the purposes aforesaid without being liable to see to the application thereof And shall invest the residue (if any) of the said income and the resulting income thereof so as to accumulate at compound interest to the intent that such accumulations shall be added to the principal share from which the same shall have arisen and follow the destination thereof but my trustees may at any time resort to the accumulations of any preceding year or years and apply the same for or towards the maintenance or education of any person for the time being presumptively entitled thereto And I direct my said trustees to invest any moneys that shall from time to time be in their hands with power to alter or vary such investments from time to time And I declare that my trustees may in their discretion raise any part or parts not exceeding one moiety of the expectant share of any infant under this my will and apply the same for his or her advancement preferment or benefit as my trustees shall think fit And I declare that the rents profits and income to accrue from and after my decease of and from such part of my estate as shall for the time being remain unsold and unconverted shall after payment thereout of all incidental expenses and outgoings be put and applied to the persons or person and in the manner to whom and in which the income of the moneys produced by such sale and conversion would for the time being be payable and applicable under this my will if such sale and conversion had been actually made."

By a codicil to her will she provided that "as to my property situate on the New South Head Road and known as the 'Darling Point Hotel' I give and bequeath the same to my said trustees their executors administrators and assigns to hold the same upon trust to pay the income thereof to my youngest brother Thomas Bowes of Hawkes Bay near Napier New Zealand during his life without power of anticipation and upon and after his decease upon trust for all the children (except John Baptist and Francis the eldest and second eldest sons of the said Thomas Bowes) or any the child of the said Thomas Bowes absolutely and if more than one in equal shares but so that the interest of such children or child

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shall not become vested until he or she attains the age of twenty-five years."

The properties referred to in the above gifts in the will and codicil were leasehold.

At the date of the will Thomas Bowes, who died on 10th June 1914, had eight children, all of whom survived him, and of whom the eldest attained twenty-one on 18th June 1886 and the youngest on 2nd May 1905.

An originating summons was taken out by the Perpetual Trustee Co. Ltd., the trustees of the estate of the testatrix, to obtain the determination of the following questions (*inter alia*) arising out of the will and codicil :—(1) Whether the children of Thomas Bowes who, having attained the age of twenty-one years, were alive at the date of his death are entitled to the income of the five cottages and two two-storey houses situated in Maclean Street, Paddington, forming part of the estate of the said deceased, for the period between 24th February 1913 and the date of the death of the said Thomas Bowes and also the interest during the said period on past accumulations of such income, or whether the said income and interest during the said period falls into the residue of the said estate. (2) Whether the trusts of the said codicil declared with respect to the Darling Point Hotel (forming part of the said estate) after the death of the said Thomas Bowes are valid, or void as infringing the rule against perpetuities.

Joseph Thomas Bowes and Michael Thomas Carroll were made defendants, the former as representing the children of Thomas Bowes, the latter as representing all persons interested in the residue of the estate of the testatrix.

The originating summons was heard by *Simpson* C.J. in Eq., who answered the first question in favour of the children of Thomas Bowes and the second question by declaring that the trusts referred to therein were valid.

From that decision Carroll now, by special leave, appealed to the High Court.

Collins, for the appellant. As to the first question under the

Thellusson Act (39 & 40 Geo. III. c. 98), the income from the expiration of twenty-one years after the death of the testatrix until the death of Thomas Bowes does not belong to the children to whom the income is given, but falls into the residue. There is an express, or at any rate an implied, direction in the will to accumulate the income after the youngest child of Thomas Bowes attained twenty-one years, for the provisions of the will could not be carried out without accumulations. There is no disposition of the income during the period; the gift is contingent, for until the death of Thomas Bowes it is not known who gets the property; and there is a direction in the will to invest any moneys that come in from time to time. [Counsel referred to *Halsbury's Laws of England*, vol. XXII., p. 370; *Gray on Perpetuities*, 3rd ed., p. 536; *Green* v. *Gascoyne* (1); *Wharton* v. *Masterman* (2); *Jarman on Wills*, 6th ed., p. 379; *M'Donald* v. *Bryce* (3).]

[GRIFFITH C.J. referred to *Jarman on Wills*, 6th ed., p. 1046.

ISAACS J. referred to *Mathews* v. *Keble* (4).

RICH J. referred to *Weatherall* v. *Thornburgh* (5); *Trim* v. *Trim* (6); *Dibbs* v. *Barrington* (7); *Gray on Perpetuities*, 3rd ed., pp. 516, 520.]

As to the gift of the Darling Point Hotel, that cannot take effect until the youngest child attains the age of twenty-five years, and therefore is void under the rule against perpetuities (*Jarman on Wills*, 6th ed., vol. II., p. 1354; *Re Baxter's Trusts* (8); *In re Wrightson*; *Battie-Wrightson* v. *Thomas* (9)).

Maughan, for the respondent Joseph Thomas Bowes. As to the first question: Where there is a gift of leasehold property at a future date the gift carries with it the intermediate income (*In re Woodin*; *Woodin* v. *Glass* (10)). There is no decided case that the *Thellusson Act* applies to such a gift as that to the children of Thomas Bowes. That Act only applies where there is an express or implied direction to accumulate, and does not apply to a disposition which by accident requires the trustee

(1) 4 D. J. & S., 565.
(2) (1895) A.C., 186, at p. 197.
(3) 2 Keen, 276.
(4) L.R. 3 Ch., 691.
(5) 8 Ch. D., 261, at p. 271.
(6) 14 N.S.W.L.R. (Eq.), 290.
(7) 15 N.S.W.L.R. (Eq.), 149.
(8) 10 Jur. (N.S.), 845.
(9) (1904) 2 Ch., 95.
(10) (1895) 2 Ch., 309.

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to collect and hold income for more than twenty-one years. If a gift may or may not necessitate accumulation the Act does not apply (*Elborne* v. *Goode* (1)). As to the gift of the Darling Point Hotel: The word "vest" should be construed as "vest indefeasibly." Where the testatrix has intended to make a gift contingent upon the beneficiary attaining a certain age she has said so clearly, and has used language quite different from that used with regard to the Darling Point Hotel. In the alternative, the will is fairly capable of two constructions, and the Court will give it such a construction as will make the gift valid and so avoid the rule against perpetuities. [Counsel also referred to *Armytage* v. *Wilkinson* (2); *Harrison* v. *Grimwood* (3); *Young* v. *Robertson* (4); *Simpson* v. *Peach* (5); *Halsbury's Laws of England*, vol. XXVIII., pp. 667, 800 (*h*); vol. XXII., p. 306; *In re Earl of Stamford and Warrington*; *Payne* v. *Grey* (6); *In re Hobson*; *Hobson* v. *Sharp* (7); *Christie* v. *Gosling* (8); *Smidmore* v. *Smidmore* (9); *Gray on Perpetuities*, 3rd ed., p. 499; *In re Macfarlane* (10); *Martelli* v. *Holloway* (11).]

[ISAACS J. referred to *Berkeley* v. *Swinburne* (12); *Re Litchfield*; *Horton* v. *Jones* (13); *Taylor* v. *Frobisher* (14).]

Collins, in reply, referred to *In re Taylor*; *Smart* v. *Taylor* (15); *Lewin on Trusts*, 12th ed., p. 97; *Richardson* v. *Power* (16); *Hale* v. *Hale* (17).

[RICH J. referred to *Mitchell's Trustees* v. *Fraser* (18).]

Cur. adv. vult.

Dec. 21.

GRIFFITH C.J. read the following judgment:—The first question raised in this case depends upon the construction of a gift to trustees expressed in the following terms: "as to my five cottages &c."

(1) 14 Sim., 165.
(2) 3 App. Cas., 355, at p. 372.
(3) 12 Beav., 192.
(4) 4 Macq. H.L. Cas., 314; 8 Jur. (N.S.), 825, at p. 827.
(5) 16 Eq., 208.
(6) (1912) 1 Ch., 343, at p. 365.
(7) (1907) V.L.R., 724; 29 A.L.T., 125.
(8) L.R. 1 H.L., 279, at p. 290.
(9) 3 C.L.R., 344.
(10) 43 Sc. L.R., 494; 8 F. (Ct. of Sess.), 787.
(11) L.R. 5 H.L., 532.
(12) 16 Sim., 275.
(13) 104 L.T., 631.
(14) 5 De G. & Sm., 191.
(15) (1901) 2 Ch., 134.
(16) 19 C.B. (N.S.), 780.
(17) 3 Ch. D., 643, at p. 646.
(18) (1915) Ct. of Sess., 350.

(a leasehold property) "to hold the same upon trust to manage the same generally until the youngest child of my brother Thomas Bowes shall attain the age of twenty-one years and upon the happening of that event to hold the same upon trust for all such one or more of the children of the said Thomas Bowes as shall be living at the time of his decease in equal shares as tenants in common." The later gift, is, it will be observed, to all the children of Thomas Bowes irrespective of age who may survive their father.

At the date of the will Thomas Bowes had eight children, of whom the eldest attained twenty-one on 18th June 1886, and the youngest on 2nd May 1905. The testatrix died on 24th February 1892. Thomas Bowes died on 10th June 1914, not having had any more children.

The appellant claims that by virtue of the Act commonly called the *Thellusson Act* the income of the property for the period between 24th February 1913, that is, twenty-one years after the testatrix's death, and the death of Thomas Bowes was undisposed of and fell into residue. The sum involved is trifling, and probably not more than sufficient to cover the costs of arguing the question. The learned Chief Judge thought that upon the true construction of the will the income for that period was not undisposed of, but followed the destination of the corpus, which he thought was effectively given by the concluding words of the passage I have quoted.

He thought the case was governed by the decision of the Court of Appeal in *In re Woodin* (1), in which a testator had given leaseholds to trustees for his daughter for life and then to her children in equal shares, to be vested in them at twenty-one or (in the case of daughters) on marriage. The Court of Appeal held that the intermediate income before they attained twenty-one was not undisposed of but followed the destination of the corpus. I agree with the learned Chief Judge. It was not suggested, as far as I could follow the argument, that the difference that in this case the gift of corpus was defeasible in the event of death in the father's lifetime while in that it was defeasible on death under twenty-one or before marriage was material, but it was contended that the direction to manage (which was supplemented by a further direction to apply

(1) (1895) 2 Ch., 309.

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the income towards maintenance or education of the minors and accumulate the balance during their minority) did not terminate, at earliest, until the death of Thomas Bowes, since up to that time he might have had another child in which event the direction to manage would have continued until that child attained twenty-one or died. In my opinion this was not the intention of the testatrix, and is not to be collected from her language. When she directed the trustees to manage her property until her brother's youngest child attained twenty-one she meant, in my judgment, the youngest living child for the time being. On that event happening the trust to manage came to an end. Whether it would have revived again, and with what consequences, in the event of another son being born to Thomas Bowes it is not necessary to consider. The trust for all his children who should survive him thereupon came into operation, and nothing subsequently happened to stop its operation. No question arises under the *Thellusson Act*, since no accumulation of income after Thomas Bowes's youngest living child should have attained twenty-one is directed, either expressly or by necessary implication.

The second question relates to property of considerable value. It arises upon a gift in a codicil to the testatrix's will, which is in these terms: "And as to my property situate on the New South Head Road and known as the 'Darling Point Hotel' I give and bequeath the same to my said trustees their executors administrators and assigns to hold the same upon trust to pay the income thereof to my youngest brother Thomas Bowes . . . during his life without power of anticipation and upon and after his decease upon trust for all the children (except John Baptist and Francis the eldest and second eldest sons of the said Thomas Bowes) or any the child of the said Thomas Bowes absolutely and if more than one in equal shares but so that the interest of such children or child shall not become vested until he or she attains the age of twenty-five years."

I do not propose to add one more to the long list of judgments in which distinctions are drawn between the language of different testators, but am content to follow the rule, stated by the learned Chief Judge, first to read the will and form an opinion on its meaning,

and then to inquire whether there is any authority binding me to interpret it contrary to what I think to have been the testator's intention.

The appellant contends that this gift is obnoxious to the rule against perpetuities, inasmuch as there was no complete and absolute disposition of the property until the youngest of Thomas's children attained twenty-five, an event which might happen more than twenty-one years after his death. This argument is founded entirely upon the words "become vested." The word "vested" is, as pointed out by the learned Chief Judge, capable of bearing more than one meaning. He thought that in this will the word means "vested indefeasibly." In my opinion, it either bears that meaning or refers to the date at which actual payment of income is to begin. In either view it is not obnoxious to the rule against perpetuities. The learned Judge relied to a great extent upon the use of the word "absolutely." I base my judgment not only on the use of that word, which I think has a very cogent effect, but also on the use of the word "all" and on a comparison of the language of this gift with that of other gifts in the will and codicil. For instance, the gift immediately preceding that in question was of a specific leasehold property "upon trust for Thomas Brian Morrisy brother of . . . Mary Morrisy absolutely, but so that the interest of such brother shall not become vested until he attains the age of twenty-five years." I find it impossible to doubt that the testatrix intended that Thomas Brian Morrisy was to take the property in all events, but was not to have possession of it until he attained twenty-five. I find it equally impossible to doubt that in the next following gift when she used the same words she meant the same thing. In other gifts she used various expressions to denote, always with precision, the conditions upon which her bounty was to take effect as to various classes of beneficiaries.

I am strongly confirmed in this conclusion by the rule stated by Lord *Chelmsford* L.C. in *Christie* v. *Gosling* (1), and often followed. And I know of no authority which compels me to hold otherwise.

For these reasons I think that the appeal fails on this point also.

(1) L.R. 1 H.L., 279, at p. 290.

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BARTON J. I concur.

ISAACS and RICH JJ. (read by ISAACS J.). As to the Maclean Street property, which is leasehold, the appeal should be allowed. The gift is in trust "for all such one or more of the children of the said Thomas Bowes as shall be living at the time of his decease in equal shares as tenants in common." These words amount clearly to a contingent gift to a class consisting of such of the children of Thomas Bowes as survive him (see *Duffield* v. *Duffield* (1)—the Judges' opinion). Under the doctrine of *Woodin's Case* (2) the income passed with the bequest. Now, if for the purpose of the *Thellusson Act* there be entirely eliminated from consideration the accumulation clause and the investment clause, there still remains the obvious duty of the trustees, if they follow the directions of the testator, under the main bequest to accumulate the income for the benefit of the beneficiaries until the contingency occurs (*In re Emmet's Estate* (3)).

As to the Darling Point property, that is also leasehold or, in other words, personalty. The crucial words of the will are "upon trust for all the children" (except certain named children) "or any the child of the said Thomas Bowes absolutely and if more than one in equal shares but so that the interest of such children or child shall not become vested until he or she attains the age of twenty-five years." Authorities are constantly cited in will cases, both at the bar and by the Court, and yet very often observations are found as to the inapplicability of citing them. Like most other generalizations, such an observation may be right or wrong according to the circumstances. There is no difference in this respect between a will and a contract. Decided cases have precisely as much relevance to the one class of instruments as to the other. For the purposes of comparison between two wills or two contracts, in order to ascertain what the persons executing them respectively meant, decided cases are, of course, useless, and none the less so because the construction of one has been decided by a Judge instead of being silently accepted by those interested. But for the purpose of ascertaining some rule of law or construction or some

(1) 1 Dow & Cl., 268, at p. 314.
(2) (1895) 2 Ch., 309.
(3) 17 Ch. D., 142.

presumption applicable to the particular class of instrument, cases are always permissible and relevant. In the present case, cases are very relevant; not for comparison of testator's language with the language of other testators in order to arrive at his actual intention, but for legal principles enunciated to guide Courts in interpreting wills and thereby to guide testators in framing them.

Lord *Davey*, for the Privy Council, in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1) says:—"There are two cardinal principles in the construction of wills, deeds, and other documents which their Lordships think are applicable to the decision of this case. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is, to use Lord *Denman's* language, that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense: *Doe* v. *Gallini* (2)."

Another is that the word "vest" is a technical word meaning primarily "vested in interest." Sir *John Romilly* laid this down with great precision in *Re Richard Arnold's Estate* (3), and not only was no doubt cast upon that case by the Court of Exchequer Chamber in *Richardson* v. *Power* (4), a case in the same estate, but the appellate Court followed the law so laid down. The point was reaffirmed in *Hale* v. *Hale* (5), per *Jessel* M.R. There is nothing to qualify that primary meaning in the clause now in question. The expression "so that the interest of such children or child shall not become vested until he or she attains the age of twenty-five years" should therefore be read as meaning that the share should not until the event mentioned be vested in interest.

So far, therefore, the gift, as Mr. *Collins* in his able argument contended, was conditional, and not absolute in the sense of freedom from all conditions. But the nature of the condition still remains to be ascertained. Is it contingency; or is it defeasance? If the

(1) 24 Ind. App., 76, at p. 85.
(2) 5 B. & Ad., 621.
(3) 33 Beav., 163, at pp. 172-173.
(4) 19 C.B. (N.S.), 780.
(5) 3 Ch. D., 643, at p. 646.

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Isaacs J. Rich J.

former, the appeal should succeed; if the latter, it should fail. Now, the gift is to be read as a whole, the proviso is part of it. Adopting the words of Lord *Haldane* L.C. in *Toronto Suburban Railway Co.* v. *City of Toronto* (1), "the document to be construed must be read as a whole, and in interpreting particular words these cannot be read without reference to what comes before and after." That is a confirmation of what Lord *Ellenborough* said in *Barton* v. *Fitzgerald* (2). So reading it, it is, on the whole, the better construction that the gift is contingent on the class attainment of twenty-five years.

The word "absolutely" is relied on to show that the interest given even if conditional is not contingent but defeasible, and the maxim *ut res magis valeat quam pereat* is called in aid. The application of the maxim will be dealt with presently. But as to the word "absolutely" it is clear from a careful reading of the will and codicil that the only constant sense in which the testatrix has used it is in relation to the amount of interest given. In several places it is used where the gift is manifestly contingent, but everywhere it means the residue of interest remaining in the testatrix after precedent limited interests are satisfied (see *In re Pickworth* (3)). Therefore there is nothing in the word "absolutely," as used, to alter or qualify the primary technical meaning of "vested."

The only remaining consideration is as to the maxim referred to. In any case it would be difficult to apply it in its entirety in the present case for reasons we shall state, but the more important matter is for general purposes to ascertain its scope. There is no doubt a presumption in favour of validity which may sometimes be applied where, after weighing carefully all other opposing considerations, the words still remain, in the opinion of the Court, "obscure and ambiguous." Lord *Selborne* spoke of it in *Pearks* v. *Moseley* (4) as "the consideration that it is better to effectuate than to destroy the intention."

Gray on Perpetuities (3rd ed.) in par. 633 refers to what he calls "a legitimate use of the rule against perpetuities in matters of construction." He states the rule as he understands it, and gives a

(1) (1915) A.C., 590, at p. 597.
(2) 15 East, 530, at p. 541.
(3) (1899) 1 Ch., 642.
(4) 5 App. Cas., 714, at p. 719.

list of authorities, both English and American. The list includes *Pearks* v. *Moseley* (1), *In re Turney* (2) and *In re Hume* (3). In the last-mentioned case, at p. 698, Lord *Parker* (then *Parker* J.) said: "It is not permissible to construe the gift otherwise than according to its natural meaning because if construed according to its natural meaning it would offend against the rule, though possibly if the gift might equally well be construed in two ways, one of which only would offend against the rule, the Court might because of the rule be led to adopt the other construction."

It is, independently, stated by *Sargent* J. in practically the same way in *In re Atkinson* (4). We think that the observation of Lord *Parker* presents the true office of the rule. Where the Court, after giving full weight to all relevant circumstances, can come to a definite opinion even on closely competing considerations, as to the meaning of the words, that meaning is not to be affected by the existence of the rule. But, where the matter still remains evenly balanced, the presumption in favour of validity, which is all that is left, is admissible in the last resort to determine the result.

Suppose, however, it were attempted to apply the maxim to the present case, what would be the result? It is settled law that you cannot have divesting after the date of distribution, that is, when the beneficiary is entitled to call for his bequest (*O'Mahoney* v. *Burdett* (5); *Ward* v. *Brown* (6)). It is also clear law that a person *sui juris* can call for a bequest that has vested, unless the will declares some other intermediate destination of the income (*Gosling* v. *Gosling* (7); *Wharton* v. *Masterman* (8)). No such intermediate destination exists here. If it were necessary to decide so much it might be found that the assumed direction to divest in case a beneficiary did not attain twenty-five would have to be disregarded. We have not, however, in the view we take, to express any concluded opinion on this point; and so, as it might affect other wills, we leave it with the observation that it is certainly not clear that the maxim we have been considering could be applied in favour of

(1) 5 App. Cas., 714, at p. 719.
(2) (1899) 2 Ch., 739, at p. 747.
(3) (1912) 1 Ch., 693.
(4) (1916) 1 Ch., 91, at p. 96.
(5) L.R. 7 H.L., 388.
(6) (1916) 2 App. Cas., 121.
(7) John., 265, at p. 272.
(8) (1895) A.C., 186, at p. 193.

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the respondents so as to maintain the proviso in all respects as a valid testamentary direction.

In our opinion the appeal should be allowed as to both the matters complained of.

Appeal dismissed. Costs of all parties to be paid out of the estate with liberty to apply if residue is insufficient.

Solicitor for the appellant, *J. W. Abigail.*

Solicitor for the respondent Bowes, *J. Lane Mullins.*

B. L.