[HIGH COURT OF AUSTRALIA.]

HUME AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

PERPETUAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF TASMANIA LIMITED AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1939.

HOBART, *Feb.* 24.

SYDNEY, *April* 17.

Latham C.J., Starke, Dixon, and McTiernan JJ.

Will—Construction—Exercise of special power of appointment—Property appointed "as and when" specified age attained—Vesting of property in interest—Rule against perpetuities.

By a deed of settlement the testator, who was a bachelor at the date of the settlement, was given, in the events which happened, a special power of appointment over a property known as Arundel. By the deed Arundel was conveyed to the use of such one or more of the children or other the issue of the testator in such shares and for such estates and interests as the testator by deed or will might lawfully appoint. The testator died, leaving him surviving four infant children, two sons and two daughters. By his will, after reciting the power of appointment, he purported to appoint Arundel to his trustees upon trust for his two sons "as and when my youngest daughter shall attain the age of twenty-seven years and if my youngest daughter shall not attain the age of twenty-seven years" then to his two sons "as and when the youngest of them attains the age of twenty-eight years." The younger daughter would attain the age of twenty-seven years and the younger son would attain the age of twenty-eight years more than twenty-one years after the death of the testator. The general scheme of the will, so far as relevant, was as follows:—The testator directed his trustees to pay to his widow during widowhood so much of the income of £5,000 as they thought fit. Two sums of £5,000 were given to his trustees upon trust to invest and to pay the net income

to his daughters until the younger daughter should attain the age of twenty-seven years and thereupon upon other trusts. After purporting to appoint Arundel as stated above the testator devised a property named Birnam Wood to his trustees upon trust for his two sons in equal shares "at the same time as I have hereinbefore provided with regard to Arundel." Until the period when the testator had "directed that Arundel and Birnam Wood should vest in" his two sons his trustees were empowered to manage the properties and provision was made for the maintenance and education of the sons and for the payment of wages to them out of the income. The residue of the testator's estate (which included the unappropriated income from Arundel and Birnam Wood) was given to his trustees upon trust to invest and accumulate the income arising therefrom until his youngest daughter attained the age of twenty-seven years or his youngest son attained the age of twenty-eight years, whichever should first happen. Each son was given a half share in the income of the trust fund for life, subject to a conditional limitation of a protective character. After his death his share devolved upon his children in such shares as he might appoint and, in default of appointment, equally.

Held, by *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting), that the sons took vested interests in Arundel at the death of the testator, and, accordingly, the appointment was not void as infringing the rule against perpetuities.

Decision of the Supreme Court of Tasmania (*Crisp* C.J.) affirmed subject to a variation.

APPEAL from the Supreme Court of Tasmania.

By a deed of settlement made on 13th January 1926 between Frederick William Hume (therein called the vendor) of the first part, Ada Margaret Hume of the second part, Frederick William Keith Amos Hume (therein called the purchaser) of the third part, and Frederick Lodge of the fourth part, the vendor conveyed unto the said Frederick Lodge an estate called Arundel to hold the same unto the said Frederick Lodge and his heirs, subject to certain annuities. "3. To the use of the purchaser during the joint lives of the vendor and the purchaser without impeachment of waste. . . . 5. With remainder in case the purchaser shall survive the vendor, to the use of the purchaser in fee simple. 6. But if the purchaser shall predecease the vendor, then to the use of such one or more of the children or other the issue of the purchaser in such shares and for such estates and interests as he by deed or will may lawfully appoint. 7. And failing or subject to any such appointment, to the use of the children or other issue of the purchaser in

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

equal shares *per stirpes* and not *per capita*, sons to take on attaining the age of twenty-one and daughters on attaining that age or marrying, and the issue of any child predeceasing the purchaser to take upon attaining the like age the share of his or her parent." At the date of the settlement the said Frederick William Keith Amos Hume was a bachelor. He died on the 23rd March 1937, leaving him surviving a widow and four infant children: two sons, born in June 1932 and August 1933 respectively, and two daughters, born in January 1931 and March 1935 respectively.

Clause 11 of his will was in the following terms:—"Whereas the property known as Arundel whereon I now reside was conveyed to Frederick Lodge by conveyance number 17/726 to certain uses to secure annuities and to the further use that if I shall predecease the said Frederick William Hume Arundel shall be held to the use of such one or more of my children in such shares for such estates and interests as I by deed or will may lawfully appoint, now in pursuance of the power thereby given I do hereby appoint Arundel to my trustees upon trust for my two sons in equal shares as and when my youngest daughter shall attain the age of twenty-seven years, and if my said youngest daughter shall not live to attain the age of twenty-seven years, then I appoint Arundel to my said two sons as and when the youngest of them attains the age of twenty-eight years." The general scheme of the will was (so far as relevant) as follows:—The sum of £5,000 was given to his trustees upon trust to invest and to pay such part as they thought fit to his wife during widowhood. Sums of £5,000 were given to the trustees upon trust to invest and to pay the net income to each of his daughters until the younger daughter attained the age of twenty-seven years, when each daughter was to receive the sum of £1,000 and the balance, that is, the sum of £4,000 each, was settled upon the respective daughters with a final gift over to the sons if both daughters should die without leaving issue who attained twenty-one." Clause 11, which is quoted above, followed. Clause 12 was as follows: "I give and devise my land at Uxbridge known as Birnam Wood to my trustees upon trust for my said sons in equal shares at the same time as I have hereinbefore provided with regard to Arundel." By clause 13 the testator empowered his trustees "until the period

when I have directed that Arundel and Birnam Wood shall vest in my said sons " to manage the two properties and, after payment of outgoings and of such sums as they might think fit for the maintenance and education of the sons, to pay the balance into his trust fund. The trustees were empowered by clause 14 to employ the sons in the management of the property at such wages as they might consider proper and to pay to each of the sons " from the time which he attains his majority until such time as the properties shall be vested in them as aforesaid " such sum as with the wages paid to him should make up £250 a year. By clause 15 the residue of the testator's estate (which included the unappropriated income from Arundel and Birnam Wood) was given to his trustees upon trust to pay debts &c. and to stand possessed of the residue, called his trust fund, upon trust to invest and accumulate the income arising therefrom until his youngest daughter attained the age of twenty-seven years or his youngest son attained the age of twenty-eight years, whichever should first happen. Upon the happening of either event the trust fund and the accumulations were to be invested and the net income was to be held upon the trusts provided in clause 16. Under clause 16 the net income was to be paid to the two sons during their respective lives subject to protective provisions. On the death of each son the trustees were directed to hold one-half of the trust fund on trust for the children of the son in such shares and for such estates and interests as he might by deed or will appoint and in default of appointment for the children of such son equally. If either son left no issue who attained twenty-one, there was a gift over in favour of his brother. By clause 19 the trustees were empowered during the infancy of the children to make payments out of the income of the funds set aside from the daughters such sums as they might think fit for their maintenance, education, advancement and welfare in life and payments out of the income of Arundel and Birnam Wood were authorized for the maintenance, education, advancement and welfare in life of the sons. The will contained a direction that during the infancy of the two daughters the surplus of the income of the sum of, £5,000 settled for them after providing for their maintenance &c. should fall into the trust fund.

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

The testator purported to make Arundel available as a residence for his wife. There was a final gift over in favour of cousins if all the testator's children died without leaving issue who attained twenty-one.

The trustees took out an originating summons for the determination of the following questions :—

1. Whether or not the estate of Arundel described in an indenture of conveyance dated the seventeenth day of January one thousand nine hundred and twenty-six registered number 17/726 has in the events that have happened vested in the plaintiffs as part of the estate of the said Frederick William Keith Amos Hume deceased and if so on what trusts ?
2. If the answer to the first question is in the negative in whom is Arundel now vested and upon what trusts ?
3. Whether the disposition in the last will of the said Frederick William Keith Amos Hume whereby the said Frederick William Keith Amos Hume appointed Arundel to his trustees upon trust for his two sons in equal shares as and when his youngest daughter shall attain the age of twenty-seven years and if his youngest daughter should not live to attain that age then to his two sons as and when the youngest of them shall attain twenty-eight years, is in excess of the power conferred upon the said Frederick William Keith Amos Hume by the settlement, inasmuch as the estate or interest in Arundel so given to the two sons of the said Frederick William Keith Amos Hume will not vest within the period of a life or lives in being and twenty-one years thereafter, commencing from the settlement.

The Supreme Court of Tasmania (*Crisp* C.J.) was of the opinion that the interests given by the will to the testator's sons were vested at the death of the testator, and held that those interests were not affected by the rule against perpetuities.

From that decision the testator's daughters appealed to the High Court.

Baker, for the appellants. If the interests limited to the sons in Arundel are void, the appellants will share Arundel equally with the sons under clause 7 of the settlement. The interests limited by the will to the sons are contingent upon an event which will not arise until after the expiration of twenty-one years from the testator's death. His was the life in being at the date of the settlement for the purpose of the rule against perpetuities. The question of construction should be approached without reference to the rule. The words " as and when " prima facie import contingency. [He referred to *Re Legh's Settlement Trusts* (1); *Pearks* v. *Moseley* (2); *Bickersteth* v. *Shanu* (3).]

[DIXON J. It ultimately comes down to the question whether " as and when " means " if and when " or " to be enjoyed when."]

The will will not permit of the application of the rule in *Boraston's Case* (4), for the reasons that the subsequent provisions with regard to maintenance are powers only, and not trusts for maintenance, and, furthermore, the power is limited to the infancy of the sons and does not endure through the whole period until the younger daughter reaches the age of twenty-seven years. [He referred to *Hawkins* on *Wills*, 3rd ed. (1925), pp. 282, 283, 284; *James* v. *Wynford* (5); *In re Blackwell* (6).]

Burbury, for the respondent trustees, and *Wright*, for the respondent Enid Hume, submitted to the court.

Doyle, for the other respondents. The words " as and when " are to be taken on a primary view as words conferring interests which are vested though postponed in possession. [He referred to *Farmer* v. *Francis* (7); *Jones* v. *Mackilwain* (8); *Eccles* v. *Birkett* (9).] Consideration of the framework of the will supports the contention that the limitations are vested in interest immediately. The provisions in clause 11 are preceded in the will by clauses 6 and 7 under which the testator directs investment of £5,000 until each

(1) (1938) 1 Ch. 39.
(2) (1880) 5 App. Cas. 714.
(3) (1936) A.C. 290.
(4) (1587) 3 Co. Rep 19*a* [76 E.R. 664].
(5) (1852) 1 Sm. & B. 68 [65 E.R. 18].
(6) (1926) 1 Ch. 223.
(7) (1824) 2 Bing. 151 [130 E.R. 263].
(8) (1826) 1 Russ. 220 [38 E.R. 86].
(9) (1850) 4 De G. & Sm. 105 [64 E.R. 755].

H. C. OF A. 1939. HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

daughter attains twenty-seven years of age and then directs payment of £1,000 to each. Subsequently, in clauses 13, 19 and 21, the testator makes three separate references to the question of maintenance, which taken together are sufficient to create such a trust for the benefit of the sons as will be considered an intermediate estate for the purpose of the rule in *Boraston's Case* (1). [He referred to *Jarman* on *Wills*, 7th ed. (1930), p. 1345; *Doe d. Wheedon* v. *Lea* (2); *Goodtitle d. Haywood* v. *Whitby* (3); *Davies* v. *Fisher* (4); *Milroy* v. *Milroy* (5).]

Cur. adv. vult.

April 17.

The following written judgments were delivered :—

LATHAM C.J. On 13th January 1926 Frederick William Hume executed a settlement of certain lands known as Arundel. The settlor was described in the settlement as the vendor and his son Frederick William Keith Amos Hume as the purchaser. The son, under whose will the questions now in controversy arise, was a bachelor at the time of the settlement. The land was conveyed to a trustee to hold to certain uses. The only provision which is material for the purpose of this case is the following :—Clause 6. "But if the purchaser shall predecease the vendor then to the use of such one or more of the children or other the issue of the purchaser in such shares and for such estates and interests as he by deed or will may lawfully appoint."

This is followed by a gift over, failing or subject to any appointment, in favour of the children or other issue of the purchaser and the issue of children predeceasing the purchaser. The purchaser died on 21st March 1937, predeceasing the vendor.

The power of appointment given to the purchaser by clause 6 is a power to appoint among the children or other issue of the purchaser, and is plainly a special power of appointment.

In his will the purchaser recited the power of appointment and exercised it in the following manner: "I do hereby appoint Arundel to my trustees upon trust for my two sons in equal shares

(1) (1587) 3 Co. Rep. 19*a* [76 E.R. 664].
(2) (1789) 3 T.R. 41 [100 E.R. 445].
(3) (1757) 1 Burr. 228 [97 E.R. 287].
(4) (1842) 5 Beav. 201 [49 E.R. 554].
(5) (1844) 14 Sim. 48 [60 E.R. 274].

as and when my youngest daughter shall attain the age of twenty-seven years and if my said youngest daughter shall not live to attain the age of twenty-seven years then I appoint Arundel to my said two sons as and when the youngest of them attains the age of twenty-eight years."

The testator had four children, who all survived him. The youngest daughter was born in March 1935. She was two years old at the date of the testator's death. She will, if she lives so long, attain the age of twenty-seven years in 1962, that is, twenty-five years after the death of the testator who was the donee of the power. The testator's youngest son was born in August 1933 and was three years old at the death of the testator. He would attain the age of twenty-eight in August 1961, that is, twenty-four years after the testator's death. The question which arises upon the present appeal is whether the gifts to the sons are void by reason of the rule against perpetuities. *Crisp* C.J. has held that the sons take an immediate vested interest under the will and that the devises are valid. It was held that, though the words quoted from clause 11 of the will—" as, and when ", &c.—prima facie gave a contingent interest, other provisions in the will relating to the maintenance of the sons provided a context which justified the conclusion that the estates were vested. It was further held that certain express references in the will to the vesting of the interests of the sons should be considered as references to vesting in possession and not to vesting in interest. An appeal is now brought to this court on behalf of the daughters of the testator who (or whose issue), if the power of appointment has not been well exercised, would take with the sons or their issue under clause 7 of the settlement.

The provision of the will which falls to be construed is an appointment in favour of the testator's two sons in equal shares " as and when my youngest daughter shall attain the age of twenty-seven years " with a further provision that if the youngest daughter does not attain the age of twenty-seven years the appointment is to be to the sons " as and when the youngest of them attains the age of twenty-eight years."

If the devises to the sons had not been made by the exercise of a special power of appointment there would, in my opinion, be no

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Latham C.J.

difficulty in the case. The gifts could not be affected by the rule against perpetuities, because they would be gifts to living persons. Even if they were held to create only contingent estates, they would, if they vested at all, necessarily vest during the life of the devisee in question: See *Jarman* on *Wills*, 7th ed. (1930), at p. 470; *Lachlan* v. *Reynolds* (1); *Williams* on *Real Property*, 17th ed. (1892), p. 375.

But the devises were made in the exercise of a special power of appointment. Accordingly, the perpetuity period must be calculated from the time of the creation of the power, and not from the time of the exercise of the power (*Halsbury*'s *Laws of England*, 2nd ed., vol. 25, p. 153). The testator was a bachelor at the date of the creation of the power. I read the appointment of 1937 into the settlement of 1926, with the result that the limitations in question are devises to the unborn sons of a living person as and when an unborn daughter of that person attains the age of twenty-seven years, and, if she does not attain that age, as and when the younger of two sons attains the age of twenty-eight years.

The rule against perpetuities is that any interest to which it applies must, in order to be valid, vest, if at all, within a life or lives in being and twenty-one years after. (I omit any reference to periods of gestation as irrelevant for the purpose of the present case.) In the present case the settlement gives a life interest to the testator, the donee of the power, during the joint lives of the settlor and the testator with a power of appointment in the terms already stated if the testator should predecease the settlor—the event which has actually happened.

The relevant life is the life of the donee—the testator (*In re Thompson* (2)). Will the estates of the sons necessarily vest within the period prescribed by the rule—within twenty-one years from the death of the testator? If they do not vest until the daughter attains twenty-seven years of age or until the younger son attains twenty-eight years, the limitations are void. If, on the other hand, as the learned Chief Justice held, the estates vest on the death of the testator, then the limitations are not obnoxious to the rule against perpetuities.

(1) (1852) 9 Ha. 796 [68 E.R. 738]. (2) (1906) 2 Ch. 199, at p. 203.

Prima facie the limitations are contingent. *In re Francis* (1) has settled the controversy which formerly existed as to the effect of a gift " when " a person attained a specified age : See the differing opinions cited in argument (2)—See *In re Blackwell* (3). Is there then any context which may operate to vest the estates ? (*Phipps* v. *Ackers* (4)). There is no gift over on failure of the daughter or a son to attain the specified ages. Is there a gift of an intermediate estate in the land in the meantime—that is, until the specified age is reached ? If there is, the gifts may be held to be vested under the rule in *Boraston's Case* (5) : " If real estate be devised to A when he shall attain a certain age, and until A attains that age the property is devised to B, A takes an immediate vested estate, not defeasible on his death under the specified age ; the gift being read as a devise to B for a term of years with remainder to A " (*Hawkins* on *Wills*, 3rd ed. (1925), p. 282).

In the present case the land is vested in the trustees until one or other of the events happens upon which the sons qualify to take, but subject to a number of directions with respect to the user and management of the land and to provisions with respect to the application of income during certain periods.

In *Boraston's Case* (5) it was possible to read the words " when the said Hugh shall come to his age of twenty-one years " as relating to the time when he should enjoy the estate. The words were read as merely identifying a time—the date when Hugh actually attained the age of twenty-one years or the date when, if he had lived, he would have attained that age. Those dates were necessarily one and the same date. But in the present case no such construction is open. The words of the will show that the testator is not merely fixing a time for possession : he is referring to two events which will happen, if they happen at all, at different times, viz., (1) the youngest daughter attaining the age of twenty-seven years, (2) the youngest son attaining the age of twenty-eight years. He is therefore not creating a precedent estate upon the determination of which the sons will take. He is referring to events, not as marking the expiration of a precedent estate, but as actual occurrences upon the happening

(1) (1905) 2 Ch. 295.
(2) (1905) 2 Ch., at p. 296.
(3) (1926) Ch. 223, at p. 236.
(4) (1835) 9 Cl. & Fin. 583 [8 E.R. 539].
(5) (1587) 3 Co. Rep. 19*a* [76 E.R. 664].

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Latham C.J.

of which the sons become absolutely entitled. In *Boraston's Case* it could be said with truth that there was a precedent estate which terminated on the date when Hugh, if he lived, would have his twenty-first birthday. That date was fixed, whether he lived or not. On that date he became entitled in possession. The case is quite different here. No date can now be pointed out as that upon which the trustees are to cease to hold the property and to convey to the sons. The determination of that date depends and must depend upon what actually happens. If the youngest daughter attains the age of twenty-seven years, the sons are entitled. But if she " shall not live to attain " that age, then the sons take as and when the youngest of them attains the age of twenty-eight years. Only the actual events therefore can determine when the sons shall take. Thus the testator is, in this case, not merely marking out a period of time by reference to the date when a person if he lives will attain a specified age. He is waiting upon the actual course of events. Thus, in my opinion, this case is very different from *Boraston's Case* (1).

But a more general rule has been invoked. The whole question is one of the intention of the testator. Do the provisions of the will, taken as a whole, show that the testator intended his sons to have an immediate interest in the property but that actual enjoyment, and that only, should be postponed until the specified ages were attained ? *Bickersteth* v. *Shanu* (2) provides an illustration of this method of approach to the question. A gift of intermediate income to a devisee of the land will give to him the whole estate. The position is the same if the income is given to some other person than the devisee—*Hawkins* on *Wills*, 2nd ed. (1912), pp. 285, 286 :—"Nature of Intermediate Estate.—' The rule proceeds on the ground that the words of time, " when," " upon," &c., express only that the ulterior estate is to take effect subject to and on the determination of the intermediate estate ; the rule, therefore, applies wherever there is an intermediate estate carved out, extending over the whole period ; although the beneficial interest be given, not for the benefit of the ulterior devisee, but of some other person, as a devise to the

(1) (1587) 3 Co. Rep. 19*a* [76 E.R. 664]. (2) (1936) A.C. 290.

testator's wife, until A shall attain twenty-four (*Doe d. Wheedon* v. *Lea* (1); *Manfield* v. *Dugard* (2)). And it is immaterial that the beneficial interest during the intermediate period is partly undisposed of, as if the devise be to trustees in trust to apply so much of the rents and profits as they should think fit towards the maintenance of A during his minority (*James* v. *Lord Wynford* (3)).' 'The principle of *Boraston's Case* (4) is, that an intermediate interest carved out does not prevent the vesting, whether it be so carved out for the benefit of the devisee or for any other person, and whether it exhausts the whole intermediate rents and profits, or only a part' (per *Stuart* V.C. (5)).''

The learned Chief Justice, finding provisions in the will relating to the maintenance of the sons during minority, regarded this statement of the law as justifying him in holding that the interests of the sons were vested. It should, however, be observed that Mr. *Hawkins* limits his statement to devises *in trust* to apply moneys towards maintenance. The statement does not apply to a discretionary power of maintenance: See *Jarman*, 7th ed. (1930), vol. II., p. 1389. Further, the whole statement is limited by the preceding statement, "the rule, therefore, applies wherever there is an intermediate estate carved out, *extending over the whole period*"—that is, the whole period for which the devise in question is postponed (*Jarman*, 7th ed. (1930), vol. II., p. 1346).

Thus the rule cannot, it appears to me, be applied to a case where there is a definite gap in the disposition of the income. Such a case cannot, whatever leaning the court may have in favour of construing a limitation as creating a vested interest, be treated as a disposition of a particular estate with an estate in remainder expectant upon it. During the period between a son attaining the age of twenty-one years and the youngest son attaining twenty-eight years or the daughter attaining twenty-seven years (whichever of the two latter events shall first happen) there is no disposition of the income except that the trustees have a power to use it towards bringing the wages of a son up to £250 per annum. Otherwise the income is to be accumulated in the hands of the trustees. It is disposed of only when one of the specified events happens.

(1) (1789) 3 T.R. 415 [100 E.R. 445].
(2) (1713) 1 Eq. Cas. Abr. 195.
(3) (1852) 1 Sm. & G. 40 [65 E.R. 18].
(4) (1587) 3 Co. Rep. 19*a* [76 E.R. 664].
(5) (1852) 1 Sm. & G., at p. 59 [65 E.R., at p. 27].

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Latham C.J.

But all the provisions of the will must be considered. I therefore ask the question whether the provisions of the will taken as a whole show that it was intended that the son's interests should vest if the specified ages were not attained. What is the disposition of the lands and the income thereof during the period between the testator's death and the attainment of the required ages by the daughter or by the youngest son as the case may be ?

The will gives the widow a right to reside at Arundel subject to a condition. The trustees are empowered to carry on and manage Arundel and Birnam Wood. Birnam Wood is land which is devised to the sons under clause 12. Clause 19 of the will contains the following provision : " I empower my trustees during the infancy of my children to pay out of the net income of ' Arundel ' and ' Birnam Wood ' such sum as my trustees may in their absolute discretion think desirable for the maintenance education advancement and welfare in life of each son." Clause 14 gives to the trustees a power to employ the sons on testator's properties " at such wages as they may consider proper and to pay to each of my said sons from the time he attains his majority until the time at which the properties shall be vested in them as aforesaid out of the net income from my said two properties such sum as with the wages which he is being paid in respect of his employment will make his income up to the sum of two hundred and fifty pounds a year."

Any net income which is not used for the purposes mentioned falls into what the testator calls " my trust fund." This fund (clause 15) is to be invested and the income thereof is to be accumulated until " either my youngest daughter shall attain the age of twenty-seven years or my youngest son shall attain the age of twenty-eight years whichever shall first happen." No question of the validity of this provision arises upon this appeal. The events upon which the accumulation of income is determined are those in relation to the happening of which the son's interests are qualified, but when *either* of those events happens, the accumulation is to cease. Upon the happening of either event the trust fund and its accumulations are to be invested and the net income is to be held upon the trusts set out in clause 16. Under clause 16 the net income of the fund is to be paid to the sons during their respective lives

subject to protective provisions. Upon the death of each son the trustees are to hold one half of the fund for the children of the son as he may by will appoint, and in default of appointment for such children equally.

Thus the sons have no right to receive any of the income of Arundel before their gifts come into possession. The trustees have a power, but only a power, to use such income for maintenance until they attain the age of twenty-one years. The words are: " I empower my trustees during the infancy of my children to pay . . . such sums as my trustees may in their absolute discretion think desirable for the maintenance," &c. After a son attains the age of twenty-one years and until the time when the interests are to fall into possession the trustees may, if they think proper, use income to increase the sons' wages. But the sons have no right to receive either maintenance or any such extra payments. The unapplied income can never go to the sons. They can, under clause 16, never receive more than the income of accumulated income for their respective lives.

I apply to this case the reasoning in *In re Blackwell* (1). There is here no direction to maintain, but only " a power to the trustees " to maintain (per *Pollock* M.R. (2)). As *Warrington* L.J. says, the " question is whether there is sufficient context in this will to convert words which, according to their natural meaning, are words of contingency into words which would confer an absolute estate and merely postpone the period of the unfettered enjoyment of that estate " (3). In *Blackwell's Case* (1) the widow had a right of residing upon the land, the trustee had a power to manage, and a power to use income for maintenance. " The power to maintain is merely the ordinary common form power under which the person whose maintenance is in question has no absolute right to the application of any part of the income " followed by " a direction to accumulate the remainder and to add it to the property from which it arose " (4), that is, a direction which might give the beneficiary the whole of the accumulated income, and not merely the income thereof as in the present case. All these provisions were described by *Warrington* L.J. as " perfectly neutral so far as the interpretation of the actual

(1) (1926) Ch. 223.
(2) (1926) Ch., at p. 233.
(3) (1926) Ch., at p. 236.
(4) (1926) Ch., at pp. 236, 237.

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Latham C.J.

gift is concerned" (1). *Sargant* L.J., after holding that the widow's right to residence did not amount to an intermediate estate within the principle of *Boraston's Case* (2), said:—"But then it is said that nevertheless there is to be implied a sufficient intermediate estate, for this reason, that the trustees have a general power of maintenance and a general power of application of such part of the rents and profits, not merely of the general residue in which the son has a share, but also of this particular real estate for the benefit of the son, and that that is sufficient to constitute what is an intermediate estate. In my opinion that is not so. I think that a mere power of application of this sort cannot be held to amount to an intermediate estate so as to have the effect, on construction, of making that which is in terms the present gift to the son construable as a gift in remainder so as to satisfy the word 'upon'" (3). (The gift in question was a gift to a son upon his attaining the age of twenty-one years.) Accordingly it was held by the Court of Appeal that the gift was a contingent gift, contingent upon the son attaining the age of twenty-one years, and not a vested gift. For the same reasons I am of opinion that the gifts in the present case are contingent gifts: See also *In re Hume* (4).

It is necessary, however, to refer to the fact that the will refers in two places in terms to the "vesting" of the lands in the sons. In clause 13 the power of management given to the trustees is prefaced by the words "Until the period when I have directed that Arundel and Birnam Wood shall vest in my said two sons." Clause 14, in words which have already been quoted, refers to "the time at which the properties shall be vested in them." The word "vest" prima facie has the legal meaning of "vest in interest": See, for example, *Hale* v. *Hale* (5), per *Jessell* M.R. Some particular context is required to deprive it of this meaning. I have above examined the will without finding any such context as I construe the will.

Accordingly, in my opinion, the appeal should be allowed.

The first question asked in the originating summons is: "Whether or not the estate of Arundel described in an indenture of conveyance

(1) (1926) Ch., at p. 237.
(2) (1587) 3 Co. Rep. 19*a* [76 E.R. 664].
(3) (1926) Ch., at p. 239.
(4) (1912) 1 Ch. 693.
(5) (1876) 3 Ch. D. 643, at p. 646.

dated the thirteenth day of January one thousand nine hundred and twenty-six registered number 17/726 has in the events that have happened vested in the plaintiffs as part of the estate of the said Frederick William Keith Amos Hume deceased and if so upon what trusts." This question should be answered in the negative and it should be declared in answer to the second question that Arundel is subject to the provisions of clause 7 of the settlement. The effect of that clause has not been argued upon the appeal. The summons should be remitted for further consideration upon this question. Question 3 is as follows : " Whether the disposition in the last will of the said Frederick William Keith Amos Hume whereby the said Frederick William Keith Amos Hume appointed Arundel to his trustees upon trust for his two sons in equal shares as and when his youngest daughter should attain the age of twenty-seven years and if his youngest daughter should not live to attain that age then to his two sons as and when the youngest of them should attain twenty-eight years, is in excess of the power conferred upon the said Frederick William Keith Amos Hume by the settlement, inasmuch as the estate or interest in Arundel so given to the two sons of the said Frederick William Keith Amos Hume will not vest within the period of a life or lives in being and twenty-one years thereafter, commencing from the settlement." This question should be answered : Yes.

All the parties should have their costs out of the accumulated income of Arundel, those of the trustees as between solicitor and client.

STARKE J. The testator died in 1937 leaving two sons and two daughters. The sons were born one in 1932 and the other in 1933 ; the daughters, one in 1931 and the other in 1935.

A property known as Arundel was conveyed to one Lodge to certain uses to secure annuities and to the further use that if the testator should predecease Frederick William Hume, Arundel should be held to the use of such one or more of his children or other the issue of the testator in such shares and for such estates and interests as the testator by deed or will might lawfully appoint. The testator predeceased Frederick William Hume. The testator by his will appointed Arundel to his trustees upon trust for his two sons in

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Starke J.

equal shares " as and when my youngest daughter shall attain the age of 27 years and if my youngest daughter shall not attain the age of twenty-seven years " then the testator appointed Arundel to his two sons " as and when the youngest of them attains the age of 28 years."

The youngest daughter will not attain the age of 27 years until the year 1962 and the youngest son will not attain the age of 28 years until the year 1961. The question is whether the appointment contravenes the rule against perpetuities.

In the case of particular or special powers the rule requires that all limitations in pursuance of the power shall be such only as would have been valid if inserted in the original will or settlement. Consequently the appointment in the present case would be bad unless it is clear that at the date of the conveyance to uses it must of necessity vest in someone, if at all, within a life in being and twenty-one years afterwards.

Standing alone, the limitation by the appointment to the testator's two sons as already set out is prima facie a contingent gift which does not necessarily vest in the sons within due time: Cf. *Re Francis* (1). Further, the testator also refers in his will to the period " when I have directed that Arundel shall vest in my two said sons " and " the time at which the properties shall be vested in them."

But in the construction of gifts of real estate " it has long been an established rule for the guidance of the courts . . . that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will " (*Duffield* v. *Duffield* (2)). Consequently the court must examine the arrangement and terms of the particular will.

The learned Chief Justice of the Supreme Court of Tasmania held that the testator had vested Arundel in the sons and merely postponed the right of possession. He relied upon provisions in the will enabling the trustees out of Arundel and a property called " Birnam Wood " to maintain and educate his sons and to pay them

(1) (1905) 2 Ch. 295.
(2) (1829) 1 Dow. & Cl. 268, at p. 311 [6 E.R. 525, at p. 542].

wages so as to make the income of each son up to £250 per year. These provisions are, I think, consistent with either of the suggested constructions and do not control the prima facie meaning of limitation.

It was also suggested to this court that the limitation itself would not in all cases involve the contingency of the younger daughter attaining the age of twenty-seven years; for instance, in case of the younger son attaining the age of twenty-eight years in August 1961 before his younger sister attained the age of 27 years in March of 1962.

But these extrinsic circumstances, as I may call them, cannot and ought not, in my opinion, to control the words of the limitation. So we are brought to the general arrangement of the will. The wife of the testator was allowed to reside at Arundel during widowhood so long as she desired, and the testator gave his trustees a sum of £5,000 and directed that his wife should have the income therefrom during widowhood or so much thereof as the trustees thought fit. To his trustees he also gave two sums of £5,000 upon trust to invest and pay the net income to his respective daughters until his younger daughter attained the age of twenty-seven years and thereupon upon other trusts. Next Arundel is appointed to his trustees upon trust for his sons in the terms already mentioned. A property called "Birnam Wood" was also devised to his trustees "upon trust for my said two sons in equal shares at the same time as I have hereinbefore provided with regard to Arundel." The provisions for the sons' maintenance, education and wages from the income of these properties have already been noted. The residue of the testator's estate (which included the unappropriated income from Arundel and Birnam Wood) was given to trustees upon trust to pay debts &c. and to stand possessed of the residue, called his "trust fund," upon trust to invest and accumulate the income arising therefrom until his youngest daughter attained the age of twenty-seven years or his youngest son attained the age of twenty-eight years whichever should first happen, and thereupon to invest his "trust fund" and to hold the net income arising therefrom "upon trust to pay the same equally between my two sons during their respective lives or until they should assign charge or otherwise dispose of income" &c. On the death of each of his sons the trustees

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Starke J.

were directed to hold one-half of the trust fund upon trust for the children of his sons in such shares and for such estates and interests as each son should by will appoint and in default of appointment for all the children of each of his sons.

It is unnecessary for present purposes to consider the effectiveness of all these provisions. They suggest, however, that the testator was endeavouring to confine his sons to the maintenance and wages already provided in the will until his youngest daughter attained twenty-seven years of age or his youngest son attained the age of twenty-eight years. This, though not identical with the limitation of Arundel, is yet in line with it.

But the point of these provisions is that despite the accumulations directed each son takes one half of the net income of the trust fund for his life and the accumulations thereof (which include the unappropriated income from Arundel and Birnam Wood) subject to a limitation over in the case of alienation and also has a power of appointment over the fund in favour of his children.

All this favours the view that the testator is postponing the sons' right to the possession and enjoyment of Arundel and Birnam Wood and not the vesting of these properties. But little indication on the part of the testator is enough to overcome the prima facie meaning of the words of limitation which he has used and he has thus given sufficient indication of his intention.

The appeal should be dismissed subject to a variation upon which the parties agreed.

DIXON J. The question for decision upon this appeal is whether certain limitations are void for remoteness.

The limitations are in favour of the two respondents who are the infant sons of the testator. In the events which happened the testator became the donee of a special power of appointment over an estate in fee simple in lands called Arundel.

The deed containing the power conveyed the land to a grantee to uses and the power of appointment consisted in a limitation to the use of such one or more of the children or other his issue in such shares and for such estates and interests as the testator by deed or will might lawfully appoint.

The testator died leaving him surviving four infant children, two sons and two daughters.

A provision in his will purported to appoint Arundel to his trustees upon trust for his two sons in equal shares as and when his youngest daughter should attain the age of twenty-seven years and, if his said youngest daughter should not live to attain the age of twenty-seven years, then to his said two sons as and when the youngest of them attains the age of twenty-eight years.

His youngest son will attain the age of twenty-eight years in August 1961 and his youngest daughter will attain the age of twenty-seven years in March 1962. As the estate or interest is appointed in the exercise of a special power, the period beyond which the rule against perpetuities will not permit the donee of the power to limit contingent interests must be calculated from the creation of the power. At the time of the creation of the power, the testator was a bachelor, and it follows that an appointment of an estate which did not vest in interest until his youngest son attained twenty-eight and his youngest daughter attained twenty-seven would be too remote. The validity of the limitation, therefore, depends upon the question whether the testator meant to do no more than postpone his sons' enjoyment or possession of Arundel until the younger of them attained twenty-eight or the younger of their two sisters attained twenty-seven, or, on the other hand, intended that unless and until one or other of those events occurred no estate or interest in the land should vest in either of his sons. The form of the words in which the limitation is expressed bears a prima facie meaning of contingency which, if uncontrolled, would make the vesting of the estate in interest depend upon the attainment by the younger son or daughter of the age specified for him or her respectively. But the question whether that is the true intention of the provision must be determined upon the whole will. It is an instrument containing somewhat unusual dispositions and presenting many difficulties of interpretation. But, before referring to other provisions of the will, it is as well to notice the peculiarities of the limitation in question. It will be seen that of the alternative times or events specified, one of them, the attainment by the youngest daughter of twenty-seven, in no way concerns the qualification of either of the appointees to

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Dixon J.

take the property and the other, the attainment of twenty-eight by the youngest son, can at most concern the qualification of one only of them. Then a consideration of the alternative times or events specified will show that, if they import contingency into the vesting of the estate, some remarkable consequences would follow, that is assuming validity. The attaining of twenty-seven years of age by the younger daughter would fulfil the condition and the estate would vest, whatever in the meantime might have happened the two sons. Thus it would be immaterial that both had died in infancy. Their legal personal representatives would take their respective interests in the lands. On the other hand, if the younger son attained twenty-eight, it would be immaterial what in the meantime had happened the younger sister and the elder brother. The interests of both sons would, in that event, become indefeasibly vested. It would not matter that the elder son had died an infant or that the younger daughter had predeceased him. If the elder son so died his legal personal representative would take. On the other hand, if both his sister and brother failed to attain the required age, he would take nothing notwithstanding that he survived. Further, as the younger son becomes twenty-eight about seven months before the younger daughter becomes twenty-seven, the estate would vest indefeasibly on the younger son attaining twenty-eight years of age, and the possibility of the younger daughter dying before attaining twenty-seven would cease to be a contingency upon which the estate depended. But, according to the tenor of the limitation, it would be necessary to wait until she reached twenty-seven before the sons were let into enjoyment. Thus words which, *ex hypothesi*, began by importing contingency would during the last seven months of their operation receive a different effect and operate simply to postpone enjoyment.

These combined considerations, which arise upon the face of the limitation, greatly weaken the effect of the presumption in favour of the prima-facie meaning of the words "as and when," if they do not destroy it. For it is a most unlikely intention to attribute to a testator. The clause standing next in the will supplies a little further evidence in support of a construction which postpones enjoyment only. The clause is as follows: "I give and devise my land at

Uxbridge known as Birnam Wood to my trustees upon trust for my said two sons in equal shares at the same time as I have hereinbefore provided with regard to Arundel."

The words " at the same time " suggest mere futurity of enjoyment. The clause does not say " in the same events," but " at the same time."

When the general scheme of the will is examined, the reason appears why, in the appointment of Arundel and the devise of Birnam Wood, the testator referred to his younger daughter's attaining twenty-seven or his younger son's attaining twenty-eight. He framed a scheme by which, until those events, control and full enjoyment of the benefits intended for his children were to be withheld or deferred. In his directions concerning Arundel the testator probably exceeded the limits of the power of appointment which he possessed, but for the purpose of ascertaining his intention that is immaterial. Those directions purported to make Arundel available as a residence for his widow, to whom he authorized his trustees to pay during her widowhood so much of the income of £5,000 as they should think fit. He provided that, until the period when he had " directed that Arundel and Birnam Wood should vest in " his two sons his trustees should be empowered to manage the two properties. The word " vest," which prima facie means " vest in interest," no doubt tends against the view that enjoyment only is postponed ; but it is often used to mean vest in possession, and I think no great weight can be attached to its use here, or to a similar use in a provision which follows. In effect, the testator by these provisions directs that until the time when, according to the limitations he has made, his sons obtain the properties, out of the proceeds of management the trustees shall allow his sons such sums as they think fit for their maintenance, education, welfare and advancement and that they may employ them at such wages as they think fit and that when each son attains his majority he shall be paid in all £250 a year. The surplus income is to be paid to the trust fund representing residue. To his two daughters the testator devotes or allocates £5,000 each. It is in stating the trusts of these sums that the earliest reference appears to the age of twenty-seven. The testator directs that, until each daughter attains that age, she shall be paid the income of her £5,000

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Dixon J.

and that then she shall receive £1,000 part of the sum. The balance, that is, the sum of £4,000 each, is settled upon the respective daughters with a final gift over to the sons if both daughters die without leaving issue who attain twenty-one.

The trust fund which is constituted by the net residue of the estate is to be invested and the income arising from it is to be accumulated until either his youngest daughter shall attain twenty-seven or his youngest son shall attain twenty-eight, whichever shall first happen. It is to be noticed that here there is a want of conformity with the limitation of Arundel; for the effect of those limitations is to take in the later event, that is the younger daughter's attaining twenty-seven, and not the earlier. A direction occurs too, which is flatly inconsistent with the trusts of the daughters' sums of £5,000. Though those trusts require the income to be paid to them until they reach twenty-seven, there is a direction that during their infancy the surplus income of those sums, after providing for their maintenance, education, welfare and advancement, shall fall into the trust fund. The trusts declared of this fund are expressed to arise upon the youngest daughter's attaining twenty-seven or the youngest son's attaining twenty-eight. For the trustees are directed "thereupon to invest my trust fund and all accumulations thereof and to hold the income arising therefrom on the trusts set out" &c. But it is clear that the limitations do not depend upon the contingency occurring which is involved in those words. This appears with certainty from the nature of the trusts. Each son takes a half share of the income for life, subject to a conditional limitation of a protective character. After his death his share devolves upon his children in such shares as he may appoint and, in default of appointment, equally. If either son leave no issue who attains twenty-one, there is a gift over to his brother.

There is a final gift over to cousins of the whole estate if all the testator's children die without leaving issue who attain twenty-one. This provision appears to suppose that Birnam Wood, which forms part of the "estate," if not Arundel, is the subject of some ulterior limitation to daughters, and perhaps also that a failure of issue who attain twenty-one would, but for the gift over, mean a failure of the

limitations of Birnam Wood and therefore of Arundel. But on no construction can such a supposition be justified.

The dominant purpose of the scheme disclosed by the will is to set apart for the benefit of the testator's two sons Arundel, Birnam Wood and the residue of the estate after providing sums of £5,000 each for the widow for life and for the two daughters by way of settlement. Until the younger daughter attained twenty-seven, or the younger son twenty-eight, maintenance and advancement clauses were to govern the application of the income of the respective parts of the estate allocated to sons and daughters. Probably the testator was alive to the fact that only seven months would separate the twenty-seventh birthday of the younger daughter and the twenty-eighth birthday of the younger son and treated them as marking substantially the same period. Adapting the language of Lord *Maugham* in *Bickersteth* v. *Shanu* (1), the provisions may be thought to suggest that the object of the testator with regard to his sons and, indeed, his daughters was not to prevent them having any estate in the real (and the personal) property unless and until they should attain given ages, but rather to postpone their enjoyment and, if possible, to prevent them misapplying the property before they reached those ages.

The rule for the guidance of the court in construing devises of real estate is that they are to be held to be vested unless a condition precedent is expressed with reasonable clearness (2). As *Warrington* L.J. in *Re Blackwell* (3) expressed it, "the court is inclined rather to hold an estate to be vested than contingent if the words of the will will allow it to do so." The words used are quite capable of referring to enjoyment and from the whole will this appears to be their meaning. In some respects the case resembles *Re Radford*; *Jones* v. *Radford* (4) and *Tyson* v. *Tyson* (5). But I think the decision should be placed rather on a proper understanding of the testator's plan than upon any rule of construction or upon analogies from decided cases.

In my opinion the appointment of Arundel is not void for remoteness. In the declaration made by the order under appeal the

(1) (1936) A.C. 290, at p. 299.
(2) (1936) A.C., at p. 298.
(3) (1926) 1 Ch. 223, at p. 233.
(4) (1918) 62 Sol. Jo. 604.
(5) (1891) 12 N.S.W.L.R. (E.) 73.

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

Dixon J.

disposition is declared valid and effectual, but words are added which may go further than was meant. I think that the declaration should stop at the word " effectual " and the order should be varied accordingly. Otherwise the appeal should be dismissed. But, having regard to the nature of the case, the guardian *ad litem* was warranted in appealing on behalf of the infants and I think the costs of the appeal should come out of the estate. The trustees should be taxed as between solicitor and client. The widow should have her costs as a submitting party.

McTIERNAN J. The exercise by the testator of his power of appointment over the property known as Arundel, which was made by his will, is not void for remoteness, if his sons, to whom he appointed the property, took at the testator's death a vested interest in the property; for, if they did not take a vested interest, the alternative construction is that their interest was contingent on the happening of one or other of the events described by the testator, and in the circumstances neither of such events could possibly happen within the period allowed for the vesting of an estate by the rule against perpetuities. I agree that it is settled that, since the power was a special power, the period ran as if the settlement which gave the power was an instrument under which the sons took their estate. Where the question arises whether an interest in land created by will is vested or contingent, there are rules of construction which will aid the devisee if the context of the will is flexible and words which sound in contingency will bend to the context. There are cases in which gifts have been held to be vested upon the language of the whole will, but which appear to establish no general principle. But particular rules of construction have been applied to resolve the question whether a testator intended to postpone the vesting of an interest or only the possession or enjoyment of it. In *In re Deighton's Settled Estates* (1) *James* L.J. referred to one of these rules in these terms: " The court leans strongly in favour of the early vesting of interests in cases where the effect of holding the share of a child of the testator to be contingent on his living to a future period would be that, if he died before that period

(1) (1876) 2 Ch. D. 783, at p. 785.

leaving a family, his children would take no benefit under the will" : See also *M'Lachlan* v. *Taitt* (1) ; *Selby* v. *Whittaker* (2). In the present case the court will lean against the construction of the will for which the appellants contend if the context is not so clear as to exclude the application of the principle enunciated in the above-mentioned case. The construction contended for by the appellants is that the words " as and when " introduce a condition precedent into the appointment of Arundel by the testator to his sons. If that contention is correct, their interest would remain contingent until the testator's youngest daughter was twenty-seven years or, if she should not live to that age, until his youngest [*sic*] son (he left two sons) was twenty-eight years. This seems to be a very improbable intention to attribute to the testator. Besides, to construe the appointment as subject to a condition precedent postponing the vesting of any estate in either son until the future contingency happened would lead possibly to such strange consequences that it appears most unlikely that the testator did not intend that the estate should vest in interest at his death. These consequences have been adverted to in the judgment of my brother *Dixon*. On the other hand, if the provisions of the will appointing Arundel to the sons be construed as vesting the property in interest in the sons, and doing no more than postponing their possession or enjoyment, the testator would appear to have made a sensible and rational will. If it is open on the context of the will to reject the appellant's contention that it was the testator's intention to appoint nothing more than a contingent interest in Arundel to his sons, the following observations of *Jessel* M.R. in *Selby* v. *Whittaker* (3) apply to the present case : " I take it that no rule of construction is better settled than that, when two meanings are open to a judge, and the one is reasonable and sensible, and the other, though not absolutely unreasonable in the sense of supposing that the testator must have been a lunatic, yet is extremely unlikely, he ought to select that meaning which is consonant to ordinary reason, and not liable to the imputation of excessive caprice." I think that it is open on the provisions of the will relating to Arundel to deny that the testator did intend to give

(1) (1860) 2 De G.F. & J. 449, at p. 454 [45 E.R. 695, at p. 697].
(2) (1877) 6 Ch. D. 239, at p. 251.
(3) (1877) 6 Ch. D. at p. 248.

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

McTiernan J.

no more than a contingent estate to his two sons. There are some considerations arising on the face of the provisions relating to Arundel, the effect of which is, I think, cumulative. In the first place, this property, which, like the other property, Birnam Wood, is given exclusively to his two sons, is severed from the general estate. Neither property is to be detached upon the happening of a future contingency: Cf. *Lister* v. *Bradley* (1). In the second place, in exercising the power in the will the testator recites that Arundel was by the anterior settlement conveyed "to the further use that if I shall predecease the said F. W. Hume Arundel shall be held to the use of such one or more of my children in such shares and for such estates and interests as I by deed or will may appoint." After that recital it was improbable that it was the testator's intention to appoint the estate to the trustees upon the trust that they were rather to hold it to await the happening of the future contingency than to hold the property in trust for the sons immediately upon the decease of the testator: Cf. *Branstrom* v. *Wilkinson* (2). And, in the third place, if the words "as and when" are read as if they annexed a condition precedent to the vesting, the provisions which he has made for his sons are so confusing that it may well be doubted whether that is the correct interpretation of his language.

In the case of *In re Francis* (3), a devise of real estate to a devisee "when she shall attain the age of 25," without more context, was held to be contingent on her attaining that age. *Swinfen Eady* J. said:—"It is the case of a devise which is in form contingent, and which stands alone and without any context to enable the court to hold that it is to be vested . . . It is a simple case of a devise to Hilda when she shall attain twenty-five. All the authorities agree that such a devise, unaided by any context, is contingent upon the devisee attaining twenty-five. In such a case I can draw no distinction between 'when she shall attain twenty-five' and 'if she shall attain twenty-five'" (4).

In *Duffield* v. *Duffield* (5) it may be observed that a distinction between the effect of "if" and "when" was recognized by *Best*

(1) (1841) 1 Ha. 10, at p. 13 [66 E.R. 930, at pp. 931, 932].
(2) (1802) 7 Ves. 421, at p. 422 [32 E.R. 171].
(3) (1905) 2 Ch. 295.
(4) (1905) 2 Ch., at p. 298.
(5) (1829) 1 Dow & Clark, at p. 312 [6 E.R., at p. 542]

C.J., who, as the Judicial Committee explained in *Bickersteth* v. *Shanu* (1), spoke for the judges and with the concurrence of Lord *Eldon*. *Warrington* L.J. approved of *In re Francis* (2) in *In re Blackwell* (3). " It is perfectly well settled," he said, " and the rule is expressed in the most recent times in *In re Francis* (2), that a gift upon attaining the age of twenty-one years without more is, according to its natural meaning, a contingent gift, and that nothing goes to the taker until he attains the fixed age. We have then to find whether there is anything in the context of the will which enables the court—I will not say compels it, because the court is inclined to take the course if it can—but enables the court to hold that gifts prima facie contingent are really vested."

The provisions upon which the present case depends are not in the simple terms to be found in *In re Francis* (2). Besides, in that case the contingency was in the description of the devisee. In the present case the intention of the context is not to state any qualification which the sons should possess as a condition of the vesting of the property. If its effect is to postpone the possession of the property by the sons, it does so for the convenience of the estate. The testator intended that his two sons should get their shares at the same time, irrespective of the seniority of one to the other. He intended that at the stipulated time there should be equality between them both in point of the *quantum* of their respective shares and as regards the time when they were to enjoy such shares.

The context may be divided into the following phrases: " I do hereby appoint ' Arundel ' to my trustees upon trust for my two sons," " in equal shares " and " as and when." If a pause be made at the end of the first or second phrase, there is clearly sufficient to constitute a gift at the testator's death of equal transmissible interests to his two sons. If the pause be made at the end of the second phrase, strictly the words " in equal shares " are found to be superfluous; for the sons would take equal shares under the foregoing words. But if the pause be made at the end of the first phrase, and the second phrase " in equal shares " is read as attached to the third phrase, " as and when," then the first phrase is capable of being read as a distinct

(1) (1936) A.C., at p. 298.
(2) (1905) 2 Ch. 295.
(3) (1926) 1 Ch., at p. 236.

H. C. OF A. 1939.

HUME v. PERPETUAL TRUSTEES EXECUTORS AND AGENCY CO. OF TASMANIA LTD.

McTiernan J.

gift and the second and third phrases as a direction that the property is to be enjoyed by the sons in equal shares " as and when " the events happen which are indicated by the testator: Cf. *Williams* v. *Clark* (1). Support for this construction is, I think, derived from the next clause of the will, which is in these words: " I give and devise my land at Uxbridge known as Birnam Wood to my trustees upon trust for my said two sons in equal shares at the same time as I have hereinbefore provided with regard to Arundel." The testator, I think, intended the pause to come after the word " sons," and the words " in equal shares " were added as a direction that, upon the happening of one of the other of the future events described by the testator there should be equality of division. In the meantime there might not be equality of division because, until then, the trustees are empowered to carry on and manage the properties or let them, but they were at liberty under the trusts not to apply the profits equally for the benefit of the two sons. But the testator directed that the trustees should manage and carry on or let the properties, subject to these trusts, only " until the period when I have directed that Arundel and Birnam Wood shall vest in my said two sons." The word " vest " has not a fixed meaning, and it may mean vest in interest or possession or enjoyment. In this context it refers back to the direction that Arundel should be shared equally by the two sons. That direction, in my opinion, is an independent part of the provisions. It is not denied that the words " as and when " could fairly be read as annexed to the substance of the appointment. But I think that it is clearly open on the context to take the view that these words were intended to be attached to the words " in equal shares," which import division, and that by them the testator intended to denote the time when he desired the sons to share equally in the enjoyment of Arundel.

In my opinion, the context does not prevent the court from exercising its preference for a construction of the testator's language under which the sons may take vested interests in Arundel at the testator's death.

I agree that the appointment of Arundel was not void for remoteness, and that the appeal should, therefore, be dismissed.

(1) (1851) 4 DeG. & Sm. 472 [64 E.R. 918].

Order varied by omitting therefrom the order and declaration therein made from the words "I do order and declare" to the words "in respect of the same" and by substituting the following therefor:—"It is ordered that the questions asked in the said originating summons be answered as follows:—(1) *Declare that the appointment contained in clause* 11 *of the said will is not void for remoteness but that it operates to give an equitable estate in fee simple in Arundel to Frederick William Keith Hume and Donald Carmichael Hume the sons of the said decesaed as tenants in common in equal shares which is vested in interest as from the death of the said deceased.* (2) *No answer.* (3) *No. Appeal otherwise dimisssed. Summons remitted to the Supreme Court. Costs of all parties of appeal to be taxed those of the trustees as between solicitor and client and those of Enid Hume as a submitting party and to be paid out of the rents and profits of Arundel.*

Solicitors for the appellants, *Finlay Watchorn, Baker & Turner.*

Solicitors for the respondents, *Clerk, Walker, Stops & Stephens*; *Page, Hodgman, Seager & Doyle*; *Crisp Wright & Hodgman.*

R.C.W.