[HIGH COURT OF AUSTRALIA.]

DUNCAN . . . . . APPELLANT;

AND

CATHELS AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1956.

SYDNEY, *Aug.* 20, 21;

SYDNEY, *Oct.* 4.

Dixon C.J., McTiernan, Williams, Fullagar and Taylor JJ.

Settlement—Construction—Trust—Absolute gift to eight children equally—Limitations respecting three shares—Rule in Lassence v. *Tierney.*

By indenture of settlement a settlor, John Fenwick, who was married and had eight children, declared that he held his interest in a partnership business "UPON TRUST as to the three elevenths . . . for the benefit of" (his wife) "for her life and after her death as to the said three elevenths and immediately after the execution of these presents as to the remainder of the said interest UPON TRUST for such of" (his children) "as being males shall attain the age of twenty-one years or being a female shall attain that age or marry in equal shares subject to the provisions and powers hereinafter appearing." These powers and provisions related to the shares of only three children, Charlotte, Peter and Bisset. It was provided that Charlotte's share should be held upon trust with power to the trustees to convert and invest etc. for her for life, the annual income to be paid to her, and after her death in trust for her children as she should appoint, with other provision in default of appointment. It was then provided that "the said trust fund or the share thereof to which either of the said Peter Fenwick and Bisset Fenwick shall become entitled shall be held upon the same trusts for conversion and investment as are hereinbefore declared with reference to the said Charlotte Fenwick AND UPON FURTHER TRUST" to pay each of them the annual income until he should die or become bankrupt or cause the fund or income to be liable to be taken in execution or encumbered, with provision for any such happening; "PROVIDED ALWAYS that if and so long as there is no person entitled to receive the said income of the shares of the said Peter Fenwick and Bisset Fenwick respectively under the trusts hereinbefore declared the same shall be paid to the then survivors of" (the settlor's children) "in

H. C. OF A. 1956. DUNCAN v. CATHELS.

equal shares." Bisset died unmarried, none other of the mentioned happenings having occurred. At his death there was still a child of the settlor then living.

Held: (1) that there was an absolute gift of his share to Bisset in the first instance and that the case was one for the application of the rule in *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551 [41 E.R. 1379].

(2) that the proviso was capable of operating only during the period within which the preceding gifts of income might operate and in the events which happened it did not become operative.

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

APPEAL from the Supreme Court of New South Wales.

The facts appear in the judgments hereunder.

A. R. Moffitt Q.C. (with him *I. Curlewis*), for the appellant. This case is similar to *Russell* v. *Perpetual Trustee Co. (Ltd.)* (1). The settlor deals with three of his children, namely Peter, Charlotte and Bisset, by engrafted trusts, all his other children getting absolute shares in the first instance. This case comes within the *Lassence* v. *Tierney* (2) rule because, firstly, the words used, "upon trust" constitute an absolute gift, followed by the words "subject to" introducing the provisos. The same clause is the only one which is the operative clause to introduce the gifts to the other five children who have not engrafted trusts in respect of such shares. They take, in form, an absolute interest by virtue of this gift. Reference was made in *Russell* v. *Perpetual Trustee Co. (Ltd.)* (1) to *Lassence* v. *Tierney* (2); *Hancock* v. *Watson* (3); *In re Burton's Settlement Trusts*; *Public Trustee* v. *Montefiore* (4); *In re Panter*; *Equity Trustees Co.* v. *Marshall* (5) and *Trustees Executors & Agency Co. Ltd.* v. *Jenner* (6). On the authorities cited the trial judge was in error and an absolute gift should be found. His Honour fell into error in construing the initial words. They are, in fact, classic words in form which, in themselves, constitute an absolute gift. It is a gift because the words "on trust" are used, and the words "subject to" are only an indication leading into the engrafted trusts. Even if those words had been omitted from this case the intention of the settlor would have been exactly the same. Further, there are many indications in the settlement that the settlor must have thought in terms of making an absolute gift, e.g. the method of description of the settlor himself when he refers to the shares the reference to them as being the shares of the particular beneficiary,

(1) (1956) 95 C.L.R. 389.
(2) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(3) (1902) A.C. 14.
(4) (1955) Ch. 348, at p. 353.
(5) (1948) V.L.R. 177.
(6) (1897) 22 V.L.R. 584.

the reference not merely to the share of Charlotte, or the share of Bisset, but " the share to which " Charlotte or Bisset, " shall become entitled " and " the share to which Charlotte, or Bisset, is entitled ". Each of the other five beneficiaries take their absolute gift by the same words relied upon by the appellant. [He referred to *Attorney-General* v. *Lloyd's Bank Ltd.* (1) and *McRae* v. *Frazer* (2).] The reasons in *Russell* v. *Perpetual Trustee Co. (Ltd.)* (3) are adopted; see also *Williamson* v. *Carter* (4).

A. B. Kerrigan Q.C. (with him *R. J. Bainton*), for the respondent Dunkley. To give to the proviso the limited construction given below denies it its proper place in the settlor's scheme. In dealing with Charlotte's share the settlor's obvious intention was to exclude as far as he could the possibility of a resulting trust to his estate. As part of his scheme he was concerned to exclude as far as possible a resulting trust; that is consistent with what he had said about exercising all his powers under the partnership deed for his children's benefit and not for his own. He gave his son Bisset no general power of appointment if the son had no children, no general disposing power at all, and no gift over in the event of that power not being exercised. The proviso was intended to fulfil the functions that had been fulfilled by the general power and the gift over in Charlotte's case. The proviso not only fills in such gaps in the disposing of the income pending the vesting of the capital or during Bisset's lifetime, but also operates after his lifetime if he did not leave any children; an event which happened. If the rule in *Lassence* v. *Tierney* (5) does apply a curious result follows in this case, because it is quite apparent that the settlor here denied to Bisset a general disposing power but gave him a special power. The application of that rule gives to Bisset the very thing which the settlor denied him in terms.

W. J. V. Windeyer Q.C. (with him *A. J. Leslie*), for the respondent Fenwick. This is not a *Lassence* v. *Tierney* (5) case in any sense. As to the further trust to pay the annual income in the manner indicated, there is nothing dealt with except annual income grammatically and at no stage is there a power of appointment over the corpus or any control of the corpus at all. There is not any reference to capital. The word " then " can only be taken as " catching the corpus " by doing violence to grammar. The provision " then "

(1) (1935) A.C. 382, at p. 395.
(2) (1932) 32 S.R. (N.S.W.) 191, at p. 205; 49 W.N. 37.
(3) (1956) 95 C.L.R. 389.
(4) (1935) 54 C.L.R. 23.
(5) (1849) 1 Mac. & G. 551 [41 E.R. 1379].

H. C. OF A. 1956.

DUNCAN v. CATHELS.

for the benefit of the wife until she remarries or dies is in regard to income. As with the provision concerning Bisset, it is dealing with income of the settled fund. It is throughout a protected life interest in income, in the case of Bisset with a provision for the destination of income after his death. It does not carry the corpus because, read as a whole, it deals with the destination of income only. The proviso is intended to deal with the situation when owing to bankruptcy and attempted alienation, etc., there is no person entitled under the trusts thereinbefore declared. Upon the happening of any one of those events the income is to go upon the same trusts as in the case of Charlotte provided " if and so long ". That applies if Bisset goes bankrupt when a bachelor. The words " if and so long as there is no person entitled to receive the said income under the trust hereinbefore declared " means if Bisset has no wife or issue and his life estate terminates by bankruptcy or otherwise, then this form catches the income. The survivors are not entitled to receive beyond the lifetime of Bisset or their own lives. The judge of first instance correctly held that there was a resulting trust of the corpus of Bisset's share to the settlor's estate. Alternatively, the corpus of Bisset's share goes to the settlor's other children equally by the settlement. In applying the rule in *Lassence* v. *Tierney* (1), care must be taken: see *Hancock* v. *Watson* (2); *Key and Elphinstone's Precedents*, 15th ed. (1953), vol. 2, p. 952 and article in *Australian Law Journal* (1943), vol. 16, p. 332. That rule is a rule of construction which is designed to give effect to the presumed intention of the settlor. To determine whether it is applicable it is necessary to construe the instrument as a whole: *Scawin* v. *Watson* (3); *In re Burton's Settlement Trusts*; *Public Trustee* v. *Montefiore* (4); *Fisher* v. *Wentworth* (5). Whatever the literal form of any passage in the instrument, the rule cannot operate if its operation would be inconsistent with the intention of the settlor as expressed in the instrument read as a whole. The presence or absence of any particular phrase or form of words can never be decisive; literal expressions used in other cases are not of dependable assistance: see *Whittell* v. *Dudin* (6).

[DIXON C.J. referred to *Cooke* v. *Cooke* (7).]

One should ascertain whether or not the application of the rule affects the intention as disclosed by the instrument (*Arnold* v.

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(2) (1902) A.C. 14.
(3) (1847) 10 Beav. 200 [50 E.R. 559].
(4) (1955) Ch., at p. 354.
(5) (1925) 36 C.L.R. 310, at p. 317.
(6) (1820) 2 Jac. and W. 279 [37 E.R. 634].
(7) (1887) 38 Ch. D. 202.

Congreve (1); *Hulme* v. *Hulme* (2); *Campbell* v. *Brownrigg* (3)). There is an incorrect tendency to see whether or not the gift is absolute in its literal terms. That is a fallacious approach. If the engrafted trusts qualify the object it is not, in a literal sense, an absolute gift, and certainly not where the sentence containing the absolute gift grammatically includes as part of it, the qualifying words: see *Lassence* v. *Tierney* (4). It must be found that it is severed from the estate so that upon the failure of the engrafted trusts there is a kind of resulting trust or reversion to the severed share (*Hancock* v. *Watson* (5); *Williamson* v. *Carter* (6)). The application of the rule is always more difficult in the case of complete limitation in which the interest said to be absolutely given is defeasible (*In re Hatch*; *Public Trustee* v. *Hatch* (7); *Attorney-General* v. *Lloyd's Bank Ltd.* (8)). The matter cannot and should not be determined by a comparison of particular phrases used in different cases because it does not really turn simply upon literalness. It is capable of being read "in equal shares subject to"; it means the equality of the share is equal in quantum for the purpose of understanding what is said in regard to each share; equal in share, but not necessarily equal in the interest of the donees. The settlor has refrained from giving to Bisset the absolute interest which he gives to some of the others directly and which he gives to Mrs. Dunkley if she has no issue.

J. A. Melville, for the respondent R. C. Cathels.

A. R. Moffitt Q.C., in reply. [He referred to *Congregational Union of New South Wales* v. *Thistlethwayte* (9).] Whereas it is a general rule of construction that an indefinite gift of income can carry the corpus, it is still a question of intention in each case. Where it is found that the testator or the settlor has known and referred earlier to corpus then it is difficult in those circumstances to imply that the testator or the settlor when he said income meant corpus: *Coward* v. *Larkman* (10). The proviso has not operated and does not operate at the present time.

Cur. adv. vult.

(1) (1830) 1 Russ. & M. 209, at p. 215 [39 E.R. 80, at p. 83].
(2) (1839) 9 Sim. 644, at pp. 649, 650 [59 E.R. 507, at p. 509].
(3) (1843) 1 Ph. 301, at p. 303 [41 E.R. 646, at p. 647].
(4) (1849) 1 Mac. & G., at pp. 561-563, 569 [41 E.R., at pp. 1383, 1384, 1386].
(5) (1902) A.C., at pp. 22, 23.
(6) (1935) 54 C.L.R., at p. 31.
(7) (1948) Ch. 592, at p. 597.
(8) (1935) A.C. 382.
(9) (1952) 87 C.L.R. 375, at pp. 438, 439.
(10) (1888) 60 L.T. 1, at pp. 2, 3.

H. C. OF A. 1956.

DUNCAN v. CATHELS.

Oct. 5.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN, WILLIAMS AND TAYLOR JJ. This is an appeal by one of the executors of Bisset Fenwick deceased from part of a decretal order of the Supreme Court of New South Wales in Equity made by *Myers* J. in an originating summons instituted to construe the trusts of an indenture of settlement executed by John Fenwick on 22nd June 1900. The part of the decretal order appealed from is a declaration that upon the true construction of that indenture and in the events that have happened the share or interest of Bisset Fenwick is not now vested in the executors of his will. The appellant claims that there should have been a declaration that the share of Bisset is now vested in the executors of his will or alternatively that subject to the defendant Charlotte Dunkley receiving the income of such share during her life the estate of Bisset is entitled to the corpus of the share. The court also declared that the estate of the settlor is now entitled to such share and from this declaration there is a cross-appeal by Charlotte Dunkley claiming that his Honour should have declared that she is solely entitled to the corpus of the share.

The indenture of settlement in question was executed by the settlor John Fenwick on 22nd June 1900. At that time he was married, his wife being Pauline Fenwick, and he had eight children—Andrew, James, Peter, Adolph, the cross-appellant Charlotte (now Mrs. Dunkley), Thomas, all of whom were adults, and Robert and Bisset, who were minors. The settlor executed a will on the same day which contained trusts identical with those of the indenture. He died on 29th January 1901. His widow died on 8th June 1924. Bisset died unmarried on 30th November 1954. The shares given to the children other than the shares of Charlotte and Bisset have been paid or transferred to them and only the shares of Charlotte and Bisset are now in the hands of the trustees of the indenture.

By the indenture the settlor declared that he held the assets there mentioned comprising his interest in the business of tug proprietor carried on in partnership with his two sons Andrew and James at Sydney and Newcastle, for the benefit of the persons therein mentioned and not for his own benefit. Subject to his obligation to carry out his duties as a partner he declared that he held the trust property upon trust as to three-elevenths of his interest in the business for the benefit of his wife Pauline for her life and after her death as to these three-elevenths and immediately after the execution of the indenture as to the remainder of the interest upon trust for such of his eight children as being males should attain the age of twenty-one years or being females should attain that age

or marry in equal shares subject to the provisions and powers thereinafter appearing. The powers and provisions thereinafter appearing relate only to the shares of Charlotte, Peter and Bisset. The trusts of the shares of Peter and Bisset are declared partly by reference to the trusts of the share of Charlotte. The settlor directed that the share of Charlotte should be held upon trust with her consent in writing for her life and after her decease in the discretion of the trustees to convert the same into money with power to postpone conversion and to invest the proceeds of sale as therein mentioned and upon further trust to pay the annual income of her share or of the moneys arising therefrom or of the securities whereon the same should be invested described as the settled fund to Charlotte during her life for her sole and separate use with restraint upon anticipation and immediately after her decease as to as well the capital of the settled fund as the annual income thenceforth to accrue due from the same in trust for all or any one or more of the children or remoter issue of Charlotte such remoter issue being born in her lifetime and generally in such manner as she should by deed with or without power of revocation or by her will appoint and in default of such appointment and subject to any partial appointment in trust for her children who either before or after her decease being sons should attain twenty-one or being a daughter should attain that age or marry such children if more than one to take in equal shares. (It was then provided that if there should not be any such child of Charlotte she should have a general appointment by will and that subject to any partial appointment her share should be held in trust for her next of kin. But this provision is not incorporated by reference in the trusts of the shares of Peter and Bisset.) The settlor directed that the shares of Peter and Bisset should be held upon the same trusts for conversion and investment as were thereinbefore declared with reference to Charlotte and upon further trust to pay the annual income of the settled funds to Peter and Bisset respectively until they respectively should die or become bankrupt or do attempt or suffer some act or thing whereby the settled fund or the income thereof should be or be liable to be wholly or partly transferred conveyed assigned charged in execution or otherwise encumbered and immediately after the death of Peter and Bisset respectively or after the bankruptcy or doing or attempting or suffering of any such act or thing then upon the same trusts for the benefit of the wife until she remarried or died and then of the children or remoter issue of Peter and Bisset respectively as were thereinbefore provided in the case of the children or remoter issue of Charlotte. Then without any break except so far as one is made

H. C. OF A. 1956.

DUNCAN v. CATHELS.

Dixon C.J. McTiernan J. Williams J. Taylor J.

by the use of capital letters it was provided always that if and so long as there was no person entitled to receive the income of the shares of Peter and Bisset respectively under the trusts hereinbefore declared the same should be paid to the then survivors of the eight children of the settlor in equal shares.

The appellant contends that the effect of the direction in the indenture that the trustees are to hold the trust property, subject as to part thereof to the life estate of Pauline, upon trust for such of the eight children of the settlor as being males shall attain the age of twenty-one years or being a female shall attain that age or marry in equal shares is to give to each of these children who attaining that age or being a female marries an absolute share in the settled property. In the case of Charlotte, Peter and Bisset, their shares are given to them subject to the provisions and powers thereinafter appearing. But it is contended that the effect of these provisions and powers is simply to engraft on to their initial absolute gifts a series of limitations which do not cut down its absolute nature except to the extent necessary to give effect to such of the limitations as became operative. In other words the appellant relies upon the principle of construction known as the rule in *Lassence* v. *Tierney* (1), the now classic statement of which is contained in the speech of Lord *Davey* in *Hancock* v. *Watson* (2). It is unnecessary to set out the passage again because this was done and the principle fully discussed in the very recent decision of this Court in *Russell* v. *Perpetual Trustee Co. (Ltd.)* (3). His Honour was of opinion in this case, as he was in that case, that where shares are given in terms which by themselves would create an absolute disposition but are at the same time made subject to a series of limitations there is no absolute gift in the first instance and the principle is inapplicable. That view was fully examined in *Russell's Case* (3). and its fallacy exposed. The present case is really a stronger case in favour of the application of the principle than *Russell's Case* (3) because in that case the residue was in the first instance divided into 200 parts and there were then ten separate sets of trusts relating to various quotas into which the 200 parts were divided for this purpose. Each set of trusts was therefore severable from the others. But in the present case the initial trust gives an equal share of the trust property to each of the eight children and it is clear that five of these shares are given absolutely. The shares of Charlotte, Peter and Bisset are therefore given absolutely in the first instance. They are each shares directed to be separated from the rest of the trust property

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(2) (1902) A.C. 14, at p. 22.
(3) (1956) 95 C.L.R. 389.

and it is these separated and segregated parts of the original whole that are subjected to the subsequent limitations. To that extent but no further the absolute gifts to these three children differ from the absolute gifts given to the other children. Bisset did not marry or go bankrupt or alienate or encumber his share or attempt to do so and the only operative trust, reserving for the moment the possible effect of the proviso, was the trust to pay the income to him during his lifetime. All the other trusts failed. His Honour held that there never was an absolute gift to Bisset in the first instance and that upon his death there was a resulting trust to the estate of the settlor but in this respect his Honour fell into error. He should have held the gift to Bisset was an absolute gift in the first instance and have applied the rule in *Lassence* v. *Tierney* (1).

It remains to refer to the proviso. It was contended for the cross-appellant that, subject to Bisset's life estate, there is no person entitled to receive the income of his share under the trusts hereinbefore declared and that since he died unmarried there never can be any one who could become entitled to receive this income. Accordingly Charlotte, who was the only child of the settlor to survive Bisset, is entitled to this income indefinitely and an indefinite gift of income is a gift of the corpus from which it is derived. But the gift of income under the proviso is not an independent but a substituted gift. It assumes that under the dispositions of income made by the anterior provisions a beneficiary might take but contemplates the possibility of events occurring in which there would be no such beneficiary or none qualified so to take. On the face of the proviso it seems clearly enough to be confined to the period during which the preceding gifts of income might operate and to have nothing to do with the disposition of corpus. As his Honour said : " it was only while those trusts relating to income or any of them could be operative that the settlor was intending to deal with income which, for the time being, no person might be entitled to receive ". It was a gift of the income only capable of operating, in the events that happened, until the death of Bisset. It could have operated if Bisset had gone bankrupt. He might then have been unmarried. Until he died it would not be known whether he would marry or if he did whether he would have children. If he had not married, then during the period between his bankruptcy and death, there would have been no person entitled to receive the income of his share, and the person or persons entitled under the proviso would have taken the income in substitution for Bisset.

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

H. C. OF A. 1956. DUNCAN v. CATHELS.

But Bisset did nothing to deprive himself of his right to receive the income of his share during his life and the trusts of the proviso never became operative. The cross-appeal therefore fails. The appeal should be allowed and the cross-appeal dismissed.

FULLAGAR J. I agree that this appeal should be allowed. The case seems to me to be a much clearer case than the recent case of *Russell* v. *Perpetual Trustee Co. (Ltd.)* (1).

The initial gift contained in the settlement is " to such of my eight children as being males shall attain the age of twenty-one years or being females shall attain that age or marry in equal shares subject to the provisions and powers hereinafter appearing ". So far as five of the eight children are concerned, no " provisions " or " powers " follow, and it is plain that the gifts to those five children are absolute gifts. But with respect to the shares of the other three children—Charlotte, Peter, and Bisset—" provisions and powers " do follow. Those relating to Charlotte's share are exhaustive in the sense that they cover every possible contingency, and there is, of course, no reason why effect should not be given to them. Those relating to the shares of Peter and Bisset, however, are not exhaustive in that sense, for there are several possible contingencies which they do not cover. In particular, they do not cover the contingency of Peter or Bisset dying unmarried and without having had any children. And in the case of Bisset—and it is with Bisset's share that we are concerned—that is the event which has in fact happened.

In *Russell's Case* (1), it seemed to me, as it seemed to *Myers* J., that it was quite impossible to say that there was, in any intelligible sense, an " absolute gift in the first instance ". If a testator says, as in *Hancock* v. *Watson* (2), " to Susan Drake I give two fifths of my residuary estate ", then, whatever may follow, it is clear that there *is* an absolute gift " in the first instance ". That case is covered by the well-known statement of the so-called rule in *Lassence* v. *Tierney* (3), which is found in *Hancock* v. *Watson* (4). But if a testator says " to Susan Drake, subject to the qualifications which follow, I give two fifths of my residuary estate ", it seems to me equally clear that there is *not* an absolute gift " in the first instance ". Such a case is not really covered by the language of Lord *Davey* in *Hancock* v. *Watson* (2). It may, nevertheless, be governed by the rule in *Lassence* v. *Tierney* (3), properly understood.

(1) (1956) 95 C.L.R. 389.
(2) (1902) A.C. 14.
(3) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(4) (1902) A.C., at p. 22.

For that rule really means, I think, that the gift "in the first instance" must prima facie be read as a gift subject *only* to such qualifications as do in fact follow and are in law capable of taking effect. If no qualification, or no qualification capable of taking effect, follows, then the initial gift takes effect without qualification—in other words as an absolute gift.

The difficulty, which (by no means for the first time) arose in *Russell's Case* (1), lay in the fact that the qualification, to which the initial gift was by its express terms made subject, was capable of taking effect in part but in part only. What the qualification did was (1) to make the gift to the donee "in the first instance" a gift of the income for life only, and (2) to give the corpus, after the death of that donee, to certain issue. The first part of the qualification was, of course, quite capable of taking effect, but the second part (for reasons which do not matter) was not. Actually this was the position which arose in *Hancock* v. *Watson* (2) itself, but the initial gift in *Hancock* v. *Watson* (2) was in terms unqualified, whereas the initial gift in *Russell's Case* (1) was by its express terms made "subject as hereinafter provided". The choice therefore, lay between (1) holding that the position was governed by the words of qualification in the "initial" gift, with the result that effect should be given to the qualification in so far as it was possible to give effect to it, and (2) holding that there was one inseverable qualification to which no effect could be given, with the result that the "initial" gift was not in fact "subject" to anything, but must take effect as an unqualified or "absolute" gift. It seemed to me—and there was authority to support this view—that the rule in *Lassence* v. *Tierney* (3), properly understood, required that the second alternative should be preferred, although the "initial" gift was not in terms absolute, and although there was a qualification to which it was possible to give effect.

The present case does not raise the same difficulty. Here there is a gift to each of eight children, which is expressed to be "subject to the provisions and powers hereinafter appearing". In what follows, as to five of the children, there are *no* "provisions" or "powers". The gifts to these five, therefore, take effect as unqualified gifts. In the case of one child there are exhaustive provisions, which define the interest of that child as a life interest only, and full effect must be given to that definition. In the case of the remaining two, there are also "provisions" to which full effect must be given. But those provisions are not exhaustive, and one

(1) (1956) 95 C.L.R. 389.
(2) (1902) A.C. 14.
(3) (1849) 1 Mac. & G. 551 [41 E.R. 1379].

H. C. OF A. 1956.

DUNCAN v. CATHELS.

Fullagar J.

of the events for which they do not provide has occurred. The initial gift must be read as subject *only* to such " provisions and powers " as are expressed. On the occurrence, therefore, of an event which is not provided for, that initial gift takes effect as an unqualified gift.

The appeal should, in my opinion, be allowed.

Appeal allowed. Cross-appeal dismissed. Delete declarations in decretal order. In lieu thereof insert a declaration that upon the true construction of the trusts declared in the indenture of settlement made by John Fenwick deceased on 22nd June 1900 and in the events which have happened the share or interest of Bisset Fenwick deceased is now vested in the executors of his will. Costs of all parties of the appeal and cross-appeal as between solicitor and client to be paid out of the said share or interest.

Solicitors for the appellant, *H. V. Harris, Wheeler & Williams*, Newcastle, by *Kevin Ellis & Price.*

Solicitors for the respondents, Robert Campbell Cathels and Charlotte Dunkley, *R. C. Cathels & Co.*

Solicitors for the respondent John Fenwick, *Sly & Russell.*

J. B.