[HIGH COURT OF AUSTRALIA.]

RUSSELL AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) AND ANOTHER . . . . . } RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 24; *Aug.* 13.

Dixon C.J., Williams and Fullagar JJ.

Will—Construction—Special power of appointment—Exercise—Gift "(subject as hereinafter provided)" to named persons as tenants in common in equal shares—Proviso to pay them income with limitations to children—Children not objects of power—Limitations void—Absolute interest in named persons.

In purported exercise of a special power of appointment over the residuary estate of her deceased husband a testatrix directed her trustees to hold the property subject to the power upon trust to divide it into two hundred equal parts and to hold those parts upon certain specified trusts. The trust here in question read:—"(iv) As to a further thirty-four of such equal parts or shares Upon Trust (subject as hereinafter provided) for such of them A, B, and C (three of the children of my sister X) as shall be living at the date of my death and if more than one as tenants in common in equal shares Provided that the share of each of the three named children of my said sister X shall be held Upon Trust to pay the income of his or her share to him or her during his or her lifetime And upon the death of the same child To Hold the said share Upon Trust for such of his or her children (living at the date of my death) as shall survive him or her and shall have attained or shall live to attain the age of twenty-one years and if more than one as tenants in common in equal shares." The gift of corpus to the children of A, B, and C after their respective deaths was void, in that it gave the fund to persons not objects of the power of appointment.

Held, that the subsequent limitations being void, A, B and C were entitled to absolute interests in the said thirty-four parts as tenants in common in equal shares.

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Lassence v. *Tierney* (1849) 1 Mac. & G. 551 [41 E.R. 1379] and *Hancock* v. *Watson* (1902) A.C. 14, applied; *Trustees Executors & Agency Co. Ltd.* v. *Jenner* (1897) 22 V.L.R. 584; *In re the Estate of Patrick O'Brien dec'd.* (1898) 24 V.L.R. 360; *In re England* (1906) V.L.R. 94; *In re Antrobus*; *Henderson* v. *Shaw* (1928) N.Z.L.R. 364 and *In re Loza (Dec'd.)*; *Fernandez* v. *Hesketh* (1934) N.Z.L.R. 717, approved.

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

APPEAL from the Supreme Court of New South Wales.

Albert Henry Nathan late of Woollahra, Sydney, New South Wales died on 20th November 1940, having first made and published his last will dated 30th October 1936 and a codicil thereto dated 3rd November 1936 of which said will and codicil he appointed Perpetual Trustee Co. (Ltd.) and his widow Katey Nathan executor and executrix save in so far as his estate situated in the United Kingdom of Great Britain and elsewhere outside the Commonwealth of Australia and the Dominion of New Zealand was concerned. Probate of his said will and codicil was duly granted to the said executor and executrix by the Supreme Court of New South Wales in its Probate Jurisdiction on 21st March 1941. No question arose in these proceedings in relation to the said codicil.

By his said will the testator, so far as is here material, directed his trustees as to his residuary estate as follows :—" And as to the rest and residue of my Estate I direct my respective Trustees to invest the same in or upon any of the securities hereinbefore mentioned and to pay the income arising therefrom to my said wife during her life And after the death of my said wife I direct my respective Trustees to stand possessed thereof and of the investments representing the same upon trust for such of the following persons namely such of my nephews and niece the said Harry N. Moss Victor Alfred Moss and Laura Woolf as shall be living at the death of my said wife also the children then living of any of my said nephews and niece who shall have predeceased my said wife also the brothers sisters nephews and nieces of my said wife who shall be living at the time of her death and also the children then living of any of the nephews and nieces of my said wife who shall have predeceased her as my said wife may by will or codicil appoint and in such shares subject to such restrictions and conditions and in such manner as my said wife may by any such will or codicil appoint and in default of appointment or so far as any such appointment shall not extend " then upon the trusts thereinafter set out.

The widow of the testator died on 12th July 1948, having first made and published her last will dated 22nd November 1946, by

cl. 5 of which she provided:—" 5. Whereas under the said will and codicil of my late husband I also have a special power of appointment over the rest and residue of my late husband's estate as in such will mentioned and by such will it is provided that after my death the said Trustees thereof are directed to stand possessed of the rest and residue of my late husband's estate and the investments representing the same upon the trusts appearing in the said Will ". (The direction from the testator's will as set out above was then recited and the testatrix continued:) " Now I hereby exercise such special power of appointment so given to me by such will and I direct the trustees of such will to hold the said rest and residue of my late husband's estate (hereinafter referred to as ' the residue of my late husband's estate ') upon and subject to the following trusts that is to say:—Upon trust to divide the residue of my late husband's estate into Two hundred (200) equal parts or shares and to hold the same upon the following trusts ".

Then followed ten separate trusts of which the material one for the purposes of this report was as follows:—" (iv) As to a further thirty-four of such equal parts or shares upon trust (subject as hereinafter provided) for such of them Naida Russell Charles Russell and Lena Young (three of the children of my sister Rebecca Russell) as shall be living at the date of my death and if more than one as tenants in common in equal shares provided that the share of each of the three named children of my said sister Rebecca Russell shall be held upon trust to pay the income of his or her share to him or her during his or her lifetime And upon the death of the same child to hold the said share upon trust for such of his or her children (living at the date of my death) as shall survive him or her and shall have attained or shall live to attain the age of twenty-one years and if more than one as tenants in common in equal shares."

The children of Naida Russell, Charles Russell and Lena Young were not objects of the special power of appointment and accordingly the limitations to them in cl. 5 (iv) were void.

Doubts having arisen as to the destination (*inter alia*) of the said thirty-four parts of the testator's residuary estate referred to in cl. 5 (iv) Perpetual Trustee Co. (Ltd.) issued an originating summons out of the Supreme Court of New South Wales in its equitable jurisdiction to which the said Naida Russell, Charles Russell and Lena Young and Zara Solomon were (*inter alios*) made defendants, the said Zara Solomon representing for the purposes of the suit the class consisting of herself and all other persons entitled to the residuary estate of the testator under his will in default of appointment or so far as any such appointment should not extend. The said

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originating summons sought the determination of the questions (*inter alia*) (a) whether the said Naida Russell, Charles Russell and Lena Young were entitled to the said thirty-four parts of the residuary estate of the testator in equal shares as tenants in common absolutely or (b) whether they were entitled only to the income thereof equally during their respective lives.

Myers J. before whom the said originating summons came for hearing declared (*inter alia*) that the said defendants Naida Russell, Charles Russell and Lena Young were entitled only to the income of such thirty-four parts equally during their respective lives and that subject to such life interests the said thirty-four parts were held by the trustee for the persons entitled to the residuary estate of the testator under his said will in default of appointment or so far as any such appointment should not extend.

From this decision the said defendants Naida Russell, Charles Russell and Lena Young appealed to the High Court.

A. B. Kerrigan Q.C. (with him *R. J. Ellicott*), for the appellants. The ultimate trusts in favour of the children of the nieces and nephew are trusts for objects outside the power of appointment and are void, and the absolute gift remains. The bracketed words "subject as hereinafter provided" in cl. 5 (iv) of the will of the testatrix do not reduce the share from an absolute one in the first instance to a limited one. [He referred to *Trustees Executors & Agency Co. Ltd.* v. *Jenner* (1); *In re the Estate of Patrick O'Brien dec'd.* (2); *In re England* (3); *Cain* v. *Watson* (4); *In re Antrobus*; *Henderson* v. *Shaw* (5); *In re Loza (Dec'd).*; *Fernandez* v. *Hesketh* (6); *Kellett* v. *Kellett* (7).] The words "subject as hereinafter provided" have not been the subject of decision in this Court, but a phrase which is the reverse in operation to that here in question, namely "subject as aforesaid" was considered in *Macpherson* v. *Maund* (8). The natural meaning of the words "subject as hereinafter provided" is "subject as may be effectually hereinafter provided". [He referred to *In re Edwards' Will Trusts*; *Dalgleish* v. *Leighton* (9).]

[FULLAGAR J. referred to *Rucker* v. *Scholefield* (10).]

The rule of construction is that if a testator has given an absolute interest which he then seeks to settle and the settlement fails, the

(1) (1897) 22 V.L.R. 584, at p. 590.
(2) (1898) 24 V.L.R. 360, at pp. 364, 367, 369.
(3) (1906) V.L.R. 94, at p. 100.
(4) (1910) V.L.R. 256, at p. 277.
(5) (1928) N.Z.L.R. 364, at pp. 366, 370.
(6) (1934) N.Z.L.R. 717, at pp. 724, 725.
(7) (1868) L.R. 3 H.L. 160, at pp. 166, 168, 169.
(8) (1937) 58 C.L.R. 341, at pp. 346, 347, 350.
(9) (1948) 1 Ch. 440, at pp. 447, 449-451.
(10) (1862) 1 H. & M. 36 [71 E.R. 16].

absolute interest remains. The attempt to settle a life estate with remainders presupposes that an absolute interest has earlier been created. Where the attempted settlement fails the rule in *Lassence* v. *Tierney* (1) applies. The duty of the Court being to read the will as a whole it is nothing to the point to be told at the commencement of the trust that the gift is subject to what thereafter appears, for that is the position in any event, and it leaves open for determination whether what is afterwards provided is effective. In using the words " the share " in cl. 5 (iv) the testatrix is referring to a capital share and this indicates that she intended an absolute gift in the first instance. [He referred to *In re Burton's Settlement Trusts*; *Public Trustee* v. *Montefiore* (2).] Cases on the problem of the execution of a power are *Carver* v. *Bowles* (3); *Kampf* v. *Jones* (4); *Lassence* v. *Tierney* (5); *Woolridge* v. *Woolridge* (6). If the words in brackets do not modify the original gift beyond the modification imposed by the proviso and the proviso is for the purpose of carrying corpus to a non-object and is therefore wholly ineffectual, the original gift is subject to no effective modification and is therefore absolute.

F. J. D. Officer, for the respondent Zara Solomon. The words here used by the testatrix produce one series of limitations only and no case for the application of the rule in *Lassence* v. *Tierney* (1) arises. [He referred to *Rucker* v. *Scholefield* (7).] There are two types of provisions to be found in the cases, a gift provision and a qualification provision. What is found in the qualification provision does not matter, but if qualifying provisions are introduced into the gift itself, as is the case here, there is no absolute gift in the first place. That is the difference between the present case and *Trustees Executors & Agency Co. Ltd.* v. *Jenner* (8). *In re the Estate of Patrick O'Brien dec'd.* (9) adds by way of reasoning nothing to *Jenner's Case* (10). The will in *In re Loza (Dec'd.)*; *Fernandez* v. *Hesketh* (11) differed from the will here under discussion not merely in the position of the words of qualification but it was there admitted that an absolute interest was conferred on certain beneficiaries. Then, too,

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(2) (1955) 1 Ch. 348, at pp. 356, 358, 360, 361.
(3) (1831) 2 Russ. & M. 301, at pp. 304, 305, 307, 308 [39 E.R. 409, at p. 412].
(4) (1837) 2 Keen. 756, at p. 761 [48 E.R. 821, at p. 823].
(5) (1849) 1 Mac. & G. 551, at p. 567 [41 E.R. 1379, at p. 1385].
(6) (1859) Johns. 63, at pp. 68, 69 [70 E.R. 340, at pp. 342, 343].
(7) (1862) 1 H. & M. 36, at p. 41 [71 E.R. 16, at p. 18].
(8) (1897) 22 V.L.R. 584, at pp. 585, 591.
(9) (1898) 24 V.L.R. 360.
(10) (1897) 22 V.L.R. 584.
(11) (1934) N.Z.L.R. 717, at p. 723.

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with regard to the beneficiary in question there was not under all circumstances a disposition after his death. [He referred to *Re Cohen's Will Trusts* (1); *Re Panter*; *Equity Trustees Co.* v. *Marshall* (2).] It is reasonable to infer that the testatrix intended all the declared trusts to take effect and therefore that the three children of Rebecca Russell would take the income. She could not have contemplated that they would take corpus and when she uses the word "share" in cl. 5 (iv) she does not mean a share of corpus. She did not at any stage contemplate that the three persons named would take corpus. No emphatic words of distribution are to be found in the gift provision, and with the qualificatory words appearing in the gift provision itself it cannot be said that there is an absolute interest outside the qualification. There is in accordance with the principle of *Rucker* v. *Scholefield* (3) merely one connected series of limitations and there is no gift other than the gift in the qualified form. The appeal should be dismissed.

R. D. Conacher, for the respondent Perpetual Trustee Co. (Ltd.). Before *Myers* J. the appellants relied only on the argument based directly on *Lassence* v. *Tierney* (4). The second argument based on *Macpherson* v. *Maund* (5) and the third based on a special compartment of the rule in *Lassence* v. *Tierney* (4) especially applicable to the exercise of special powers of appointment were not presented in the court below. If the appellants succeed on either of the second or third arguments they should have no order for their costs, whilst those of the respondents should be paid as between solicitor and client out of the estate; if on the first, then the costs of all parties as between solicitor and client should be so paid.

A. B. Kerrigan Q.C., in reply. The Court did not desire to hear him on the question of costs.

Cur. adv. vult.

Aug. 13.

The following written judgments were delivered:—

DIXON C.J. AND WILLIAMS J. This is an appeal from part of a decretal order made by *Myers* J. in a suit instituted by originating summons in the Supreme Court in Equity to determine certain questions relating to the construction of the will of the testator Albert Henry Nathan and of the appointments made thereunder by

(1) (1936) 1 All E.R. 103, at pp. 104, 105.
(2) (1948) V.L.R. 177, at pp. 179, 180.
(3) (1862) 1 H. & M. 36 [71 E.R. 16].
(4) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(5) (1937) 58 C.L.R. 341.

his widow Katey Nathan. The testator died on 20th November 1940. His widow died on 12th July 1948. The appellants are a nephew and two nieces of the widow.

The testator by his will dated 30th October 1936 directed his trustees to pay the income arising from his residuary estate to his widow during her life and after her death to stand possessed thereof upon trust for " such of the following persons namely such of my nephews and niece the said Harry N. Moss Victor Alfred Moss and Laura Woolf as shall be living at the death of my said wife also the children then living of any of my said nephews and niece who shall have predeceased my said wife also the brothers sisters nephews and nieces of my said wife who shall be living at the time of her death and also the children then living of any of the nephews and nieces of my said wife who shall have predeceased her as my said wife may by will or codicil appoint and in such shares subject to such restrictions and conditions and in such manner as my said wife may by any such will or codicil appoint " and in default or so far as such appointment should not extend upon the trusts therein mentioned. His widow by her will dated 22nd November 1946, after reciting the terms of this special power of appointment, expressed her intention to exercise it. She directed the trustees of the will of the testator to divide his residue into two hundred parts or shares and to hold the same upon the trusts that followed. These trusts consist of ten separate sets of trusts relating to various quotas into which the two hundred parts are divided for this purpose. The fourth of these sets of trusts, in which the appellants are interested, is the subject matter of this appeal. The trustees are directed to hold thirty-four of the two hundred parts upon trust : " (iv) As to a further thirty-four of such equal parts or shares upon trust (subject as hereinafter provided) for such of them Naida Russell Charles Russell and Lena Young (three of the children of my sister Rebecca Russell) as shall be living at the date of my death and if more than one as tenants in common in equal shares Provided that the share of each of the three named children of my said sister Rebecca Russell shall be held upon trust to pay the income of his or her share to him or her during his or her lifetime And upon the death of the same child to hold the said share upon trust for such of his or her children (living at the date of my death) as shall survive him or her and shall have attained or shall live to attain the age of twenty-one years and if more than one as tenants in common in equal shares ".

Two of the appellants are married and have children who were alive at the death of the widow but their parents were also then alive

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and it is therefore the parents and not the children who are the objects of the special power of appointment and the ultimate trusts in favour of their children are trusts for objects outside the power and are void. The question therefore arises whether there is an absolute gift of the thirty-four parts to the appellants in the first instance. If there is, they are entitled to rely upon the rule in *Lassence* v. *Tierney* (1). The classic modern statement of the rule appears in the speech of Lord *Davey* in *Hancock* v. *Watson* (2). He said: "it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be" (3). The rule applies to appointments under a power as well as to bequests and devises; "if the first appointment gives the absolute interest to the appointee, and the subsequent superadded modification of it is void, the original appointment stands exactly as if the attempted modification were struck out of the will": per Lord *Romilly* M.R. in *Churchill* v. *Churchill* (4); *Farwell* on *Powers*, 3rd ed. (1916), pp. 346, 347.

If the rule applies then, since the ultimate trusts in favour of the children of the appellants are void, there remains only the absolute gift of the thirty-four parts to the appellants as tenants in common in equal shares in the first instance and imposed upon it there is an attempt to settle these shares upon them for their lives. But this attempt would obviously be repugnant to the absolute interests already given and the appellants would be entitled to an immediate distribution of the corpus of the thirty-four parts.

This was one of the questions his Honour had to determine in the suit. He held that the rule in *Lassence* v. *Tierney* (1) was inapplicable because there was no absolute gift to them in the first instance and that their shares upon their respective deaths devolved under the trusts in default of appointment contained in the will of the testator. His Honour said that but for the words in brackets occurring in the initial trust he would have no doubt that there was a gift of an absolute interest but that the presence of these words prevented this construction. He said, after reciting the words of the initial trust: "If I were to stop at the part of the clause which I have just quoted, I am of the opinion that it would be quite impossible for me to tell what interest was created because

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(2) (1902) A.C. 14.
(3) (1902) A.C., at p. 22.
(4) (1867) L.R. 5 Eq. 44, at p. 48.

the trust for the three named children is a trust which is expressly stated to be subject to something which is later provided. Without looking at what is in fact later provided, it is impossible to determine the limits of the trust. When one does look at what follows, which is essential in order to determine the extent of the trust, one finds that only a life interest is given to the three named children of the sister of the testatrix. In my view that clause is so tied to what follows that it is impossible to separate it, and I am of the opinion that it is not possible to separate it and construe it by itself without reference to the later provisions."

But, with all respect to his Honour, in deciding whether a gift falls within the rule in *Lassence* v. *Tierney* (1) or not, it is always necessary to look at the whole of the trusts in order to inquire whether the initial gift is absolute or not. In *Lassence* v. *Tierney* (1) Lord *Cottenham* L.C. said: "It is, however, obvious that the intention that the gift should be absolute as between the legatee and the estate is, as in all cases of construction, to be collected from the whole of the will, and not from there being words which, standing alone, would constitute an absolute gift" (2). In *Hancock* v. *Watson* (3), Lord *Davey* said: "Of course, as Lord *Cottenham* pointed out in *Lassence* v. *Tierney* (1), if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event" (4). This passage from Lord *Davey* was cited by *Evershed* M.R. in the recent case of *In re Burton's Settlement Trusts*; *Public Trustee* v. *Montefiore* (5) and his Lordship remarked that he took the words "But when the court has once determined that the first gift is in terms absolute" to mean "is by or as a consequence of its language absolute" (6).

Upon this inquiry the words in brackets are of course material. But they must be interpreted as part of the entire disposition. So interpreted their purpose seems to be to make it clear that the outright gift is qualified only so far as may be necessary to give effect to the desire of the testatrix that the shares appointed to the three children shall be settled. Except for that the gift is absolute. In a sense the interpretation of the words reinforces the operation of the rule. In so far as the limitations in the proviso do not extend

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(2) (1849) 1 Mac. & G., at p. 562 [41 E.R., at p. 1383].
(3) (1902) A.C. 14.
(4) (1902) A.C., at p. 22.
(5) (1955) 1 Ch. 348.
(6) (1955) 1 Ch., at p. 353

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the intention is that the gift should take effect. In terms they do no more than make the initial gift " subject as hereinafter provided " and all that is " hereinafter provided " is what is provided by the trusts which follow the initial trust and they are in terms trusts engrafted or imposed upon the shares of each appellant created by the initial trust. To the extent to which these trusts fail to take effect there is nothing " hereinafter provided " at all and the original absolute interests must remain. Some of the cases in which it was held that there was not an absolute gift in the first instance were discussed by *Fullagar* J. in *Re Panter* ; *Equity Trustees Co.* v. *Marshall* (1). In that case his Honour reached that conclusion, but in the will before him there were no words of trust corresponding to those contained in the first trust of the series now under discussion. Unfortunately the headnote in *Re Panter*; *Equity Trustees Co.* v. *Marshall* (1) is inaccurate. It states that the daughter of the testator by her will, in exercise of the power of appointment conferred upon her by his will, directed the trustees to hold the £5,000 in trust for her three daughters in equal shares, to appropriate one share to each daughter, etc. There was no such trust in the appointment but only a direction to the trustees to hold the £5,000 upon trust to divide it into three equal shares and appropriate one of such shares to each of three named daughters, and this was an appointment very different in terms to those of the present appointment.

In the present case there is plainly a gift which by its language is an absolute gift in the first instance. The trustees are directed by the will of the widow to hold the thirty-four parts in trust for the three appellants as tenants in common in equal shares. These are most definitely words of gift. They are appropriate and appropriate only to give the appellants absolute beneficial interests in the thirty-four parts. The ensuing trusts are trusts engrafted or imposed on these beneficial interests. The frame of the appointment, as Lord *Tomlin* expressed it in his speech in *The Attorney-General* v. *Lloyds Bank Ltd.* (2), is such as to attract the rule in *Lassence* v. *Tierney* (3). His Lordship pointed out that phrases such as the " share of each child " are phrases indicating ownership (4). See also the remarks of Lord *Romer* in *Fyfe* v. *Irwin* (5). See also *Williamson* v. *Carter* (6). These remarks of Lord *Tomlin* were cited in *In re Burton's Settlement Trusts* ; *Public Trustee* v. *Montefiore* (7). In *Trustees Executors*

(1) (1948) V.L.R. 177.
(2) (1935) A.C. 382, at p. 394.
(3) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(4) (1935) A.C., at p. 395.
(5) (1939) 2 All E.R. 271, at pp. 281-283.
(6) (1935) 54 C.L.R. 23, at p. 31.
(7) (1955) 1 Ch. 348.

& Agency Co. Ltd. v. *Jenner* (1) the testator by cl. 5 of his will directed his trustees to hold property on trust for such of his children as should attain twenty-five " but nevertheless subject to the declaration next hereinafter contained ". He then by cl. 6 proceeded to declare that the shares bequeathed in trust for each daughter should be held by his trustees upon trust for her for life and after her death in trust for her children who should attain twenty-five. *a'Beckett* J. held that the gifts to the grandchildren were void for perpetuity and that the whole of the sixth clause was inoperative to restrict the gift already made to the daughters who therefore took absolute interests and not for life only. The words " but nevertheless subject to the declaration next hereinafter contained " raised a problem for his Honour very similar to the problem raised by the words in brackets in the present case. But *a'Beckett* J., it will be seen, came to the opposite conclusion to *Myers* J. He said : "Supposing cl. 5 had omitted the words, ' but nevertheless subject to the declaration next hereinafter contained ', the effect of cl. 6 would have been precisely the same so far as the intention of the testator was concerned. Without any necessity for using those words ' but nevertheless subject to the declaration next hereinafter contained', it would appear, beyond all question, that it was the intention of the testator to reduce the daughter's share to a life interest, with remainder to her children ; and according to the authorities there would be first an absolute gift, and then there would be a reduction of the gift by a void disposition, and the principle of the cases would apply " (2). With this approach of *a'Beckett* J. we entirely agree and we are not alone because it has been adopted in at least four subsequent cases, two in Victoria and two in New Zealand. They are *In re the Estate of Patrick O'Brien dec'd.* (3) ; *In re England* (4) ; *In re Antrobus* ; *Henderson* v. *Shaw* (5) and *In re Loza (Dec'd.)* ; *Fernandez* v. *Hesketh* (6).

It appears to us that *Myers* J. fell into error because he considered the words in brackets required the initial trust to be read in a different sense to that in which it would be read if the words were not there. Effect must of course be given if possible to every word in the series of trusts. But the words in brackets do not say expressly or by implication that the words of the initial trust are not to have their natural meaning. The expression " subject as hereinafter provided " would have the same operation whether it appears as it does towards the commencement of the initial trust

(1) (1897) 22 V.L.R. 584.
(2) (1897) 22 V.L.R., at p. 591.
(3) (1898) 24 V.L.R. 360.
(4) (1906) V.L.R. 94.
(5) (1928) N.Z.L.R. 364.
(6) (1934) N.Z.L.R. 717.

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or at the end of it. If it appeared at the end of it the initial trust would require the trustees to hold the thirty-four parts on trust for the appellants as tenants in common in equal shares " subject as hereinafter provided "; it is then provided that the shares of each of the three named children of her sister Rebecca Russell should be held upon trust to pay etc. All that the words in brackets do is to subject something to something and when the whole of the trusts of the thirty-four parts are read together the former something clearly emerges as the beneficial interests created by the initial trust and the latter something as what Lord *Evershed* in *Burton's Case* (1) described as " the detailed and more limited trusts which follow ". His Honour has in effect construed the initial trust as though it had been reduced by the words in brackets to mere arithmetic for dividing the thirty-four parts into as many shares as there should be survivors of the appellants at the death of the widow with the consequence that the beneficial dispositions of the thirty-four parts only commence with the creation of the life estates. But the initial direction to the trustees to hold the thirty-four shares on trust for the appellants cannot be so construed. Imperative words of trust must be given their full beneficial and not a mere administrative operation. The words in brackets accept the position that absolute beneficial interests, that is absolute equal shares, are created in the thirty-four parts in the first instance and proceed to subject these very shares to the subsequent limitations. The initial absolute gift is of course defeasible only to the extent to which the subsequent limitations to which it is subjected are valid : see *In re Edwards' Will Trusts*; *Dalgleish* v. *Leighton* (2); *Macpherson* v. *Maund* (3).

For these reasons the appeal should be allowed. The declaration in the decretal order relating to the thirty-four parts should be deleted and in lieu thereof there should be a declaration that in the events that have happened the trustee of the will of the testator now holds the thirty-four two-hundredth parts of the testator's residuary estate in trust for the appellants as tenants in common in equal shares absolutely. The costs of all parties of the appeal as between solicitor and client should be ordered to be paid out of the estate of the testator.

FULLAGAR J. I agree that this appeal should be allowed, though I have felt some difficulty over the case, and was at first disposed to agree with the view taken by *Myers* J.

(1) (1955) 1 Ch. 348.
(2) (1948) 1 Ch. 440, at pp. 449-451.
(3) (1937) 58 C.L.R. 341, at pp. 346, 350.

The testatrix, by cl. 5 of her will, exercises the power of appointment given to her by her husband's will. She directs the trustees to hold the property subject to the power upon trust to divide it into two hundred equal parts, and to hold those parts upon " the following trusts ". Then follow ten numbered paragraphs, in which she declares the trusts. The immediately material paragraph is the fourth. This reads :—" (iv) As to a further thirty-four of such equal parts or shares upon trust (subject as hereinafter provided) for such of them Naida Russell Charles Russell and Lena Young (three of the children of my sister Rebecca Russell) as shall be living at the date of my death and if more than one as tenants in common in equal shares Provided that the share of each of the three named children of my said sister Rebecca Russell shall be held upon trust to pay the income of his or her share to him or her during his or her lifetime And upon the death of the same child to hold the said share upon trust for such of his or her children (living at the date of my death) as shall survive him or her and shall have attained or shall live to attain the age of twenty-one years and if more than one as tenants in common in equal shares."

There is, of course, no intrinsic vice in the direction to the trustees to hold the shares and pay the income to the named beneficiaries during their respective lives. But the gift of corpus to their children after their respective deaths is void, because it gives the fund to persons who are not objects of the power of appointment which the testatrix is purporting to exercise. The appellants, who are the beneficiaries named in par. (iv), maintain that the result of this is to give them an absolute interest in the shares dealt with in par. (iv). They base this contention on the so-called rule in *Lassence* v. *Tierney* (1). *Myers* J. held that the " rule " is not applicable, that the appellants take life interests only, and that on their respective deaths the property goes to the persons entitled in default of appointment under the will of the testatrix's husband.

The so-called rule in *Lassence* v. *Tierney* (1) is almost always stated in the words of Lord *Davey* in *Hancock* v. *Watson* (2). This famous statement of the rule begins with the words : " If you find an absolute gift to a legatee in the first instance " (3). There has perhaps been a tendency at times to give to Lord *Davey's* words almost the force of a statutory enactment. And, if it is really necessary, in order that the three persons named in the will may take an interest unrestricted by the proviso, that we should find in terms an " absolute gift to them in the first instance ", then I think that

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(2) (1902) A.C. 14.
(3) (1902) A.C., at p. 22.

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they must fail. For I would respectfully agree with *Myers* J. that it is impossible to find here in terms an absolute gift in the first instance. The words of gift are *introduced* by the words " subject as hereinafter provided ". Those words come before the legatees are named. The gift " in the first instance " is *only* a gift " subject as hereinafter provided ". I can see no possible escape from this.

After full consideration, however, I have come to the conclusion that this is not the end of the matter. It has seemed to me that the correct approach is not made by taking a selected statement of a rule and inquiring whether the particular case falls within the literal terms of that statement. The so-called rule is only a rule of construction, designed, like all such rules, to assist in the interpretation of wills. It is based on presumed intention. Even in a case where the conditions laid down by Lord *Davey* are literally fulfilled, we may find indications which compel us to say that, although there is in terms an absolute gift in the first instance, the testator did not intend it to take effect as such on the failure of an engrafted trust: he may, for example, have expressly provided for what is to happen if the engrafted trust cannot take effect. Conversely, the gift in the first instance may not be in terms absolute, and yet it may be proper to infer that the testator intended it to take effect as an absolute gift if a subsequently imposed trust failed. As I said in *Re Panter*; *Equity Trustees Co.* v. *Marshall* (1) (in which the headnote, as has been pointed out, is incorrect in a vital respect), I think that the best statement and analysis of the " rule " is to be found in the judgment of *Page Wood* V.-C. in *Rucker* v. *Scholefield* (2). The Vice-Chancellor said:—" In all cases of this kind the question turns upon the language in which the appointment is attempted to be made. If you find a clear and definite gift of the property to be appointed, and then, engrafted upon that, subsequent provisions directing the fund to be settled, *so as to shew that the purpose was first to make the gift to and for the benefit of the person named, and then to have the fund settled*; in a case of that kind, if the limitations of the proposed settlement are such as cannot become operative, the first absolute gift is held to take effect without restriction. So, if you find a clear gift followed by words which affect to divest it, and the limitations over are inoperative, then the Court will uphold the gift, striking out the limitations which cannot have any legal effect " (3) (The italics are mine). It is true that the Vice-Chancellor uses the words " absolute gift ", but I think he

(1) (1948) V.L.R. 177.
(2) (1862) 1 H. & M. 36 [71 E.R. 16].
(3) (1862) 1 H. & M., at p. 41 [71 E.R., at p. 18].

uses the adjective proleptically. In any case, the same prominence is not given to the word as is given in Lord *Davey's* formulation.

The words which I have italicised in the above citation from the judgment of Sir *William Page Wood* reveal, I think, the true underlying basis and reason of the " rule ". It is, as I have said, based on presumed intention. If a testator simply intends to give the income of a fund to A for life and to give the corpus of the fund to A's children after his death, it is easy enough for him to say simply that he gives the fund to his trustees to be held on trust for A for life and after his death for his children. But, if he says : " I give the fund to A, provided that he is to have the income for life and his children are to have the fund after his death ", we are faced with a peculiar and abnormal—almost a contradictory—form of gift. In some cases, indeed, there is held, on the construction of the will as a whole, to be actual repugnancy. In the generality of cases, however, the proviso is naturally read as qualifying the initial gift to A. But the peculiar form of the gift, the typical *Hancock* v. *Watson* (1) form, provokes the question—why does the testator do it in this way ? The most natural answer is that he intends primarily to benefit A, but wishes the fund to be handed on to his children : the settlement contained in the proviso is a secondary consideration to him—an afterthought, so to speak. And so, if the gift to the children cannot take effect, and we ask what the testator would have wished, if he had foreseen this, the most natural answer is likely to be that he would have simply given the fund to A. And so we arrive at the rule of construction which is associated with *Lassence* v. *Tierney* (2) and *Hancock* v. *Watson* (1). The rule is perhaps, from one point of view, a very artificial one, but, in my opinion, it is a sound and sensible rule.

The above observations serve, I think, to show that the appellants' claim cannot be rejected on the mere ground that the initial gift is not made in terms which would of their own force create an absolute interest. It is now necessary to consider what is the proper interpretation of par. (iv) of cl. 5 of the will with which we are concerned. This involves, I think, two steps.

The first step must be to consider the first part of the proviso, which directs the trustees to " hold " each of the three shares and pay the income to the named beneficiary for life. I have already pointed out that it is only the second part of the proviso, which provides for what I may call the " remainder ", that is incapable of taking effect. There is nothing intrinsically wrong with the

(1) (1902) A.C. 14.

(2) (1849) 1 Mac. & G. 551 [41 E.R. 1379].

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first part of the proviso, and it is, of course, on this first part that the respondent Zara Solomon relies. But the proper inference is, in my opinion, that the testatrix intended to limit the interest of each named beneficiary to a life interest for the purpose only of making the provision for children which follows. In other words, the proviso must, in my opinion, be regarded as one inseverable whole, so that, if one part goes, the other must go also.

The view which I have expressed has been adopted in several similar cases. It was adopted by Lord *Romilly* M.R. in *Churchill* v. *Churchill* (1) and by *a'Beckett* J. in *Trustees Executors & Agency Co. Ltd.* v. *Jenner* (2). In the latter case *a'Beckett* J. said:—" . . . the authorities that have been cited establish the proposition that where there is a gift in the first instance, and then there are clauses cutting down that gift to a life interest, which is lawful, with a gift over, which is unlawful, both the lawful curtailment and the unlawful curtailment go together; that, though there may be no objection to the one taking effect in reduction of the absolute interest if it stood alone, yet it will not take effect because that which is connected with it—the gift to the grandchildren—is incapable of taking effect" (3). The position was, I think, well put by Mr. *Hayes* in argument. He said: "The testator's only object in cutting down the interest of his daughters was to give it to and preserve it for their children on their death. As that object cannot be carried out the testator cannot be regarded as desiring to cut down his daughters' interests" (4). The decision in *Jenner's Case* (2) was followed by *Madden* C.J. in *In re the Estate of Patrick O'Brien dec'd.* (5) and again in *In re England* (6): see also *In re Antrobus*; *Henderson* v. *Shaw* (7) and *In re Loza (Dec'd.)*; *Fernandez* v. *Hesketh* (8), to which Mr. *Kerrigan* referred us. *Jenner's Case* (2) and *Re O'Brien* (5) were brought to the attention of *Myers* J., but his Honour said that, if they were indistinguishable from the present case, he would not follow them. Part of what *a'Beckett* J. said in *Jenner's Case* (2) may be thought to be open to the criticism to which his Honour subjected it, but I think, with respect, that the decision and the real reason for the decision were perfectly sound, and gave effect to the probable intention of the testator.

The second step must now be taken, and that is to consider the words "subject as hereinafter provided" in the first part of par. (iv). This step seems to present no difficulty. When once we

(1) (1867) L.R. 5 Eq. 44.
(2) (1897) 22 V.L.R. 584.
(3) (1897) 22 V.L.R., at pp. 590, 591.
(4) (1897) 22 V.L.R., at p. 588.
(5) (1898) 24 V.L.R. 360.
(6) (1906) V.L.R. 94.
(7) (1928) N.Z.L.R. 364.
(8) (1934) N.Z.L.R. 717.

arrive at the conclusion that *the whole* of the proviso in par. (iv) of cl. 5 must go, the problem seems to me to be solved. For the result is that no effect can be given to the words " subject as hereinafter provided ". We are thus left with an unqualified gift to the three named persons—an absolute gift to them.

It may, of course, be argued that the above reasoning puts the matter the wrong way round. It may be said that we ought rather to infer from the words " subject as hereinafter provided " that the limitation to a life interest was intended to stand whatever might be the fate of the gift to children. But it is, I think, precisely at this point that the rule in *Lassence* v. *Tierney* (1) assumes its main importance for present purposes. We are, in effect, faced with a choice between (1) saying that the words " subject as hereinafter provided " preserve the limitation to a life interest, and (2) saying that that limitation must go because the gift to children goes, with the result that the words " subject as hereinafter provided " are deprived of effect. And, in my opinion, the true meaning and reason of the rule, as explained in *Rucker* v. *Scholefield* (2) and illustrated by *Jenner's Case* (3) and the cases which I have cited in association with it, require that the latter alternative should be preferred.

I think that this result most probably gives effect to the intention of the testatrix. Reading cl. 5 as a whole, one is left with a strong impression that the testatrix intended primarily to benefit the three named beneficiaries. The actual form of the gift made by par. (iv) is the peculiar and typical *Hancock* v. *Watson* (4) form. The very form itself suggests that she intended (in the words of *Page Wood* V.-C.) " first to make a gift to and for the benefit of the person named " (5), her desire to settle the fund being secondary and subsidiary to this primary intention. This is rather emphasised by the use of the words " and if more than one as tenants in common in equal shares "—the words which are used in pars. (i) and (ii) of cl. 5, both of which give absolute interests. She is making a substantive gift " in the first place ", though she intends to qualify it if she can. Then there is a conspicuous contrast between par. (iv) of cl. 5 and pars. (vi), (vii), (ix) and (x). In each of these paragraphs she gives a specified number of the parts to a named beneficiary " for his lifetime " or " for her lifetime " *simpliciter*. What is to happen after the death of these beneficiaries, who take only for their respective lifetimes, is dealt with by a general provision which comes later in cl. 5. The contrast with par. (iv) serves again

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(2) (1862) 1 H. & M. 36 [71 E.R. 16].
(3) (1897) 22 V.L.R. 584.
(4) (1902) A.C. 14.
(5) (1862) 1 H. & M., at p. 41 [71 E.R., at p. 18].

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to emphasise the peculiar form of the gift made by par. (iv), and suggests that the case is well within the spirit and intendment of the rule in *Lassence* v. *Tierney* (1).

The correct construction of cl. 5 of the will is, in my opinion, that which gives to the three appellants an absolute interest in thirty-four of the two hundred parts into which the fund subject to appointment is divided. The appeal should be allowed, and the order of *Myers* J. varied accordingly.

Appeal allowed. Delete the declaration in the decretal order of the Supreme Court relating to the thirty-four two-hundredth parts of the residuary estate of the testator Albert Henry Nathan and in lieu thereof insert a declaration that in the events that have happened the trustee of his will now holds those parts in trust for the appellants as tenants in common in equal shares absolutely. Costs of all parties of the appeal as between solicitor and client to be paid out of the estate of the said testator.

Solicitors for the appellants, *Nicholl & Hicks.*

Solicitors for the respondent Perpetual Trustee Co. (Ltd.), *W. R. Fincham & Co.*

Solicitors for the respondent Zara Solomon, *Norton, Smith & Co.*

R. A. H.

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].