H. C. OF A. 1954. SUNDELL v. QUEENSLAND HOUSING COMMISSION. Webb J.

It is interesting to note on the one hand that only one counsel appeared for the appellant in the Supreme Court, and on the other hand that four counsel appeared for the respondent in the High Court. When the junior counsel for the respondent took silk another junior counsel was briefed. Why four counsel were employed by the respondent was not explained. The briefing of a very eminent leading counsel for the appellant may account for it. I have considered the fact that the respondent briefed four counsel on the appeal; but, having regard to all the other circumstances, I do not think it affords a sufficient justification for interfering with the decision of the taxing officer.

In my opinion then the respondent should not be held liable to pay for more than two counsel.

The fifteenth item in question was a reduction by £1 1s. 0d. to £4 14s. 6d. of a fee for the solicitor attending the High Court instructing counsel when the hearing concluded. Little or no reference was made to this item.

The application is dismissed with costs fixed at twenty guineas. Certify for counsel.

*Order accordingly.*

Solicitors for the applicant, *Chambers, McNab & Co.*

Solicitor for the respondent, *H. T. O'Driscoll*, Crown Solicitor for Queensland.

R. A. H.

[HIGH COURT OF AUSTRALIA.]

THOMAS AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

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

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1955.

SYDNEY, *Dec.* 1, 19.

Dixon C.J., Williams and Kitto JJ.

*Will—Construction—Residuary estate—Income—Trusts—Annuities—Payment out of income—Surplus income—Accumulation—Direction—Rule against perpetuities—Void for remoteness—Intestacy—Disposition—Conveyancing Act* 1919-1943 (*N.S.W.*), *s.* 31—*Thellusson Act* (39 *&* 40 *Geo. III, c.* 98).

A testator vested his residuary real and personal estate in trustees upon trust to pay out of the income thereof certain annuities, the annuitants being his wife, his daughter (an only child) and two sisters, and certain discretionary sums to provide for the children of his daughter should she die before they reached the age of twenty-one. He directed that any balance of income after payment of annuities and other charges should fall into and become part o his residuary estate, and that on the death of all the annuitants and on the youngest surviving child of his daughter reaching the age of twenty-six, his entire residuary estate should be converted and held upon trust as to one-half thereof to divide the same in equal shares among such children of his daughter as should have attained the age of twenty-six, with a restriction of such share in the event of there being only one such child to one-third of his residuary estate or to £7,000 whichever should be less, and as to the remainder upon trust to divide it among certain named charities.

When the maximum period (twenty-one years) of accumulation permitted by the *Thellusson Act*, 39 & 40 Geo. III c. 98 (in N.S.W. the *Conveyancing Act* 1919-1943, s. 31 (1) ) expired, the testator's daughter was the sole surviving annuitant and there was a considerable surplus of income each year after paying the annuity and any other charges. Her only child was over twenty-one (the age which, by virtue of s. 36 (1) of the latter Act, must be read for the age of twenty-six provided in the will), there was no possibility in fact of

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another child being born and a one-third share of the residuary estate far exceeded £7,000.

By s. 31 (2) of the Act, when income directed to be accumulated is released by the operation of s. 31 (1), income so directed to be accumulated shall go to such person as would have been entitled thereto if such accumulation had not been directed. The trustees applied by originating summons for the determination of the question whether the persons entitled consisted entirely of those who took as on an intestacy, namely the testator's daughter and grand-daughter (the latter through the estate of the testator's widow), or, as to half the income, consisted of the charities named in the will.

It was held by *Myers* J. in the Supreme Court of New South Wales that, after the expiration of the period of accumulation, the surplus of income in any year in which the annuity to the testator's daughter was paid in full was freed from any charge under the will and from the direction to accumulate; that there was no other person than the charities interested in the one-half share of that surplus; and that therefore the charities were entitled as to the one-half of such surplus to have it distributed amongst them.

The testator's daughter and grand-daughter appealed.

*Held*, reversing the decision of *Myers* J., that the residuary legatees were not alone interested in the direction to accumulate, for the will charged such future instalments upon all future income of the residuary estate, including the future income of each piece of surplus income added to the corpus of the residuary estate by the operation of the direction to accumulate; that therefore the charities were not entitled, as legatees of at least one-half of residue, to intercept the accumulation of one-half of the surplus income from time to time by requiring immediate distribution thereof; and that, as the gifts of residue gave only interests taking effect at the period of distribution, and were not so expressed as to carry surplus income released by the statutory failure of the direction to accumulate, such surplus income passed as on the intestacy of the testator.

*Wharton* v. *Masterman* (1895) A.C. 186, distinguished; *In re Coller's Deed Trusts*; *Coller* v. *Coller* (1939) Ch. 277 and *Re Rose*; *Rose* v. *Rose* (1915) 113 L.T. 142, referred to.

Decision of the Supreme Court of New South Wales (*Myers* J.), reversed.

APPEAL from the Supreme Court of New South Wales.

This was an appeal from so much of a decretal order of the Supreme Court of New South Wales in Equity (*Myers* J.) as declared that upon the true construction of the will of John Frederic Codrington deceased and in the events which happened the balance of income accruing since 11th August 1950 was distributable, as to one-half thereof, between the estate of his widow, Laura Elizabeth Codrington deceased, as to one-third of such one-half, and his daughter, Irene Frances Thomas, as to two-thirds of such

one-half, and as to the other one-half thereof between the eight charities entitled to share in the residuary estate of the testator.

The parties to the originating summons were the respondent Perpetual Trustee Co. (Ltd.) as plaintiff; the appellants Irene Frances Thomas and her daughter Irene Myee Stephens as defendants; and the undermentioned respondents as defendants, namely, Howard West Kilvinton Mowll, Thomas Samuel Holt, Victor Charles Hughesdon, John Bidwell and Robert John Hewett, trustees of the Home of Peace for the Dying; New South Wales Institution for the Deaf and Dumb and the Blind; the Boy's Brigade; Octavius Wilkinson Cowley, Allan Edward John Pont, Howl William Swanton and Ian Wellesley Holt, trustees of Sydney Ragged Schools; Royal Society of New South Wales; Royal Alexandria Hospital for Children; Thomas Arthur Bowden Dakin, honorary secretary of a committee for the New South Wales Branch of the Church Missionary Society of Australia and Tasmania; and the Committee of the Church of England Homes.

Further facts are sufficiently set forth in the headnote and the judgments hereunder.

*A. B. Kerrigan* Q.C. (with him *K. W. Pawley*), for the appellants. The appellants, who are the persons entitled under an intestacy, contend that the whole of the income released from accumulation by s. 31 of the *Conveyancing Act* 1919-1943 (N.S.W.) is distributable as upon an intestacy. The judgment of the court below is wrong in so far as it suggests that an implied trust for accumulation only arises if the annuitants have a continuing charge or income. Even if they have only a charge on the annual income there is an implied trust for accumulation. The implied trust is void. The gift of residue may be saved by s. 36 of the *Conveyancing Act* 1919-1943, but the accumulation remains void (*Jarman* on *Wills*, 8th ed. (1951), vol. 1, p. 396; *Curtis* v. *Lukin* (1); *Fenton* v. *Perpetual Trustee Co. (Ltd.)* (2)). Consequently unrequired income is not disposed of and being income of residue it results in an intestacy (*Berry* v. *Geen* (3)).

Accepting the position that the original residue is vested *a morte testatoris*, it is timed to take effect upon a future *dies certus*; that will not carry intermediate income and will not attract it (*In re Gillett's Will Trusts*; *Barclays Bank Ltd.* v. *Gillett* (4)). Therefore there must be an intestacy. If the interest of the charities is not vested there is no-one who can stop the accumulations because the

(1) (1842) 5 Beav. 147 [49 E.R. 533].
(2) (1940) 64 C.L.R. 52.
(3) (1938) A.C. 575, at pp. 581, 582.
(4) (1950) Ch., at pp. 109-111.

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other half of residue is clearly not vested—the person to take is not yet ascertained.

*J. D. Evans* Q.C. (with him *L. W. Street*), for the respondents other than the Perpetual Trustee Co. (Ltd.). This case is governed by the principle in *Wharton* v. *Masterman* (1). The annuities were correctly limited by the judge below to the annual income of the particular year: see *In re Coller's Deed Trusts*; *Coller* v. *Coller* (2). "Annual rests" or "Annual accounts" were dealt with in *In re Robb, dec'd.*; *Marshall* v. *Marshall* (3). *Berry* v. *Geen* (4) does not apply in this case. [Counsel also referred to *Browne* v. *Moody* (5); *Re Parry*; *Powell* v. *Parry* (6); *Harbin* v. *Masterman* (7); *Bective (Countess)* v. *Hodgson* (8); *Blair* v. *Curran* (9); *Cain* v. *Watson* (10).]

*D. M. Selby*, for the respondent-plaintiff.

*A. B. Kerrigan* Q.C., in reply. *In re Robb dec'd.*; *Marshall* v. *Marshall* (11) hardly justifies the judge below coming to the conclusion that an annual accounting was required. What had been given under this will was not in the nature of a life-fund referred to in *Browne* v. *Moody* (12). *Re Parry*; *Powell* v. *Parry* (13) does not assist the Court. The case now before this Court is more like *Weatherall* v. *Thornburgh* (14) than *Wharton* v. *Masterman* (15). The last-mentioned case was distinguished in *Berry* v. *Geen* (16). In *Congregational Union of New South Wales* v. *Thistlethwayte* (17) the scheme took up all the income and disposed of it to carry out a pension scheme. It was a *Browne* v. *Moody* (12) case. On the question of continuing charge see *In re Rose*; *Rose* v. *Rose* (18).

*J. D. Evans* Q.C., by leave, referred to *Weatherall* v. *Thornburgh* (19); *Wharton* v. *Masterman* (20); *In re Travis*; *Frost* v. *Greatorex* (21) and *In re Mundy* (22).

*Cur. adv. vult.*

(1) (1895) A.C., at pp. 190-193, 197, 198, 200.
(2) (1939) Ch. 277.
(3) (1953) Ch. 459, at p. 465.
(4) (1938) A.C. 575.
(5) (1936) A.C., at pp. 644, 645.
(6) (1889) 60 L.T. 489, at p. 491.
(7) (1871) L.R. 12 Eq. 559; (1894) 2 Ch. 184; (1895) A.C. 186.
(8) (1864) 10 H.L.C. 656 [11 E.R. 1181].
(9) (1939) 62 C.L.R. 464, at pp. 497, 498, 500-502, 507.
(10) (1910) V.L.R. 256, at p. 273.
(11) (1953) Ch. 459.
(12) (1936) A.C. 635.
(13) (1889) 60 L.T. 489.
(14) (1877) 8 Ch. D. 261, at pp. 262, 268-271.
(15) (1895) A.C. 186.
(16) (1938) A.C., at pp. 582, 583.
(17) (1952) 87 C.L.R. 375, at pp. 431 et seq., particularly at pp. 435-438.
(18) (1915) 85 L.J. Ch. 22, at p. 25.
(19) (1877) 8 Ch. D. 261.
(20) (1895) A.C., at pp. 200, 201.
(21) (1900) 2 Ch. 541.
(22) (1924) S.A.S.R. 306.

The following written judgments were delivered.

DIXON C.J. The question for decision in this appeal concerns the destination of certain surplus income which, if effect were given to the express direction contained in the will of the testator, would fall into and become part of his residuary estate. The testator died on 11th August 1929 and the twenty-one years to which a direction to accumulate is limited by the *Thellusson Act* 39 & 40 Geo. III c. 98 (in New South Wales the *Conveyancing Act* 1919-1943, s. 31) expired on 11th August 1950. As the provision in the will would amount to a direction to accumulate income it could have no effect after that date. According to the terms of the statute itself the income so directed to be accumulated shall go to such person as would have been entitled thereto if such accumulation had not been directed. The question is whether in the present case the persons who in that event would have been entitled consist entirely of those who take as on intestacy or, as to half the income, consist of a number of charities named in the will.

It is unnecessary to give more than a summary of the more material dispositions of the will for the purpose of showing how the matter arises. After vesting his real and personal estate in his trustees, the testator gave and bequeathed certain annuities. With the exception of his daughter Irene, his only child, the annuitants are now all dead. By the ensuing clause in his will he directed that the annuities so bequeathed should be payable out of the income arising from his estate and should be payable half yearly. Another clause empowered the trustees after the death of Irene to apply in or towards the maintenance, education or advancement of her children a discretionary amount not exceeding, in the event of her leaving one child, the sum of £100 per annum. She has in fact one child, a daughter, who was born in 1908. Mother and daughter are the persons who would be entitled as on an intestacy, the latter through the estate of the testator's widow, and they are the appellants. On the death of all the annuitants and upon the youngest child of Irene (the testator's daughter) attaining twenty-six (which by virtue of s. 36 of the *Conveyancing Act* must be read as twenty-one in order to give the limitation validity) the testator directed the trustee to convert his residuary estate and hold the proceeds upon trust as to one-half to divide the same in equal shares among the children of his daughter Irene attaining twenty-six (that is statutorily speaking twenty-one), with a limitation to £7,000 in the event of there being only one such child, and as to the remainder of his residuary estate upon trust to divide it among the charities in question. These charities, together with the trustee, are the

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respondents in the appeal. The law will not, of course, notice the certainty that now obtains of the testator's daughter Irene leaving not more than the one child her surviving.

Among the provisions which have thus been summarized occurs that which contains the direction to accumulate. It is as follows :— " I direct that any balance of income from time to time accruing from my estate not required for the purposes of payment of annuities or otherwise in connection with the management of my estate shall fall into and become part of my residuary estate." In point of fact the income of the residuary estate has always been more than enough to provide for the annuities and before 11th August 1950 a large amount was accumulated from surplus income and the capital of the estate would provide the £7,000 for Irene's daughter many times over. But these are facts that explain the controversy rather than aid in determining the question who gets the surplus income accruing since 11th August 1950 and released from accumulation.

In considering that question it is necessary first to see whether according to the expressed intention of the testator the will includes a disposition which covers it. Very little consideration will show that there is no such disposition intended. The trusts of the residuary estate in favour of Irene's children as to one-half, or £7,000 in case of one child, and in favour of the charities as to the remainder, are trusts to divide proceeds of conversion and take effect at the period of distribution and until then future interests only are given which could not, so far as the intended operation of the provisions of the will go, carry intermediate income or any part of such income.

The income released by the *Thellusson Act* from the direction to accumulate is not otherwise caught by any ultimate residuary disposition. It is in fact income of ultimate residue not disposed of.

If that were all, it would therefore be clear that it must go as on an intestacy. But, on behalf of the charities it is said that the persons who would have been entitled to such surplus income, if the accumulation had not been directed, are not to be ascertained by a simple consideration of the expressed intention of the testator. It is said that so far as half the surplus income " not required for the purposes of payment of annuities or otherwise in connection with the management of (the) estate " is concerned, the direction that it should fall into and become part of the residuary estate is nugatory. One-half of the income subject to this direction must necessarily form part of the fund to be divided amongst the charities. They are entitled, though *de futuro*, to this interest, so it is contended,

and the direction to pay the surplus income into residue would operate as nothing but an attempt to withhold the immediate enjoyment of what in the end must become theirs in possession. They are therefore entitled as the only persons interested to call for the surplus income which would, on the terms of the will, be accumulated, and stop the process of accumulation. This right is of course entirely independent of the *Thellusson Act*. It is anterior to the application of that Act and intercepts its operation. " The principle of this court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age—unless, during the interval, the property is given for the benefit of another."—per *Page Wood* V.C., *Gosling* v. *Gosling* (1).

Reliance is of course placed upon *Wharton* v. *Masterman* (2), itself a case of a direction to accumulate surplus income after payment of annuities and, subject thereto, a gift to charities. The essential condition, however, of the application of the principle is expressed in the following sentence from the opinion of Lord *Davey* : " There is no condition precedent to happen or to be performed in order to perfect the title of the legatees, and there is no other person who has any interest in the execution of the trust for accumulation, or who can complain of its non-execution " (3).

The question is whether this condition is fulfilled in the present case. *Myers* J. considered that it was fulfilled and accordingly made a declaration in favour of the charities as to one-half of the surplus income. As to the other half the persons taking as on intestacy took all of it because, in contemplation of law, it could not be certain who would take.

In my opinion it is not correct that there was no other person than the charities who was interested (as to the half in question) in the direction to accumulate. The matter depends in the end upon the meaning and effect of the clause containing that direction. It is not an easy provision to interpret and apply. The scope of its application is doubtless difficult to define with confidence. But I am disposed to go some distance with the view of the clause upon which *Myers* J. acted. When it is read with the clause which, notwithstanding the gift and bequest of the annuities, directs that they shall be payable out of income and the clause for the maintenance etc. of Irene's children out of income, I am inclined to

(1) (1859) Johns. 265, at p. 272 [70 E.R. 423, at p. 426].
(2) (1895) A.C. 186.
(3) (1895) A.C., at p. 198.

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think that the result is to leave the annuitants and Irene's children with no recourse to the sums that have been properly treated in the past as a balance of income not required and as falling into and becoming part of the residuary estate. If annuities had at any time fallen into arrear I think that no income accruing thereafter could have been properly so treated until all the arrears had been paid thereout. This may be the same thing as saying that the annuities fall into the third of the classes given by *Sargant* J. in *Re Rose*; *Rose* v. *Rose* (1), viz. annuities payable out of income generally, that is to say cumulative indefinitely. But it is with this qualification, that once there is a balance of income at a point of time contemplated by the clause not required for the payment of annuities present or past or otherwise in connection with the management of the estate, that balance ceases to be income out of which future payments of annuity may be made and becomes part of the corpus of the residuary estate. It is difficult to say what points of time the clause does contemplate by the indefinite phrase "from time to time". Probably *Myers* J. gave the most likely solution in adopting yearly intervals. But apart from any other consideration, there appears to me to be one element which is fatal to the view that no other interests than those of the charities are involved in the intended operation of the clause. It is that every piece of income that falls into residue pursuant to the clause becomes part of the corpus from which the income arises out of which the annuities are paid and out of which maintenance etc. was payable. The surviving annuitant therefore had (subject to the *Thellusson Act*) an interest in the accumulation of the balance of income not required for the purposes mentioned in the clause. The interest may seem slight and practically unimportant. But it is enough. Such matters do not depend upon degrees of practical importance but on the existence of legal or equitable rights.

I am therefore of opinion that the declaration made in the decree appealed from was erroneous.

I agree in the order proposed by *Williams* J. in his judgment.

WILLIAMS J. This is an appeal from so much of a decretal order of the Supreme Court of New South Wales in Equity (*Myers* J.) made on 5th August 1955 as declared that upon the true construction of the will of John Frederic Codrington deceased and in the events which have happened the balance of income accruing since 11th August 1950 is distributable as to one-half thereof between the estate of Laura Elizabeth Codrington deceased as to one-third of

(1) (1915) 113 L.T. 142, at p. 144.

such one-half and Irene Frances Thomas as to two-thirds of such one-half and as to the other one-half thereof between the eight charities entitled to share in the residuary estate of the testator. The testator in question died on 11th August 1929. He was survived by his wife Laura Elizabeth Codrington who died on 31st December 1939, by his only child Mrs. Irene Frances Thomas who is still alive, by her only child Myee (now Mrs. Stephens) who was born on 30th January 1908 and is still alive, and by two sisters who are now both dead. The testator made his will on 24th July 1913. He also made two codicils thereto but the contents, apart from adding a charity to the seven named in the will, are not material on this appeal. By his will the testator appointed the Perpetual Trustee Co. (Ltd.) as trustee and executor and, after bequeathing certain specific and pecuniary legacies with which we are not concerned, gave devised and bequeathed (cl. 5) the whole of his residuary real and personal estate unto his trustee upon trust to stand possessed of the same and to receive the rents income and profits thereof upon the trusts and with and subject to the powers provisions and authorities thereinafter expressed concerning the same. By cl. 6 he bequeathed four annuities for life, one to his wife (£200), one to his daughter (£300) and one to each of his sisters (£100 each). By cl. 7 he directed that the annuities should be payable out of the income arising from his estate and should commence from his death and be payable half-yearly on 30th June and 31st December in each and every year. By cl. 8 he directed that upon the death of any one or more of the other annuitants the annuity bequeathed to Mrs. Thomas should be increased until it amounted to £500. An application was made by the wife and daughter under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (N.S.W.) and an order was made under that Act increasing the annuity of the wife to £700, the original annuity of the daughter to £500 and the ultimate annuity to her under cl. 8 to £700. By cl. 9 the testator authorized his trustee, upon the death of his daughter Mrs. Thomas, to pay out of the income of his estate such sum as it should deem proper not exceeding £300 per annum towards the maintenance of her children but, if she should only leave one child surviving, directed that the amount should not exceed £100 per annum provided always that such sum of money should cease to be applied upon such children or child attaining the age of twenty-one years respectively. By cl. 10 the testator directed that any balance of income from time to time accruing from his estate not required for the purposes of the payment of annuities or otherwise in connection

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with the management of his estate should fall into and become part of his residuary estate. By cl. 11 the testator provided that, upon the death of all the annuitants and upon the youngest surviving child of Mrs. Thomas attaining the age of twenty-six years, his trustee should convert into money the whole of his residuary estate or such part thereof as should not consist of money and should stand possessed of the proceeds of conversion or other the whole of his residuary estate upon trust as to one-half thereof to divide the same in equal shares between such of the children of Mrs. Thomas as should have attained the age of twenty-six years provided however that if only one child of hers should have attained that age then upon trust to pay to such child one-third only of his residuary estate unless such one-third should exceed the sum of £7,000 in which event he directed that such child should be paid and receive the sum of £7,000 only and as to the remainder of his residuary estate or the whole of the same in the event of no child of Mrs. Thomas attaining the age of twenty-six years upon trust to divide the same in equal shares amongst eight charities. By cl. 12 the testator authorized his trustee at any time to sell any portion of his real and personal estate. By cl. 14 the testator declared that his trustee should have full power to determine any question which might arise as to whether any money forming part of his estate ought to be considered as capital or income for the purposes of his will.

The present position is that, the widow of the testator and his two sisters having died, the only annuity now payable out of the estate is the annuity of £700 to Mrs. Thomas. There is and has been for some time a considerable surplus of income from the residuary estate after paying the annuities. The amount of such surplus income accumulated and invested up to 11th August 1950 (that is up to twenty-one years from the death of the testator, the longest period of accumulation permitted by the *Thellusson Act*, now s. 31 of the *Conveyancing Act* 1919 (N.S.W.) as amended) was £16,320 and from that date there has been and there probably will continue to be surplus income after paying the annuity. Although her age is not given, it would seem very unlikely that Mrs. Thomas will have any more children so that Mrs. Stephens is the only child likely to inherit under the will, although legally there is still the possibility of further children in whose favour the power of maintenance under cl. 9 of the will could be exercised and who on attaining twenty-one would take a share of residue under cl. 11. The latter clause refers to the children of Mrs. Thomas attaining twenty-six but this gift would be a perpetuity and would

be rendered void for remoteness and s. 36 (1) of the *Conveyancing Act* provides that in such a case the age of twenty-one shall be substituted for the age stated in the instrument. It would also appear that the trust to convert the residuary estate into money and distribute it in accordance with cl. 11 of the will, hereinafter called the period of distribution, will come into operation on the death of Mrs. Thomas. On the happening of that event it would appear as though £7,000 will be less than one-third of the residuary estate so that Mrs. Stephens will receive £7,000 and the balance will be distributed amongst the charities. The charities will in any event receive at least one-half of the residue. Both Mrs. Stephens and the charities have vested interests in this fund but they are not interests which will become interests in possession until the death of Mrs. Thomas (or until the youngest child of Mrs. Thomas attains the age of twenty-one in the unlikely event of her having more children). The charities contend that since, in any event, they must between them inherit at least one-half of this fund they are now presently entitled to be paid one-half of the balance of income accrued or to accrue due since 11th August 1950 not required for the payment of the annuity to Mrs. Thomas and for the expenses of management.

His Honour acceded to this contention and it is from his consequent declaration that the present appeal comes. The appellants are Mrs. Thomas and Mrs. Stephens. They are the persons entitled under the intestacy of the deceased, Mrs. Thomas directly as to two-thirds and she and Mrs. Stephens derivatively as to the other one-third under the will of Mrs. Codrington. They contend that from 11th August 1950 until the gift of residue under cl. 11 becomes a gift in possession there is an intestacy as to this surplus income. In my opinion this is right. The gifts under cl. 11 are gifts by way of distribution of the proceeds of sale of the residue and not gifts of shares of the assets comprised in it prior to conversion. They are only gifts of corpus. They are not gifts of the surplus income of residue pending the arrival of the period of conversion and distribution although they would carry the intermediate income from the date the gifts fell into possession pending conversion. They are gifts the commencement of the enjoyment in possession of which must await at least the death of the last annuitant. Argument took place before his Honour as to whether the annuities were charged on the whole income of the residuary estate accruing prior to the period of distribution so that, in the event of a deficiency of income to pay the annuities in full in any year, any balance of income from previous or future years prior to this period could be

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resorted to to make good the deficiency; or whether, after the annuities had been paid in full in any year (or possibly in any half-year), any balance of income would be freed from the charge of the annuities and be governed solely by the provisions of cl. 10 so far as those provisions could validly operate and would therefore fall into residue for the period of twenty-one years and thereafter be not expressly disposed of. His Honour accepted the latter contention and considered that since 11th August 1950 any balance of income of any year in which the annuity to Mrs. Thomas was paid in full would be freed from any charge under the will and from the provisions of cl. 10 and would be available for immediate distribution. His Honour said "I am inclined to think, but I do not think it necessary in view of the opinion I hold to decide it, that if that were the case (that is if the prior contention was correct) there would be an intestacy as to the surplus income and it would devolve upon the next of kin. I do not think it necessary to decide that question because I do not think that there is a continuing charge upon income."

With all respect to his Honour, I cannot accept this conclusion. Clause 7 provides that the annuities "shall be payable out of the income arising from my estate". Clause 10 directs that "any balance of income from time to time accruing from my estate not required for the purposes of the payment of annuities shall fall into . . . and become part of my residuary estate". The words "from time to time" refer to the income accruing from the trust funds. It is the balance of income not required for the purposes of the payment of annuities that is to fall into and become part of residue. Clause 5 provides that the income of residue is to be held upon the trusts of the will. The primary trust for payment of the annuities is contained in cl. 7 and this is a trust for the payment of the annuities in full out of the whole of that income. It is a trust which is operative until the period of distribution. The only trust in the will concerning surplus income during that period is that this balance is to fall into residue. The surplus income is not given away in the meantime, it is merely directed to fall into residue, and it would therefore be available in case the income of any year should be insufficient to pay the annuities in full. It would require clear and definite language to that effect before a construction restricting the charge of the annuities to the income of residue *de anno in annum* should be adopted: *Re Rose*; *Rose* v. *Rose* (1). A mere direction that the surplus income should fall into residue,

(1) (1915) 113 L.T., at p. 144.

there to be retained, accumulated and invested pending the period of distribution, so that even as corpus the income it produced would be available to pay the annuitants, would be quite insufficient for this purpose. But on the arrival of this period, in accordance with cl. 11, there is an unqualified and unconditional gift-over of the corpus and a direction for its realization and immediate distribution amongst other beneficiaries and this is inconsistent with a continuing charge upon income after that event: *Foster* v. *Smith* (1); *In re Coller's Deed Trusts*; *Coller* v. *Coller* (2); *Re Cameron* (3); *Re Pulbrook*; *Pulbrook* v. *Pulbrook* (4) (not overruled on the point under discussion (5)); *Executor Trustee & Agency Co. of South Australia Ltd.* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (6). The true view is that the charge is confined to the income of the estate and to income accruing due prior to the arrival of the period of distribution fixed by cl. 11 but that there is nothing in the provisions of cl. 10 to free the income of the estate from the primary trust prior to this date. It would appear that if his Honour had formed this opinion he would have held that there was an intestacy as to the surplus income after 11th August 1950. His Honour relied on *Wharton* v. *Masterman* (7). There the headnote says "Where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee; in other words the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit. This is the principle of *Saunders* v. *Vautier* (8) and it is as applicable where the legatee is a charity, corporate or unincorporate, as where he is an individual". But the will there was very different to the present will. Its contents were summarized and explained in the speech of Lord *Davey* (9). These differences may be shortly stated: (1) the annuities were charged and charged only on the annual income of the capital of the original residuary estate *de anno in annum*, so that the annuitants had no right to have the deficiency of income of any one year made good out of the surplus income of subsequent years or out of the income of accumulations; (2) the surplus income of each year as it accrued was directed to be

(1) (1845) 1 Ph. 629 [41 E.R. 772].
(2) (1939) Ch. 277, at p. 281.
(3) (1955) 1 All E.R. 424, at p. 427.
(4) (1937) 37 S.R. (N.S.W.) 223; 54 W.N. 74.
(5) (1937) 37 S.R. (N.S.W.) 345; 54 W.N. 128.
(6) (1940) 64 C.L.R. 413, at p. 420.
(7) (1895) A.C. 186.
(8) (1841) 4 Beav. 115 [49 E.R. 282]; Cr. & Ph. 240 [41 E.R. 482].
(9) (1895) A.C., at pp. 196, 197.

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accumulated and invested, not so as to be added to the original residuary capital and thereby increase the annual income out of which the annuities would be payable, but so as to form a separate fund held upon different trusts, and as a distinct subject of gift, in which the residuary legatees, the charities, were exclusively interested. Accordingly, as surplus income accrued from time to time, it became the exclusive property of the charities, no other person had or could have any interest in it, and in these circumstances it was held that the principle in *Saunders* v. *Vautier* (1) applied, that the principle was applicable to both individuals and charities, and that the charities could stop an accumulation which was for their benefit alone and demand payment of the surplus income. Lord *Davey* (2) then described the principle in the same words as those reproduced in the headnote.

In the present will the surplus income, prior to the period of distribution, is directed to fall into and become part of the residue. It therefore becomes part of the general residuary fund out of the income of which the annuities are payable and does not become a separate fund like that created by the direction for accumulation in *Wharton* v. *Masterman* (3). It also becomes part of the fund out of the income of which maintenance would be payable from after the death of Mrs. Thomas, if a further child or children of hers should subsequently be born, until her youngest surviving child should attain twenty-one. The current income of the residuary fund would have to bear these charges independently of whether any deficiency in payment of the annuities or of maintenance should be made good out of the surplus income of any past or future years or not. But these deficiencies, if any, would be payable, as has already been said, out of any surplus income accruing due prior to the date fixed for the realization and distribution of residue by cl. 11. In *Wharton* v. *Masterman* (3) it was held that the charities could claim the surplus income whether the period of twenty-one years allowed by law (the *Thelluson Act*) for accumulations had expired or not. If his Honour was right, the charities could have made the same claim to the extent of half the surplus income in this case. Their rights cannot vary according to whether the period of twenty-one years has expired or not. They could have claimed half the surplus income from the date of the testator's death. But the residuary gift in the present will is quite different to that in *Wharton* v. *Masterman* (3). In the first place it is intended

(1) (1841) 4 Beav. 115 [49 E.R. 282]; Cr. & Ph. 240 [41 E.R. 482].
(2) (1895) A.C., at p. 198.
(3) (1895) A.C. 186.

that it should include the whole of the accumulations of surplus income prior to the period of distribution, and in that gift the children of Mrs. Thomas who attain twenty-one, if more than one, are entitled to one-half. Mrs. Stephens has an existing vested interest in one-third of the proceeds of sale of the residue or £7,000 whichever is the less, which is liable to be divested if there are further children of Mrs. Thomas who attain twenty-one but that interest has not yet fallen into possession. It is to her interest that the surplus income should be accumulated and added to residue so as to ensure that her one-third interest is worth at least £7,000. The value of the residuary estate at present is £53,000 so that actually it is extremely unlikely that the one-third interest will not exceed this amount in any event. But it is not impossible. All these considerations are quite conclusive to indicate that at no time prior to the period of distribution fixed by cl. 11 have the charities any present right to be paid part of any residue. The only gifts to them are in the direction, when the period of distribution arrives, to realize the residue and distribute the proceeds in the manner provided by cl. 11. They are entitled not to distributive shares of the residue pending conversion, but to distributive shares of the property when it is converted into money: *In re Kipping*; *Kipping* v. *Kipping* (1). It will only be possible to ascertain the sum to be distributed among them when that has taken place and the prior claim or claims of the child or children of Mrs. Thomas have been satisfied or provided for: *Macculloch* v. *Anderson* (2). The charities have vested rights to these shares *a morte testatoris*, but they only have rights to have this distribution made in future: *Browne* v. *Moody* (3). Section 31 (2) of the *Conveyancing Act* provides that, where the accumulation is directed for more than twenty-one years from the death of the testator, such direction shall be void, and the income so directed to be accumulated shall, so long as the same is directed to be accumulated contrary to the provisions of the section, go to such person as would have been entitled thereto if such accumulation had not been directed. If there is no such person entitled under the will there must be an intestacy. Apart from the charge on the income of the annuity to Mrs. Thomas and the possible future charge on it for the maintenance of her possible further children, while under twenty-one, after her death, there is no person entitled under the will to the surplus income from 11th August 1950. It is a well-settled rule of construction that the court must first construe the

(1) (1914) 1 Ch. 62, at p. 67.
(2) (1904) A.C. 55.
(3) (1936) A.C. 635.

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will and then ascertain the effect of the section upon the will when construed. Only the direction to accumulate is struck out and everything else is left as before and all the other directions of the will, be there such, as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute: *Eyre* v. *Marsden* (1); *Weatherall* v. *Thornburgh* (2); *Berry* v. *Geen* (3); *Perpetual Trustee Co. (Ltd.)* v. *Fenton* (4); *Blair* v. *Curran* (5). In the present case the surplus income of residue pending the period of distribution accruing after 11th August 1950 not required for the payment of the annuity to Mrs. Thomas or after her death for the maintenance of any further children of hers, should she have any, while under twenty-one years of age, will be undisposed of and will devolve as upon the intestacy of the testator: *Berry* v. *Geen* (6); *Perpetual Trustee Co. (Ltd.)* v. *Fenton* (7); *Congregational Union of New South Wales* v. *Thistlethwayte* (8).

For these reasons the appeal should be allowed, the part of the decretal order of the court below under appeal should be set aside and in lieu thereof a declaration should be made that as from 11th August 1950 until the death of Mrs. Thomas or until her youngest surviving child attains the age of twenty-one years, whichever is the later, there is an intestacy of any balance of income from time to time accruing from the estate of the testator not required for these purposes. The costs of all parties of the appeal should be paid out of the estate of the testator as between solicitor and client.

KITTO J. I have had an opportunity of reading the judgment which has been delivered by the Chief Justice. I agree in it, and there is nothing that I wish to add.

*Appeal allowed. Decretal order below varied by deleting therefrom the fourth declaration and inserting in lieu thereof a declaration that as from 11th August 1950 until the death of Mrs. Irene Frances Thomas or until her youngest child attains the age of twenty-one years, whichever is the later, there is an intestacy of any balance of income from time to time accruing from the estate of the testator not required for*

(1) (1838) 2 Keen 564 [48 E.R. 744].
(2) (1877) 8 Ch. D. 261.
(3) (1938) A.C. 575, at p. 581.
(4) (1940) 57 W.N. (N.S.W.) 85, at p. 88 (Eq.); (1940) 40 S.R. (N.S.W.) 382 (Eq. F.C.); 57 W.N. 234; (1940) 64 C.L.R. 52 (H.C.).
(5) (1939) 62 C.L.R. 464, at pp. 523-526.
(6) (1938) A.C. 575.
(7) (1940) 57 W.N. (N.S.W.) 85; (1940) 40 S.R. (N.S.W.) 382; 57 W.N. 234; (1940) 64 C.L.R. 52.
(8) (1952) 87 C.L.R. 375, at p. 437.