of other estates and insolvents. The Supreme Court reached the same conclusion as we have (*M'Lelland* v. *Smith* (1)). See, too, *M'Auley* v. *Beatty* (2).

In our opinion the appeal should be dismissed with costs.

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McTIERNAN J. I agree with the judgment of *Dixon* and *Evatt* JJ.

Appeal dismissed.

Solicitors for the appellant, *Lionel Dare & B. P. Purcell.*

Solicitor for the respondents, *P. N. Roach.*

J. B.

[HIGH COURT OF AUSTRALIA.]

HARRIS AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

KING AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1936. SYDNEY, *Aug.* 17, 18; *Nov.* 26. Starke, Dixon and McTiernan JJ.

Will—Construction—Rule against perpetuities—Remoteness—Gift over on compound event—Splitting gift over.

A testator, who died in 1880, by his will devised certain land to trustees, subject to an annuity, upon trust to pay the rents to the testator's daughter for life and from and after her death, in case she should leave a husband and one or more children, upon trust in favour of the husband and children, but if she should leave a husband and no issue, or the issue should fail during the lifetime of the husband, then upon trust to pay the rents to the husband during his life. The testator directed that after the death of his daughter

(1) (1856) 1 V.L.T. 150. (2) (1886) 12 V.L.R. 633; 8 A.L.T. 66.

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and her husband (if any) his trustees should stand seised of the land upon trust to sell it and to pay and divide the ultimate surplus of the proceeds of such sale equally between and amongst all the children of his daughter who should be living at the time of the decease of the survivor of them the daughter and the husband (if any) and who should have attained the age of twenty-one years or married, and the issue of such of her children as should have died leaving issue should take their parents' share in equal proportions. The daughter survived the testator by many years and died a widow, leaving children who had attained full age.

Held that the gift over in favour of the testator's grandchildren was not conditioned on the happening of either of two distinct events, but was a single gift over on one condition involving two events not separated by the testator, one of which, namely, the death of the daughter's husband, would not necessarily have happened within the period prescribed by the rule against perpetuities, and that therefore the gift over was void.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

By his will dated 20th November 1873 the testator, Reuben Uther, who died on 10th July 1880, after making certain other devises and bequests, devised the land and premises situate at and known as number 220 Pitt Street, Sydney, to trustees upon trust in favour of his daughter Wilhelmina, her husband and children, and with and subject to the like powers, provisions and directions and appropriations after the death of his daughter and her husband in all respects as were expressed with respect to certain land and premises thereon devised to his daughter Emma. A similar devise was made to his daughter Florence in respect of land and premises thereon situate at and known as number 218 Pitt Street. The devise to Emma was of certain land situate at number 222 Pitt Street; it was devised to trustees, subject to an annuity, upon trust to pay the rents to Emma for life, and from and after her death, in case she should leave a husband and one or more children, upon trust in favour of the husband and children, but if she should leave a husband and no issue, or the issue should fail during the lifetime of the husband, then upon trust to pay the rents to the husband during his life. The will proceeded:—"And I direct that after the death of my said daughter and her husband (if any) my said trustees their heirs and assigns shall stand seized of the said house and premises upon trust to sell and dispose of the same . . . and

to pay and divide the ultimate surplus of the proceeds of such sale . . . equally between and amongst all the children of my said daughter who shall be living at the time of the decease of the survivor of them my said daughter and her husband (if any) and who shall have attained the age of twenty-one years or married. And the issue of such of the said children as shall have died leaving issue such issue to take in equal proportions the share which would otherwise have gone to their father or mother." Wilhelmina was married in 1884, and died in 1931, a widow. Florence was married in 1883, and died in 1932, a widow. Each of the daughters left children who had attained full age.

The trustees of the will, Ronald Talbot Smyth King and Philip Walter Smyth King, took out an originating summons for the determination of the following questions:—(1) Whether the trusts to sell and dispose of the houses and premises respectively situate at and known as numbers 218 and 220 Pitt Street were valid trusts or failed by reason of the same infringing the rule against perpetuities or otherwise? (2) If these trusts were not valid trusts, whether they had become validated by the *Trustee (Amendment) Act* 1929 (N.S.W.)? (3) Whether the trust to pay and divide the ultimate surplus of the proceeds of the sale of the house and premises number 220 Pitt Street, after making certain deductions thereout, equally amongst all the children of the testator's daughter Wilhelmina who should be living at the time of the decease of the survivor of that daughter and her husband if any and who should have attained the age of twenty-one years or married was a valid trust or failed to any and what extent by reason of the same infringing the rule against perpetuities or otherwise? (4) Whether the trust to pay and divide the ultimate surplus of the proceeds of sale of the house and premises number 218 Pitt Street, after deducting therefrom certain expenses, equally between and amongst the children of the testator's daughter Florence was a valid trust or failed to any and what extent by reason of the same infringing the rule against perpetuities or otherwise?

The defendants to the summons were James Oswald King and Ada Irene Douglass, the legal personal representatives and children of the testator's daughter Wilhelmina; William Uther Harris and

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Leonard Uther Harris, the children of the testator's daughter Florence; Florence Edith Smyth King, William Cooper Smyth King, Marjorie Georgina Smyth King, Emily Barker, Theodore Hugh Barker, Roy Brian Marks, Eric Marks, Henry Albert Uther, Hulton Smyth King and Enid Vera St. Clair, in their own interests or as representing various interests under the will.

The summons was heard by *Nicholas* J., who held that the trusts infringed the rule against perpetuities and were therefore invalid, and that they had not been validated by the *Trustee (Amendment) Act* 1929 (N.S.W.).

From that decision William Uther Harris and Leonard Uther Harris appealed to the High Court, the respondents to the appeal being the plaintiffs and the other defendants to the summons.

Although served with notice of the appeal, three of the respondents did not appear at the hearing thereof.

Flannery K.C. (with him *Weston* K.C. and *Moffitt*), for the appellants. The question at issue is whether the words " after the death of my daughter and her husband (if any) " as appearing in the will express two points of time or only one. The principles of construction involved are set forth in *Jarman* on *Wills*, 7th ed. (1930), vol. I., particularly at p. 329; *Gray* on *Perpetuities*, 2nd ed. (1906), pp. 433, 637. The rule against perpetuities is as set forth in *Miles* v. *Harford* (1). The judge of first instance was wrong in holding that it was his duty to guard against a benevolent construction. On the contrary, there should be a leaning towards such a construction, which is really a reasonable construction, for the purpose of ascertaining what was the testator's intention. The intention of the testator, as indicated by the use of the words " if any," was to provide for the grandchildren concerned on either of the two events, either on the death of their mother, his daughter, or on the death of the survivor of the mother and father, her husband, whichever should happen. The words " if any " must be given the meaning " if any shall survive her." Where two constructions are open, the construction in favour of the maintenance of the disposition should be adopted. The " alternative " rule should be applied.

(1) (1879) 12 Ch. D. 691, at pp. 702, 703.

The court leans against the rule against perpetuities (*In re Bowles*; *Page* v. *Page* (1)). *In re Hancock*; *Watson* v. *Watson* (2) merely decides that the rule against perpetuities must be applied if it is found on a proper construction of the will that there is one and only one event, and that that event is outside the particular limits. It in no way deals with the particular aspect involved in this case, nor gives a meaning to the general intention of the testator. The principle applied in *In re Harvey*; *Peek* v. *Savory* (3) is not disputed; if it is found on construction that there is one gift, then it cannot be split. The construction contended for here is: "I direct that after the death of my daughter or her surviving husband as the case might be the disposition takes place." The court should lean towards the testator's general intention (*In re Earl of Stamford and Warrington*; *Payne* v. *Grey* (4)).

Wickham, for the respondents James Oswald King and Ada Irene Douglass, adopted the argument submitted on behalf of the appellants.

R. K. Manning, for the respondent trustees, Ronald Talbot Smyth King and Phillip Walter Smyth King.

Bonney K.C. (with him *David Wilson*), for the respondents Emily Barker, Theodore Hugh Barker, Roy Brian Marks and Eric Marks. The solution of the question before the court depends upon the meaning of the words used by the testator irrespective of what his intention may or may not have been (*Pearks* v. *Moseley* (5)). In *Gray* on *Perpetuities* the subject matter is dealt with as it obtains in the United States of America, where the law differs considerably from the law in force throughout the British Empire, and where the courts lean much more readily than do our courts to finding meanings against the rule against perpetuities. The words used by the testator include several contingencies. In some of those cases the gift is perfectly good, in others it is bad, not because of the operation of the rule of construction, but because of the operation of law which

(1) (1905) 1 Ch. 371, at p. 376.
(2) (1901) 1 Ch. 482; (1902) A.C. 14.
(3) (1888) 39 Ch. D. 289.
(4) (1912) 1 Ch. 343, at p. 365.
(5) (1880) 5 App. Cas. 714, at pp. 719, 733.

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provides that where one of a number of contingencies is too remote the whole gift is affected and not merely the particular contingency. If the words used by the testator are a form of expression which creates two gifts in the alternative and one of those gifts is a good gift, then there is no reason why it should not take effect. If, however, the form of expression does not create two gifts in the alternative, then neither of them takes effect although they are both inherent in the words used. It is entirely a question of the form in which the gift is made (*Miles* v. *Harford* (1)). The matter of divisibility was considered in *In re Harvey* ; *Peek* v. *Savory* (2). The judgments in that case apply with particular force to this case. See also *In re Frost* ; *Frost* v. *Frost* (3) and *In re Appleby* ; *Walker* v. *Lever* (4). Although the two alternatives, and many others, are included within the one form of expression, they are not separately expressed, so that one may be discarded and the remaining provision be unaffected and good. In order to avoid the rule the alternative must be expressed.

[DIXON J. referred to *Evers* v. *Challis* (5).]

That case was distinguished in *In re Bence* ; *Smith* v. *Bence* (6). A gift not necessarily ascertainable within a life or lives in being and twenty-one years afterwards, as here, is void for perpetuity (*In re Bowles* ; *Page* v. *Page* (7)). *In re Earl of Stamford and Warrington* ; *Payne* v. *Grey* (8) was purely a matter of construction and does not apply to anything directly concerned in this case. The words " if any " mean " if she shall have any husband." The gift depends upon a compound event. It is one gift with a combined condition, and therefore is void.

Dudley Williams K.C. (with him *Emerton*), for the respondents Henry Albert Uther, Hulton Smyth King and Enid Vera St. Clair, adopted the argument submitted to the court on behalf of the preceding respondents.

Flannery K.C., in reply.

Cur. adv. vult.

(1) (1879) 12 Ch. D., at p. 703.
(2) (1888) 39 Ch. D., at p. 298.
(3) (1889) 43 Ch. D. 246.
(4) (1903) 1 Ch. 565.
(5) (1859) 7 H.L.C. 531 ; 11 E.R. 212.
(6) (1891) 3 Ch. 242.
(7) (1905) 1 Ch., at p. 376.
(8) (1912) 1 Ch. 343.

The following written judgments were delivered :—

STARKE J. This is an appeal from a decretal order made by *Nicholas* J., declaring that certain testamentary dispositions in connection with lands, known as Nos. 218 and 220 in Pitt Street, Sydney, infringe the rule against perpetuities and are consequently void for remoteness.

Reuben Uther died in July 1880, and by his will devised the lands situate at No. 220 Pitt Street to trustees upon trust in favour of his daughter Wilhelmina, her husband and children, and with and subject to the like powers, provisions and directions and appropriations after the death of his daughter and her husband in all respects as were expressed with respect to the property devised to his daughter Emma Barker. A similar gift was made to his daughter Florence in respect of the premises known as No. 218 Pitt Street. The devise to the daughter Emma, which is here referred to, was of certain land, also in Pitt Street; it was devised to trustees, subject to an annuity, upon trust to pay the rents to the testator's daughter Emma for life and from and after the death of his daughter, in case she should leave a husband and one or more children, upon trust in favour of the husband and children, but if she should leave a husband and no issue living at the death of her husband, then upon trust to pay the rents to the husband during his life. The will proceeded: "And I direct that after the death of my said daughter and her husband (if any) my said trustees their heirs and assigns shall stand seized of the said house and premises upon trust to sell and dispose of the same . . . and to pay and divide the ultimate surplus of the proceeds of such sale . . . equally between and amongst all the children of my said daughter who shall be living at the time of the decease of the survivor of them my said daughter and her husband (if any) and who shall have attained the age of twenty-one years or married." It is this disposition in favour of the children of Wilhelmina and Florence respectively, made by reference to the gift in favour of the children of Emma, that has been held invalid. Wilhelmina was married in the year 1884, and died in 1931 a widow, leaving children who survived her. Florence was married in 1883, and died in 1932 a widow, leaving children who survived her. The dispositions which

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have been held invalid are by way of executory interests in realty. A gift of such an interest " to be valid must vest, if at all, within a life or lives in being and twenty-one years after ; it is not sufficient that it may vest within that period ; it must be good in its creation, and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being, and twenty-one years and the period allowed for gestation, it is not valid, and subsequent events cannot make it so " (*Hancock* v. *Watson* (1)). The period within which a future interest must vest commences at the time when the limitation comes into force, which is the date of the testator's death where the limitation is contained in a will. The direction in the present case is, as we have seen, to sell after the death of the testator's daughter and her husband (if any) and to pay and divide the surplus of the proceeds equally between the children of his daughter who shall be living at the time of the death of the survivor of " them my said daughter and her husband (if any) who shall have attained the age of twenty-one years or married." But it is possible that the daughter's husband may be a person who is not born at the time of the testator's death, and thus the lives after which the interest is to vest are not necessarily lives of persons in being at the death of the testator. It is immaterial that the contingency in fact happened in this case within the limits prescribed by the rule. It was contended that the disposition refers to two distinct events, and not to one event. If, however, property is given on a compound event, that is, an event involving several contingencies, the disposition cannot be split up into as many gifts as there are possible events so as to sustain it whenever the actual event falls within the limits of the rule. But the testator may himself separate the gift so as to make it take effect on the happening of any of several events and if the event which happens is not too remote, then the gift is good. It is really a question of words—a question of expression and not of the ascertainment of a general intent (*Miles* v. *Harford* (2) ; *In re Harvey* ; *Peek* v. *Savory* (3) ; *Theobald* on *Wills*, 8th ed. (1927), p. 680). Does the testator in the present case separate the gift so as to make it take effect in the event of his daughter dying

(1) (1902) A.C., at pp. 17, 18.
(2) (1879) 12 Ch. D. 691.
(3) (1888) 39 Ch. D. 289.

without leaving a husband surviving ? On the contrary—unless the words " if any " split up into several events the contingency which conditions it—the gift is so expressed that it takes effect on a compound event, namely " the death of my said daughter and her husband." And the words " if any," far from splitting the contingency, indicate the possibility of an event that would exclude the contingency arising which conditions the gift in favour of the children of Wilhelmina and Florence.

The appeal should be dismissed.

DIXON J. The decretal order under appeal declares void for remoteness two executory limitations contained in the will of a testator who died in 1880. The limitations were of equitable interests in realty. The conditions upon which their vesting was expressed to depend were such that at the time when the will took effect it was conceivable that the fulfilment of the conditions might occur outside the requisite period. In fact the fulfilment has taken place inside the period. Those who would take under the respective limitations, if they were valid, claim that they depend upon contingencies with a double aspect. It is said that two distinct contingent events are described by each of the dispositions in question ; the occurrence of one such event outside the period which the rule against perpetuities allows might have been antecedently possible, but the other, that which in fact happened, could only occur inside the period. The principle relied upon amounts almost to a qualification of the general rule that no future estate or interest is valid unless at the time of its creation it is certain that, if it vests, it will do so within the prescribed period, and that no account is to be taken of the way in which events actually occur. For it is a subsidiary rule that, if the vesting of the estate or interest is expressly made to depend on the happening of one of two or more distinct contingencies specified as independent and alternative events, it is no objection that some of them might conceivably have taken place beyond the period if, in the result, a contingency so separately stated occurs which could not have done so. For example, a gift over, if a named person in being should die leaving no issue him surviving or if he should die without issue who attain the age of

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twenty-five, describes two distinct conditions. If the first is to be fulfilled, its fulfilment must occur at the end of the life in being and so within the requisite period. But the second condition may be fulfilled more than twenty-one years after the dropping of that life. The limitation therefore depends upon a contingency with a double aspect. It comprises alternative conditions, one only of which is to operate. One condition conforms with the rule against perpetuities, the other offends against it. Accordingly the gift may take effect in the one case but not in the other. But this is so only because the two contingencies are expressly distinguished. They are stated as two separate events, the happening of which will vest the future interest created. From their nature they are alternative, and therefore one interest, not two, is limited to depend upon them. But there are two separate limitations of that interest in the alternative. If in the example given the stated contingency had been simply the death of the person *in esse* without issue who attained twenty-five, it would necessarily have included the event of that person dying without leaving issue him surviving. But a condition so expressed cannot be analysed into all the events the happening of any one of which would fulfil it. The condition last described would be satisfied by the happening of many contingencies confined to the period of limitation allowed by law, as, for example, by the death of the person *in esse* without ever having had children, by his surviving his children and having no remoter issue, by his children's surviving him but dying childless at each and every possible age before twenty-one, and by his children's so dying leaving issue who die within twenty-one years of the death of such person. If the donor had expressly stated each of these possible events as an alternative contingency upon which the vesting of the executory interest should depend, the limitation over upon them would have been good and would take effect on the occurrence of one of them, notwithstanding that the donor had added as other events the invalid contingency of the person *in esse* dying leaving children or remoter issue who failed to attain the age of twenty-five. But as in the supposed case the donor has not done so but has stated one condition and has suspended the vesting of an interest created by a single limitation until that condition is fulfilled, from whatever

precise events its fulfilment may arise, the entire gift is void *ab initio*. "Wherever the valid alternative contingency is left to implication merely or wherever it is not so expressed as to be separable from the remote contingency, but is rather embraced by this, the limitation will be void, as depending upon an event which is too remote and with which there is no event alternate or concurrent that may give effect to the limitation" (*Lewis, Law of Perpetuity*, (1843), p. 509).

The limitations which we are called upon to consider relate to two parcels of land in the city of Sydney. They were comprised in a devise to trustees. The trusts declared of each of the two parcels in question were in favour of two daughters respectively of the testator. Each of the two daughters survived the testator by many years and died a widow leaving children who had attained full age. The trusts were declared by reference to provisions in the preceding part of the will in favour of another daughter. In the case of each parcel of land the first trust was for the daughter for life. After her death if she should leave a husband and one or more children, a trust was declared for the payment of one half of the income of the land to the husband for life and for the application of the other half to the maintenance and education of the children until they should all attain twenty-one or marry, and then for the division of that half of the income among them in equal shares with a provision for the substitution of the issue of any of them who should have died in the meantime. The will then provided that, if the daughter should die leaving a husband and no issue or such issue should fail in the lifetime of her husband, the land should be held upon trust to pay the income to her husband for life. Then followed a direction that after the death of the daughter and her husband (if any) the trustees should stand seised of the land upon trust to sell it and to pay and divide the proceeds amongst all the children of the daughter who should be living at the time of the decease of the survivor of them the daughter and the husband (if any) and who should have attained the age of twenty-one years or married and the issue of such of her children as should have died leaving issue, such issue taking their parents' share in equal proportions. It is this limitation that has been declared void for remoteness. It was followed by a direction that if the daughter died leaving no issue or leaving a

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husband and issue which should fail in the lifetime of the husband, the trustees after the husband's death should divide the proceeds of the sale of the land equally amongst the testator's daughters by his second wife. Under the disputed disposition the sale of the land and division of the proceeds was to take place at the death of the daughter or any husband she might marry, whichever should last happen. The class among whom the proceeds should be divided was made ascertainable upon the same event. It was, of course, conceivable that the daughter might marry a man born after the testator's death and that he might survive her by more than twenty-one years. Thus the event upon which the ascertainment of the class to take and the realization and distribution depended might have taken place outside the requisite period. It is on this ground that the limitation has been declared void. *Nicholas* J., who made the declaration, rejected the view that it was a gift upon a contingency with a double aspect stated as two separable conditions operating in the alternative. If the limitation could be regarded as specifying the event of the daughter dying without leaving a husband her surviving and expressing it as a distinct and independent contingency upon which the class should be ascertained and the distribution made, then, since that is the event which happened and it is a contingency not itself open to the objection of remoteness, the gift to the daughter's children would take effect.

The question for decision is whether the limitation should be so regarded.

It is a question which must be determined by reference to the manner in which the disposition is expressed. It does not depend upon the contingencies which are necessarily comprised within that expression and the inherent difference or distinction between the events themselves. Indeed it has been said that it is really a question of expression or of words and not one of general intention, because the events covered by one expression cannot be divided or split, but when the instrument contains two expressions by means of which the events are separately described, effect is given to it as if the bad one were struck out (Cf., per *Jessel* M.R., *Miles* v. *Harford* (1)). But it could scarcely be otherwise. For, except when a

(1) (1879) 12 Ch. D., at pp. 702, 703.

condition is such that it could not possibly be fulfilled within the prescribed period, which must be very rare, limitations void for remoteness would but for their invalidity be capable of taking effect either within or outside the limits fixed by the rule against perpetuities. In every such case, if by any appropriate restriction the contingency were confined to those limits, the gift would, of course, be good. Further, it could not be infected with invalidity merely because, in the event of the contingency not happening within those limits, an alternative but void gift were made by the same instrument to take effect upon the contingency happening otherwise than within those limits. The law, therefore, has no resource but to make the question one governed by the manner in which the donor has attempted to carry out his general intention. If he has made in effect two alternate gifts by describing distinct and independent contingencies in which the limitation takes effect, if he has separated and disjoined the events so as to express an intention that the gift shall vest in either without regard to the other, then one may be allowed to stand although the other would fall (Cp. *Gray* on *Perpetuities*, 3rd ed. (1915), secs. 331, 354, pp. 311, 326, 327). Two cases not unlike the present illustrate the application of the doctrine. In *In re Harvey*; *Peek* v. *Savory* (1) a will contained one ultimate gift over in case both of two daughters of the testatrix should die without leaving any child or remoter issue living at the decease of the survivor of the two daughters or at the decease of the survivor of their then present or future husbands, an event which, of course, might occur outside the prescribed period, the husbands not necessarily being *in esse* at the death of the testatrix. The gift over was expressed to take effect " after the death of such of the daughters as might happen to survive the other of them, and the death of the survivor of their respective husbands." The Court of Appeal found in this no disjunctive expression of two contingencies, the survival of a daughter and the survival of a daughter's widower. In argument *Cotton* L.J. said: " Is not the gift over in effect a gift on the happening of such one of two specified events as shall last happen? " (2). In his judgment he said:—" It is a gift over on failure of a class to be ascertained at the death of the

(1) (1888) 39 Ch. D. 289.

(2) (1888) 39 Ch. D., at p. 296.

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survivor of the daughters and their husbands present or future, and is bad for remoteness. It is not enough that you can separate the gift over so as to make it an alternative gift on two contingencies —the testatrix must herself have separated it so as to make it take effect on the happening of either of two events" (1). *Fry* L.J. :— "The true inquiry is whether the testatrix refers to one event or to two distinct events . . . I think that is not a true alternative, but that she means 'at the death of the survivor of my daughters, or of the survivor of their husbands, whichever of those two survivors shall be the last survivor.' The gift over was not to take effect until the husbands as well as the daughters were dead" (2).

In *In re Norton* ; *Norton* v. *Norton* (3) the question related to the validity not of a limitation but of a power of appointment. Its validity, however, depended upon the remoteness of the event upon which, according to the conditions of the power, any interest appointed would vest. That event was "after the decease of the survivor of a daughter of the testatrix and any husband she might marry leaving any child or children or more remote issue of such daughter who might be living at such death," that is, the death of the daughter or any husband who should survive her. The daughter desirous of exercising the power was an elderly widow. *Joyce* J. did not finally decide that the power was invalid. But he said that it was unfortunate that the draftsman made no express disposition in the event of there being no surviving husband. He went on :—"According to the authorities it is settled that in construing the will the court may not, in order to escape from the consequence of this rule against remoteness, sever or split up the compound event, the death of the survivor of the daughter and her husband, so as to make a separate and express disposition after the death of the daughter leaving no surviving husband. We must take the disposition after the death of the survivor of the daughter and her husband exactly as we find it in the will. . . . The disposition made by this will after the death of the survivor of a daughter and any husband is contingent and conditional upon

(1) (1888) 39 Ch. D., at p. 298. (2) (1888) 39 Ch. D., at p. 299.
(3) (1911) 2 Ch. 27.

there being issue, children or more remote, of the daughter living at the death of the survivor of the daughter and her husband, so that it would not necessarily be determined until this event (that is, the death of the survivor) whether the subsequent limitation of the will can take effect or not" (1). See, further, *In re Bence*; *Smith* v. *Bence* (2); *Hancock* v. *Watson* (3).

In the present case I think the contingency upon which the duty to sell arises and the ascertainment of the class depends is the dropping of two lives. One life, that of the daughter, is the life of a designate person *in esse*. The other life, that of the husband, is the life of a person answering a description, a description which might or might not be filled. In my opinion the provision does not expressly discriminate between the two orders in which the lives may drop should the description be filled nor does it treat the possibility of the description never being filled as another independent contingency. It does not contain any sufficient reference to the daughter surviving her husband or dying discovert as a distinct and separate condition upon which the duty to sell and distribute should arise and the class to take should be ascertained. That contingency is necessarily contained in the contingency expressed, but it is not described or indicated as a distinct condition the fulfilment of which should independently determine the time and manner of distribution.

In opposition to this conclusion it is said that the bracketed words "if any" which both in the direction to sell and in the description of the class occur after the word "husband" mean "if any should survive" and that a sufficient specification of the contingency should be deduced or inferred from this expression and from the anterior limitations which provide for the cases of the daughter leaving a husband both with and without issue and from the manner in which the limitations of corpus relate to the alternative intermediate interests so given. Reliance is placed upon these considerations and the description of the dual contingency contained in the expressions "after the death of my daughter and her husband (if any)" and "the survivor of them my daughter and her husband (if any)."

(1) (1911) 2 Ch., at p. 39. (2) (1891) 3 Ch. 242.
(3) (1902) A.C. 14.

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In my opinion nothing more is to be found in the matters relied upon than indications that the draftsman was alive to the possibility of the fulfilment in a variety of ways of the one condition he formulated. There is not enough to justify the view that any one or more of these ways is disjunctively prescribed as a separate contingency. It remains one condition capable from its nature of fulfilment by different events but it is a condition which will not necessarily be fulfilled within the requisite time, because events in which it would be satisfied may occur outside the period prescribed by the rule against perpetuities.

In my opinion the appeal should be dismissed.

The parties have agreed that the costs of the appeal should be dealt with in the same manner as the costs of the proceedings in the Supreme Court were dealt with by the decretal order under appeal.

McTIERNAN J. This is an appeal from a decretal order of the Supreme Court which declared void for remoteness future trusts for the sale of the parts of the residue of the testator's estate, known respectively as Nos. 218 and 220 Pitt Street, and the payment and division of the proceeds amongst the respective children of his daughters Florence Uther and Wilhelmina Uther. The appellants are the children of Florence, and the children of Wilhelmina, who are amongst the respondents, support their appeal.

The trusts which were declared to be invalid were created by the testator by reference to the trusts which were expressed in an earlier part of the will with respect to No. 222 Pitt Street, which the testator devised to trustees upon trust, subject to the payment of an annuity, to pay the rents to another daughter, Emma Barker, during her life. The material parts of the trusts which follow were in these terms :—" And from and after the death of my said daughter, in case she shall leave a husband and one or more children upon trust to pay one-half of the said rent . . . to such husband during his life and . . . the other half . . . to such husband until all the children or surviving children of my said daughter shall have attained the age of twenty-one years or married provided that my said daughter's husband shall suitably maintain

and educate her said child or children . . . and from and after all my said daughter's children or surviving children shall have attained the age of twenty-one years or married upon trust to pay and divide the said last-mentioned part of the said rents . . . to and equally between and amongst all the children of my said daughter who shall have attained the age of twenty-one years or married . . . And if there shall be only one child then upon trust for such only child. And if my said daughter shall die leaving a husband and no issue or such issue shall fail in the lifetime of my said daughter's husband then upon trust to pay the whole of the said rents . . . . to the husband of my said daughter during his life." The testator thereby provided for his daughter during her lifetime and her husband, in case she should leave a husband, during his lifetime. Then follow the limitations over, which, as applied to Nos. 218 and 220 Pitt Street, the Supreme Court declared to be invalid for remoteness: "And I direct that after the death of my said daughter and her husband (if any) my said trustees, their heirs and assigns shall stand seized of the said house and premises upon trust to sell . . . And to pay and divide the ultimate proceeds of such sale . . . equally between and amongst all the children of my said daughter who shall be living at the time of the decease of the survivor of them my said daughter and her husband (if any) and who shall have attained the age of twenty-one years . . . but if my said daughter shall die without leaving issue or if she shall die leaving issue and a husband and such issue shall fail in the lifetime of her said husband, then after the death of her said husband upon" other trusts.

The appellants' mother married once and survived her husband. She married in 1883 and died in 1932. The testator died in 1880.

The *Trustee* (*Amendment*) *Act* 1929 of New South Wales provides that trusts for sale shall not be held to be bad for infringing the rule against perpetuities if the trusts for the proceeds of sale are held to be good. The argument accordingly centred on the question whether the limitation over of the proceeds of sale was void for remoteness.

The limitation is of an equitable and executory interest in realty. According to the testator's form of expression this future interest

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was given to the members of a class who would be ascertained " at the time of the decease of the survivor of them my said daughter and her husband." This expression includes the events which have in fact happened. The daughter married once only and died a widow. It follows that the members of the class can in the events which have happened be ascertained at a time which is not too remote. But these are not the only events which are comprehended by the testator's expression. The possibility that the daughter would marry a person who was not born in the testator's lifetime and would survive the daughter could not be excluded as at the testator's death (*Gray* on *Perpetuities*, 3rd ed. (1915), p. 179, and the cases there cited). The testator's expression of the events at which the limitation over to the grandchildren would take effect includes the death of his daughter and the death more than twenty-one years afterwards of a husband who was not born in his lifetime. This event would be too remote. It is settled that if the events at the happening of which a future interest is to vest are expressed as distinct alternatives, the interest will not be void for remoteness if one event must happen within the limits of the rule against perpetuities but the other event would possibly happen at a time which is too remote. But if the testator has not separated the contingencies the court will not do so in order to avoid the rule against perpetuities. Here the two sets of contingencies which may happen are not expressed separately. The events which have in fact happened are only one exemplification of the double contingency which the testator has expressed. The other events which have been described are equally an exemplification of that double contingency. The testator's expression refers to the happening of one compound event only and there is only one limitation. It cannot be read to comprehend as many separate gifts as there are contingencies included within the testator's words. The limitation cannot be read other than as a gift of a future equitable interest to a class the composition of which is conditioned by an event which would possibly not happen within the period prescribed by the rule against perpetuities. There is no more than a gift over on the contingency which is expressed whenever it might happen. It might happen within or outside the prescribed period. The testator

has not made a gift upon a contingency which would happen within the period and a substitutional gift on a contingency which would possibly not do so. He has not split the expression of the compound event upon which the composition of the class is conditioned into two sets of double events, that is, the death of the wife if she is the survivor or the death of any husband if he is the survivor. There is no separate limitation over on the event which happened (See *Re Thatcher's Trusts* (1); *In re Bence*; *Smith* v. *Bence* (2), overruling *Watson* v. *Young* (3); *Hancock* v. *Watson* (4); *Miles* v. *Harford* (5)). The testator's intention was that the daughter should receive the rents of the property for life and in case a husband survived her he was to receive one-half or the whole of the rents during his life according as any of the daughter's issue survived or were deceased. The trust for sale and the payment and division of the proceeds of sale was not expressed to arise until the death of the survivor of these two persons, one of whom was not ascertained at the testator's death. As the future equitable interest in the proceeds of sale would possibly not vest within twenty-one years after the expiry of a life or lives in being at the testator's death, it is void for remoteness and the trust for sale is void for the same reasons.

The appeal should be dismissed and the costs of all parties paid out of the estate pursuant to the agreement between them.

Appeal dismissed.

Solicitors for the appellants, *Hawdon & Hawdon*, Gloucester, by *Aubrey Halloran*.

Solicitors for the respondents, *C. M. P. Horan*; *E. S. Dunhill*; *Ryan & Watkins*, Kiama, by *E. S. Dunhill*; *W. A. Gilder, Son & Co.*; *Holdsworth, Summers & Garland*.

J. B.

(1) (1859) 26 Beav. 365; 53 E.R. 939.
(2) (1891) 3 Ch. 242.
(3) (1885) 28 Ch. D. 436.
(4) (1902) A.C. 14.
(5) (1879) 12 Ch. D. 691.