[HIGH COURT OF AUSTRALIA.]

FORSYTH AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) AND OTHERS . . . . . } RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 8; *Dec.* 13.

Dixon, Williams and Kitto JJ.

Deed—Construction—Settlement—Protective trusts—Subject to prior disentitlement absolute gift of trust fund to beneficiary on attaining age of fifty-five years—Gift over in event of beneficiary dying "without having received the absolute transfer of the trust fund . . . and leaving no lawful issue"—Death of beneficiary after attaining fifty-five years but before actually receiving gift—No prior disentitlement or lawful issue—Destination of trust fund—"Received"—Beneficially received de jure.

The trustee of a deed stood possessed of a trust fund upon trust for W. until he attained the age of fifty-five years, upon certain protective trusts, provision being made for the disentitlement of W. if certain things were done or happened prior thereto. If not disentitled, the trustee was directed, upon W. attaining that age, to transfer to W. the trust fund for his own separate use. If W. became disentitled or died before attaining that age, the trust fund was to be held in trust for W.'s surviving lawful issue, but "should he die without having received the absolute transfer of the trust fund . . . and leaving no lawful issue" then the trustee was to hold the trust fund upon other trusts. W. attained the age of fifty-five years and remained entitled to the trust fund, but three months later he died without issue, and, owing to a long illness, before the trust fund had been transferred to him.

Held that the word "receive" was used by the settlor in the sense of "receive *de jure*", therefore the trust fund was held by the trustee of the deed in trust for the executors of the will of W.

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

APPEAL from the Supreme Court of New South Wales.

Perpetual Trustee Co. (Ltd.) was the trustee of an indenture of trust made on 4th October 1934, between Edgar William Forsyth, since deceased, and that company whereby certain investments consisting of 5,000 shares in Britannia Investment Co. Ltd. were settled upon trust for William Edgar Forsyth, a son of the settlor, and in certain events to such of his brother Walter Wright Forsyth and sisters Mavis Forsyth and Lorna Madge Forsyth as should survive him.

Clause 1 of the indenture provided that the income arising from the shares should be paid to William Edgar Forsyth until he should attain the age of fifty-five years or die, or until he should become bankrupt or alienate or charge or attempt to alienate or charge the income or part thereof, or the happening of any event disentitling him personally to receive and enjoy such income or some part thereof, and after the failure or determination of this trust in the lifetime of William Edgar Forsyth by reason of any such bankruptcy alienation or charge or attempted alienation or charge or other event the trustee should, during the remainder of the life of William Edgar Forsyth, in its absolute discretion, either pay or apply the whole or any part of the income as it accrued for and towards the maintenance and personal support of William Edgar Forsyth, his wife and issue and the settlor's other sons and daughters or their children as the trustee in its absolute discretion should think fit, or pay it to the person or persons to whom it would be payable if William Edgar Forsyth were then dead.

Clause 2 provided that if William Edgar Forsyth should not prior to his attaining the age of fifty-five years by reason of any antecedent bankruptcy or alienation or charge, or any attempted alienation or charge or other event be disentitled personally to receive and enjoy the income as provided by clause 1 and should not be disentitled from any cause personally to receive the transfer thereinafter referred to, then the trustee should, upon William Edgar Forsyth attaining the age of fifty-five years transfer to William Edgar Forsyth for his own separate use absolutely all the trust fund and any accrued dividends, profits and income then remaining in the hands of the trustee and all other assets then the subject of the trusts of the indenture for his own absolute separate use and benefit.

Clause 3 provided that if William Edgar Forsyth should by reason of any of the events specified in clause 2 be disentitled to receive the absolute transfer therein mentioned, then upon his

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death or if he should die before attaining the age of fifty-five years, the trustee should hold the trust fund upon trust for such of his lawful issue as should survive him, and if more than one in equal shares as tenants in common.

Clause 5 provided that should William Edgar Forsyth "die without having received the absolute transfer of the said trust fund as hereinbefore provided "and leaving no issue him surviving then the trustee should hold the trust fund upon trust for such of the settlor's children Mavis Forsyth, Lorna Madge Forsyth and Walter Wright Forsyth as should survive William Edgar Forsyth, and if more than one then equally between them, and the settlor declared that should Mavis Forsyth or Lorna Madge Forsyth or Walter Wright Forsyth predecease William Edgar Forsyth their respective lawful issue should take the share which his, her or their father or mother would have been entitled to receive and if more than one equally between them as tenants in common.

William Edgar Forsyth, who was born on 1st May 1893 and died on 2nd August 1948 without leaving any surviving issue, did not become bankrupt or alienate or charge, or attempt to alienate or charge, the whole or any part of the income of the trust fund nor did any other event happen disentitling him to personally receive and enjoy the whole or any part of that income before he attained the age of fifty-five years. Probate of his will was granted on 6th December 1948 to Burns Philp Trust Co. Ltd. and William Kelso named in the will as executors and trustees.

Prior to his death William Edgar Forsyth was seriously ill for some months and at the date of his death the investments constituting the trust fund had not been transferred to him. The shares which originally constituted the trust fund were sold on 2nd May 1947, and the proceeds were invested in other assets so that at the date of the death of William Edgar Forsyth the trust fund consisted of Australian consolidated stock and Commonwealth Government stock to the face value of £24,380 and the sum of £227 9s. 9d. invested on bank deposit.

William Edgar Forsyth was survived by his brother Walter and by his sisters Mavis and Lorna Madge, who, by marriage, became Mavis Baker and Lorna Madge Kelso respectively.

The trustee, by way of originating summons, submitted to the Supreme Court of New South Wales in its equitable jurisdiction the question whether the investments which constituted the trust fund were held by that company on trust for (a) the defendants Burns Philp Trust Co. Ltd. and William Kelso as executors of the will of William Edgar Forsyth absolutely, or (b) the defendants

Walter Wright Forsyth, Mavis Baker and Lorna Madge Kelso in equal shares absolutely, or (c) for some other person or persons, and if so what other person or persons and in what shares and interest ?

Roper C.J. in Eq. held that in the circumstances the interest of William Edgar Forsyth in the trust fund became absolutely vested on the attaining by him of the age of fifty-five years and was not divested. Question (a) was answered in the affirmative and question (b) in the negative.

From that decision Walter Wright Forsyth, Mavis Baker and Lorna Madge Kelso appealed to the High Court, the respondents to the appeal being the other parties to the originating summons.

F. G. Myers K.C. (with him *J. D. Evans*), for the appellants. There is not any principle that a gift over on death before actual receipt is void. The true rule is that where the words used are ambiguous and are capable of meaning either received in fact or entitled to receive, then the second meaning may be accepted as the more reasonable or convenient of the two. If the testator shows that he clearly intends the gift over to take effect on death before actual receipt the gift over may be void unless he also clearly shows what is to go over, that is, if the beneficiary has received part, whether only the balance or the whole interest is divested. Such a gift over cannot be void where the subject matter cannot be transferred in parts as, for example, a watch. Where a share of residue is given over it must necessarily be void unless restricted to the part not actually received, because it is not possible at any time, however remote, to postulate that no accretion to residue can take place and it is therefore never possible to ascertain whether the part given and received is liable to be divested (*Johnson* v. *Crook* (1); *Re Chaston*; *Chaston* v. *Seago* (2); *Re Wilkins*; *Spencer* v. *Duckworth* (3); *Minors* v. *Battison* (4); *Capel* v. *Capel* (5)). In the present case the settlement itself shows that the settlor had clearly in his mind the difference between actual receipt and entitled to receive. The condition on which divesting was to take place is not ambiguous and is reasonably capable of meaning only actual receipt. The settlor intended the beneficiary to take the whole fund by one act of transfer and obviously intended the whole to go over if the beneficiary should die before he had received the whole.

(1) (1879) 12 Ch. D. 639.
(2) (1881) 18 Ch. D. 218.
(3) (1881) 18 Ch. D. 634.
(4) (1876) 1 App. Cas. 428.
(5) (1936) 36 S.R. (N.S.W.) 658; 53 W.N. 248.

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J. K. Manning, for the respondents Burns Philp Trust Co. Ltd. and William Kelso. It is only if the settlor has clearly shown a manifest intention that the beneficiary should not have the fund unless he lives to receive it in specie that the settlement will be construed as contended for by the appellants. Such an intention will not be imputed to the settlor unless the words used, considered in the light of the whole of the provisions of the settlement, will not admit of a contrary intention (*Gaskell* v. *Harman* (1)). The terms of the settlement show that the beneficiary became absolutely entitled to the whole of the beneficial interest in the fund and some words would have to be found in the terms of the document before the Court would construe clause 5 as divesting him of his absolute beneficial interest. The settlement is capable of being fairly construed so that clause 5 will refer to the *de jure* right to receive the fund and not to the receipt of the fund in fact. The courts have always leaned to such a construction (*Minors* v. *Battison* (2) ; *Jarman* on *Wills*, 7th ed. (1930), vol. 3, p. 2119). If the true construction of the settlement were otherwise then clause 5 would be void for uncertainty (*Capel* v. *Capel* (3)). This is not a case which would fall into the class of which *Johnson* v. *Crook* (4) is an example. There is not any reference here to a gift over only of such part of the fund as has not been transferred.

A. B. Kerrigan, for the respondent Perpetual Trustee Co. (Ltd.).

Cur. adv. vult.

Dec. 13.

The following written judgments were delivered :—

DIXON J. I have had the advantage of reading the reasons of *Williams* J. and of *Kitto* J. and I agree in them. In my opinion the appeal should be dismissed.

WILLIAMS J. This is an appeal from a decretal order made by the Supreme Court of New South Wales in its equitable jurisdiction (*Roper* C.J. in Eq.) declaring that upon the true construction of a certain indenture of settlement and in the events which have happened the respondent company Perpetual Trustee Co. (Ltd.) now holds and since 2nd August 1948 has held the investments the subject of the indenture for the respondents Burns Philp Trust Co. Ltd. and William Kelso as executors of the will of William

(1) (1805) 11 Ves. Jun. 489, at p. 497 [32 E.R. 1177, at pp. 1179, 1180].
(2) (1876) 1 App. Cas. 428.
(3) (1936) 36 S.R. (N.S.W.) 658 ; 53 W.N. 248.
(4) (1879) 12 Ch. D. 639.

Edgar Forsyth now deceased absolutely and that the plaintiff company does not now hold and has not since 2nd August 1948, held these investments for the appellants Walter Wright Forsyth, Mavis Baker and Lorna Madge Kelso in equal shares absolutely. The declaration relates to the construction of the ultimate trust contained in clause 5 of the indenture which is an indenture of settlement made on 4th October 1934 between Edgar William Forsyth as settlor and the respondent Perpetual Trustee Co. (Ltd.) as trustee. By a memorandum of transfer of the same date the settlor transferred to the company 5,000 shares of £1 each in Britannia Investment Co. Ltd. to hold upon the trusts of the indenture. By the indenture the settlor created trusts primarily for the benefit of his son William and his issue, if he left any issue him surviving, and secondly if those trusts failed for the benefit of William's two sisters Mavis and Lorna and his brother Walter.

The trusts of income are contained in clause 1. The settlor directed the trustee to stand possessed of the trust fund, if William should not by reason of any antecedent bankruptcy or alienation or charge or attempted alienation or charge or any other event be disentitled personally to receive and enjoy the income or any part thereof, upon trust to pay the income to William until he should attain the age of fifty-five years or die or he should become bankrupt or alienate or charge the income or part thereof or affect so to do or the happening of any other event disentitling him personally to receive and enjoy the income or some part thereof. In that event the settlor directed the trustee to pay or apply the income during the remainder of William's life in its discretion for the maintenance and personal support of all or any one or more to the exclusion of the others of William and his wife and issue for the time being in existence and the other sons and daughters of the settlor or their children or to pay and apply the whole of the income or so much thereof as should not be so applied to the persons or person or for the purposes to whom or for which the income would for the time being be payable or applicable if William were then dead.

The trusts of corpus follow, the material trusts being those contained in clauses 2, 3 and 5 of the indenture. Clause 2 provided that if William should not prior to attaining fifty-five years by reason of any antecedent bankruptcy or alienation or charge &c. be disentitled personally to receive and enjoy the income as provided by clause 1 and should not be disentitled from any cause personally to receive the transfer thereinafter referred to, then the trustee should upon William attaining the age of fifty-five years transfer the whole trust fund to him for his separate use

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absolutely. Clause 3 provided that if William should by reason of any of the events specified in clause 2 be disentitled to receive the absolute transfer therein mentioned then upon his death or if he should die before attaining the age of fifty-five years the trustee should hold the trust fund upon trust for such of his lawful issue as should survive him and if more than one in equal shares as tenants in common. Clause 5 provided that if William should die without having received the absolute transfer of the trust fund as thereinbefore provided and leaving no lawful issue, then the trustee should hold the trust fund upon trust for such of the settlor's daughters Mavis and Lorna and his son Walter as should survive William and if more than one equally between them. The settlor declared that if any of these children predeceased William leaving lawful issue surviving such issue should take the share which their parent would have been entitled to receive thereunder and if more than one equally between them as tenants in common.

It is evident from this analysis of clauses 2, 3 and 5 that there could be three possible ways in which William could die without having received the absolute transfer of the fund. As to the first two ways there is no dispute. They are (1) by his death under fifty-five years; (2) by his death over fifty-five years his right to receive a transfer of the fund having been forfeited before attaining fifty-five years. The third possible way, and this raises the question in dispute, depends upon the meaning of "received" in the expression in clause 5 "without having received the absolute transfer of the trust fund as hereinbefore provided". If this means death prior to the actual receipt of the fund then William could die without having received the absolute transfer of the fund if he died after attaining the age of fifty-five years, no forfeiture of his personal right to receive the fund having occurred, but before the actual transfer of the fund. This is what happened. William attained the age of fifty-five years on 1st May 1948 and died on 2nd August 1948. He had been seriously ill for some months. When he died the investments constituting the fund had not been transferred to him. His sisters and brother, the appellants, contend that the third way is open and that they are entitled to the fund in equal shares. *Roper* C.J. in Eq. was of opinion that the material words of clause 5 should be read in a modified sense as meaning "die without having become entitled to receive the absolute transfer of the fund" or as "without having received the right to the absolute transfer of the fund". William had become entitled *de jure* to receive the transfer on attaining

fifty-five years so that, if this is the true meaning of the expression, his interest in the fund had become absolutely and indefeasibly vested prior to his death. This sense accords with a long line of decisions upon the construction of wills where the word " receive " has been construed as meaning " entitled to receive " or " receivable *de jure* ". They are decisions upon wills which have provided that a gift should vest in a beneficiary upon a certain event and at the same time have provided that the gift should be divested if the beneficiary died before receiving it. This construction has been adopted to prevent the initial vesting being defeated by any delay on the part of the trustee in transferring the fund. The same principle of construction has been applied to deeds (*In re Westby's Settlement*; *Westby* v. *Ashley* (1)). The root of the principle is thus expressed by *Jessel* M.R. in *Johnson* v. *Crook* (2): " Where the gift over is not quite clear, that is, where it is susceptible of two meanings, what has been called received *de jure*, and received in fact, or what might perhaps be better expressed as actually received and entitled to receive, there the presumption of law being in favour of not divesting a gift except there are clear words to take it away, and there being two possible meanings, you are to prefer that which leads to the least inconsistency, or it might be said, as was said in two of the cases, you are to prefer that which is the more convenient of the two ". It is a principle which should not be lightly departed from where an intention that the word should have that meaning is fairly open on the construction of the instrument as a whole.

The word " receive " appears in several places in the indenture in relation to both income and corpus. In the case of income it is now settled that under trusts similar to those contained in clause 1 a beneficiary is entitled to receive and personally to enjoy the income of a trust fund when the income has actually accrued due or has been received by the trustee and is available for distribution: see the cases cited in *In re Gourju's Will Trusts* (3). Prima facie, one would expect the word to have the same meaning in relation to the trusts of corpus. Clause 2 contains an imperative trust to transfer the fund to William on attaining fifty-five years provided—(1) there has been no forfeiture of the income prior to attaining that age, and (2) he is not disentitled from any cause personally to receive the transfer of the fund. The second proviso is not, like the first, confined in express terms to a cause arising before William

(1) (1950) Ch. 296.
(2) (1879) 12 Ch. D., at pp. 653, 654.
(3) (1943) 1 Ch. 24.

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attained fifty-five years, but that appears to be its natural implication. Accordingly, under clause 2, William became absolutely entitled *de jure* to have the fund transferred to him on attaining fifty-five years. Clause 3 contemplates two contingencies, the occurrence of either of which would bring it into operation—(1) the death of William at any time leaving lawful issue him surviving if either form of forfeiture contemplated in clause 2 occurred before William attained fifty-five years, or (2) the death of William under fifty-five years, leaving lawful issue him surviving, no forfeiture of his interest under clause 1 having occurred. It does not contemplate the further contingency of William's interest in the corpus being divested if he attained fifty-five years but died before the actual transfer of the fund leaving lawful issue. Clause 5 provides that it is to operate if William should die without having received the absolute transfer of the fund "as hereinbefore provided" and leaving no lawful issue him surviving. The clause is not really a divesting clause at all. It is an original gift supplementary to those contained in clauses 2 and 3 and intended to fill the gap if both these gifts fail. In that event, in the absence of a further gift, there would be a resulting trust to the settlor. There is one possible resulting trust as it is. The income of the fund was only payable to William until he attained fifty-five years. The discretionary trust of the income during his life only came into operation if there was a previous forfeiture of his right personally to receive income. If there was no forfeiture of this right but there was a forfeiture of his right personally to receive the corpus on attaining fifty-five years there would be no disposition of the income for the remainder of William's life. That is an event for which the draftsman failed to provide. But it would be unlikely that William would forfeit his right to the income without at the same time forfeiting his right to the fund. Despite this lapse, it is obvious that the draftsman did not intend to leave any event unprovided for. The words "as hereinbefore provided" in clause 5 hark back to clause 2. That clause provides that the trust fund shall be transferred to William immediately upon the fulfilment of the contingencies therein mentioned. The literal meaning of "without having received" is no doubt "without having actually received" (*Pilcher* v. *Logan* (1)). But, as Lord *Maugham* pointed out in *Parkes* v. *Parkes* (2), where there are no technical words in question and the intention of the testator (here the settlor) can be collected "with reasonable certainty

(1) (1914) 15 S.R. (N.S.W.) 24, at p. 27; 32 W.N. 5.

(2) (1936) 3 All E.R. 653, at p. 669.

from the entire trust disposition or will, . . . that intention 'must have effect given to it, beyond and even against, the literal sense of particular expressions' ". It would be unlikely that the settlor would want to divest the fund in favour of the appellants if William died between the age of fifty-five years and the actual transfer of the fund without leaving lawful issue him surviving but not to do so in favour of his issue if he died in this period leaving lawful issue him surviving. The sense contended for by the appellants means that clause 5 would operate as an original gift on the death of William where he incurred a forfeiture but as a gift over where he attained fifty-five years without incurring a forfeiture but died before the actual transfer of the fund. The whole structure of the indenture indicates an intention on the part of the settlor to vest the fund absolutely and indefeasibly in William if he qualified under clause 2. It indicates that the word " receive " has been used throughout in the sense of " receive *de jure* ". The meaning placed upon the word by his Honour accords with the primary principle for the construction of all instruments that the Court should in the first instance read the language of the testator or settlor " in the sense which it appears he himself attached to the expressions which he has used " (*Towns* v. *Wentworth* (1)). The appeal should be dismissed.

KITTO J. This appeal is brought from a decretal order made by *Roper* C.J. in Eq. on an originating summons which was taken out in the Supreme Court of New South Wales by the trustee of a certain indenture of settlement for the determination of a question as to the true construction of that indenture.

The indenture was made on 4th October 1934 between one Edgar William Forsyth, the settlor, and a trustee company, and it declared the trusts upon which a parcel of shares transferred by the settlor to the company should be held. The general nature of the indenture is that of a settlement of the shares on protective trusts for the benefit primarily of the settlor's son, William Edgar Forsyth, who was aged forty-one at the date of the settlement.

Clause 1 of the indenture deals with income, and its effect is sufficiently stated by saying that it provides, first, that the income shall be paid to the son until he shall attain the age of fifty-five years or die, or until he shall become bankrupt or alienate or charge the income or part thereof or affect so to do, or the happening of any event disentitling him personally to receive and enjoy such income or some part thereof ; and, secondly, that, after the failure

(1) (1858) 11 Moo. P.C. 526, at p. 543 [14 E.R. 794, at p. 800].

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or determination of this trust in the lifetime of the son, the trustee shall, during the remainder of the son's life, in its absolute discretion, either pay or apply the income for the maintenance and personal support of the son, his wife and issue and the settlor's other sons and daughters or their children as the trustee should think fit, or pay it to the person or persons to whom it would be payable if the son were dead.

Clauses 2, 3 and 5 provide for the destination of the corpus of the trust fund in various events.

Clause 2 provides that, if the son shall not, prior to his attaining fifty-five, by reason of any antecedent bankruptcy, alienation, charge or attempted alienation or charge, or any other event, be disentitled personally to receive and enjoy the income, and shall not be disentitled from any cause personally to receive the transfer thereinafter referred to, then the trustee shall, upon the son attaining the age of fifty-five years, transfer to him, for his own separate use absolutely, all the trust fund and accrued income remaining in the trustee's hands and all other assets then the subject of the trusts of the indenture, for his own absolute separate use and benefit.

Clause 3 provides that if the son shall, by reason of any of the events specified in clause 2, be disentitled to receive the absolute transfer therein mentioned, then, upon his death (*i.e.* after attaining fifty-five) or if he shall die before attaining the age of fifty-five, the trustee shall hold the trust fund upon trust for such of his lawful issue as shall survive him, and if more than one in equal shares as tenants in common.

Clause 5 provides that should the son die " without having received the absolute transfer of the said trust fund as hereinbefore provided " and leaving no issue him surviving, then the trustee shall hold the trust upon trust for such of the settlor's children Mavis, Lorna and Walter as shall survive the son, the surviving issue of any of them who shall predecease the son taking the share which their father or mother would have been entitled to receive.

It is not necessary to mention any other provision of the indenture, except to say that clause 7 permits moneys to be invested, not only in authorized trustee investments, but also in the purchase of real estate, in shares, debentures or debenture stock of any company, or on fixed deposit; and that clause 8 defines the expression " trust fund " to mean and include the settled shares and all other forms of investment into which the same may be varied, and to include any accumulations of income and investments of the same.

The son attained fifty-five on 1st May 1948, the trust fund being then in the hands of the trustee company in the form of Government stock and a bank deposit. On 2nd August 1948 the son died. During the intervening three months the son had been seriously ill, and the investments were not transferred to him. He died without leaving issue, and was survived by his sisters Mavis and Lorna and by his brother Walter.

In these circumstances, the trustee company submitted to the Court the question whether the investments which it held on the trusts of the settlement were held upon trust for the executors of the deceased son, or for his surviving sisters and brother, or for any other and if so what person or persons. *Roper* C.J. in Eq. held that the question should be answered in favour of the executors of the deceased son, construing clause 5 of the indenture as applying in the event of the son's dying leaving no issue him surviving, without having become entitled under clause 2 to the absolute transfer of the trust fund, or, in other words, without having received the right to the absolute transfer thereof.

The argument for the appellants attributed a narrower meaning to the introductory words of the clause. A difficulty was felt, however, in insisting upon a literal interpretation of them, for the reason that conceivably the result might be to make the clause void for uncertainty. The subject-matter of the clause is not a sum of money or a single asset. It is a trust fund which at the relevant time might be found invested in a variety of assets, yet it is spoken of as a whole. If the clause should be construed as referring to the actual vesting of the legal title to the trust assets in the son, then, in the event of his dying, leaving no issue, after some of the assets had been transferred to him but before the transfer of others had been completed, it would be a matter of doubt whether the condition of the clause should be held to be satisfied, either as to the whole of the fund, or as to the part transferred, or not at all; and if not at all, then whether the intention is that the son's estate should restore to the trustee the part already transferred. The failure of the clause to resolve this doubt might spell invalidity (cf. *Capel* v. *Capel* (1)).

Accordingly, it was submitted that the intention of the clause is to refer to death before the trustee company has done all that is necessary to be done by it in order to transfer the trust assets to the son. This submission concedes a meaning to the words which is not their literal meaning; it treats a receipt of the means of obtaining a transfer as a receipt of a transfer. But if the clause

(1) (1936) 36 S.R. (N.S.W.) 658; 53 W.N. 248.

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is not to be construed literally, the question at once arises whether its intention is to refer, not to actual transfer, but to the accrual of a right to receive a transfer, which is " tantamount in equity to actual receipt " (*Minors* v. *Battison* (1)).

There are many cases in which the word " received " in defeasance clauses has been held, in the absence of a context making clear an intention to refer to actual receipt, to be satisfied by the happening of events giving the *propositus* a right to receive by virtue of antecedent limitations. The effect of the authorities is thus stated in *Jarman* on *Wills*, 7th ed. (1930), vol. 3, at p. 2119 : " Executory gifts over in the event of legatees dying before ' receiving ' their legacies have given rise to much litigation. Actual receipt may be delayed by so many different causes that the Court is unwilling to impute to the testator an intention to make that a condition of the legacy, and thus indefinitely postpone the absolute vesting of it. If, therefore, the will points out a definite time when the right to receive the legacy accrues, either expressly, as by directing payment at a particular age or time, or by implication from the dispositions of the will, as upon the determination of a prior life estate, the gift over will be referred to that time "

In *Whiting* v. *Force* (2) Lord *Langdale* M.R. said :—" The testator intended, and has distinctly directed his estate to be divided amongst all his children on the whole of them attaining twenty-one, and not before that period. Under that direction the duty of the trustees to pay, and the right of the legatees to receive, accrued at the moment when the testator's youngest child attained twenty-one. He then goes on to say, that ' in case any one of his children should die before receiving his or her share,' then it was to go to the children which such child should leave behind, and if there should be none, it was to go over to the surviving children of the testator. The word ' receive ' must be construed with its co-relative ' pay ' and therefore the right to receive and the duty to pay occurred at the very same time ; I cannot imagine, then, that it was the intention of the testator, if one of his children having become entitled to receive a share of this property asked for payment, but happened to die without receiving it, that this accident was to alter the destination of the fund ".

To the same effect are *Re Dodgson's Trust* (3) ; *In re Chaston* ; *Chaston* v. *Seago* (4) ; *Wilks* v. *Bannister* (5).

(1) (1876) 1 App. Cas. 428, at p. 453.
(2) (1840) 2 Beav. 571, at p. 573 [48 E.R. 1303, at p. 1304].
(3) (1853) 1 Drew. 440 [61 E.R. 520].
(4) (1881) 18 Ch. D. 218.
(5) (1885) 30 Ch. D. 512.

In *Johnson* v. *Crook* (1) Sir *George Jessel* M.R. discussed the decision in *Gaskell* v. *Harman* (2), in which Lord *Eldon* had said, referring to *Hutcheon* v. *Mannington* (3): "The use I have since made of that case is as an authority, that, if the words will admit of not imputing to the testator such an intention (i.e. an intention that there shall have been an actual receipt), it shall not be imputed to him" (4); and *Jessel* M.R. added as his own opinion that if the words are ambiguous and bear two meanings, it should be imputed to the testator that he meant receivable in the sense of being entitled to receive, and not received in the sense of actual receipt. In *In re Sampson* (5) *Stirling* J., after considering many of the cases on this subject, said "these cases are not entirely consistent among themselves, but this at least they establish—that whether or not a testator can effectually cause a vested gift to be divested before it has actually come to the hands of the legatee, such an intention ought not to be attributed where the words are not clear; and in cases where the words are susceptible of such an interpretation, the Court has held that the period over which the operation of a divesting clause of this kind is to extend ought not to be held to continue beyond that at which the legacy is de jure receivable. The courts in such cases favour early vesting, regarding it as undesirable that rights and interests should depend on the degree of diligence with which trustees perform their duties."

In the present case the deed provides by clause 2 that, if the son shall not be disentitled to receive an absolute transfer, the trustee shall make such a transfer to him "upon (his) attaining the age of fifty-five years". No discretion to withhold the transfer is conferred on the trustee. The attainment of fifty-five years by the son without his having become disentitled is, so far as clause 2 is concerned, to terminate the settlement. The possible event of his attaining fifty-five years but being disentitled to receive the transfer is envisaged by clause 3. In that event the discretionary trusts created by clause 1 operate for the remainder of the son's life, and the provision made by clause 3 for the disposition of the corpus of the trust fund on the termination of the discretionary trusts by the son's death is confined to the event of his dying leaving issue him surviving. The destination of the corpus in the event of the termination of the discretionary trusts by the son's dying without leaving issue him surviving remains to be provided for, and clause 5 is directed at least to that topic.

(1) (1879) 12 Ch. D., at p. 646.
(2) (1805) 11 Ves. Jun. 489 [32 E.R. 1177].
(3) (1791) 1 Ves. Jun. 366 [30 E.R. 388].
(4) (1805) 11 Ves. Jun., at p. 497 [32 E.R., at p. 1180].
(5) (1896) 1 Ch. 630, at pp. 635, 636.

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Kitto J.

The decision below means that clause 5 has no further application. The appellants' contention, however, treats clause 5 as effecting a wider intention. If correct, it means that clause 5 not only makes a provision complementary to clause 3 by providing for the obvious alternative event, but also reduces the absolute interest arising under clause 2 to an interest defeasible by the son's death before the trustee has performed the duty peremptorily imposed upon it by clause 2. That this was the intention is inherently improbable, though not impossible. In the first place it would mean that, although there is a gift over in the event of the son's dying, either leaving issue or without leaving issue, after having failed to qualify for an absolute transfer at fifty-five years, there is no gift over in the event of his dying leaving issue after having qualified for an absolute transfer at fifty-five years but before the transfer is made. A construction producing this result is not to be accepted readily. In the second place, there is the difficulty, which has been felt in many of the cases to be a potent if not a decisive consideration, that a settlor of property who in the first instance gives an absolute interest is not likely to intend to make that interest defeasible in an event which may occur by reason of fortuitous circumstances unrelated to the scheme of the settlement. It is not difficult to share the reluctance, which the cases have so often revealed, to suppose that a clear direction to trustees to make an absolute transfer of property is intended to be exposed to defeasance in consequence either of the dilatoriness of the trustees in obeying the direction or of some accident. The reluctance must be the greater in the present case because the words "as hereinbefore provided" actually introduce into clause 5 itself a recognition that the absolute transfer referred to is that which clause 2 has directed shall be made upon the son's attaining fifty-five years without having become disentitled to receive it.

Reference was made in the argument to a passage in the judgment of *Harvey* J. in *Pilcher* v. *Logan* (1). His Honour said:— "*Prima facie*, as a matter of the orginary English language, I think 'received' means actually got into their hands. A number of cases, however, have been cited which show that the courts have displayed an inclination to treat the word as meaning 'receivable' in order to prevent the accident of whether trustees have or have not paid over money to affect the rights of beneficiaries. In some cases the word 'received' is construed as being

(1) (1914) 15 S.R. (N.S.W.), at p. 27; 32 W.N. 5.

equivalent to ' vested in possession ', but that cannot be the case in this will ".

The problem in this case is really not one of the primary or secondary sense of the word " received " (cf. *Girdlestone* v. *Creed* (1)); it is one of the intention disclosed by clause 5 considered in the context of the entire deed. The words used in clause 5 are not intractable, and there is ample warrant, both in authority and in reason, for construing the clause as framed on the assumption that the direction given to the trustee in clause 2 will be precisely observed, and therefore as being directed only to the event which clause 3 left unprovided for. The expression " having received " should be construed with its correlative " shall transfer " in clause 2; and the whole phrase " without having received the absolute transfer of the said trust fund as hereinbefore provided " may then properly be rendered, by reference to the language of clauses 2 and 3, as " having been disentitled to receive, in accordance with the provisions contained in clause 2, the absolute transfer of the said trust fund upon attaining the age of fifty-five years ".

In my opinion the decision below was correct, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Stephen, Jaques & Stephen.*
Solicitors for the respondents, *R. C. Cathels & Co.*

J. B.

(1) (1853) 10 Hare 480, at p. 488 [68 E.R. 1016, at p. 1019].