

JUDGMENT.KNOX C.J.

This is an appeal from an order of the Chief Judge in Equity where by it was declared that upon the true construction of the will and codicil of Edmund Mason and in the events which have happened the directions in the said will for the building of tenements for certain poor persons constituted a good charitable gift, and certain consequential declarations were made and directions given.

The will contained bequests of annuities and legacies to the wife and children of the testator and other persons and proceeded as follows viz:- " In time as the annuitants become deceased and the funds of the estate accumulate then my executors are to commence paying all my chil-

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"dren's children including those of my late son Edmund the amount the estate will afford up to £26 per annum each but never to exceed said sum - When some of my grandchildren pass away and funds accumulate and are sufficient then my executors are to commence building in or near Parramatta suitable small tenements for free occupation of poor persons such persons to be of good character and who have been local residents and who from sickness and infirmity or old age are in bad circumstances and in somecases of necessity other small aid may be afforded AND as funds ~~Edward James, Bertha Dillport, Clara L. Allport~~ further accumulate more of these houses are to be built I direct that all persons who are interested may be furnished with a quarterly statement of income expenditure and when Alms Houses are built an annual statement shall be published in the local newspapers Should any of my children depart this life leaving husband or wife such husband or wife is to receive annually one-third the amount my still living children are receiving."

It is upon this portion of the will that the question for decision

turns. It will be observed that the only gift in favour of charity is contained in the direction to commence building suitable tenements and to build more of such tenements as funds accumulate. The point of time fixed by the will for the executors to commence building is "when some of my grandchildren pass away and funds accumulate and are sufficient". I am inclined to think that this direction is too vague and uncertain to constitute a valid trust. But however this may be I think it is clear that the point of time fixed for the commencement of building will not necessarily be reached within the limits prescribed by the rule against perpetuities. No distinction is made in the will between grandchildren born in the lifetime of the testator and those born after his death, and it is therefore possible if the death of

some grandchildren is a condition precedent to the ~~operation of the~~ trust for the commencement of building that that trust would not take effect until the death of a person unborn at the date of testator's ~~an~~ death. But it was sought to support the gift to charity on the ground that it vested at the death of the testator and consequently the rule against perpetuities had no application. In my opinion this interpretation is not consistent with the words used in the will. As I have pointed out the only gift to charity is that contained in the direction to commence building, and this direction is to become operative only when some of testator's grandchildren pass away and funds accumulate and are sufficient. Construing the words used according to ~~to~~ their natural meaning I think the death of some of the grandchildren

and the accumulation of sufficient funds are conditions precedent to the operation of the direction to commence building.

For these reasons I am of opinion that the appeal should be allowed and a declaration made that the testator died intestate as to his residuary real and personal estate.

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JUDGMENT.

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MR JUSTICE ISAACS.

JUDGMENT.

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ISAACS J.

The clearest intention of a testator must be disregarded if it is violation of a rule of law. Here there is no doubt the testator intended to create a trust for charity, but the words by which the trust is constituted leave me clear after the fullest consideration that to carry out the expressed intention would violate the rule against perpetuities. The testator first provided for his family - his wife, his twelve children and his grandchildren. The wife's benefits were definite. The children were given annuities not to exceed £100 a year. The grandchildren were given annuities not exceeding £25 a year, and in terms not repugnant to the rule against perpetuities. That completed the family bounty, and the testator undoubtedly intended to devote the balance of his estate if any to charity. But being in doubt as to whether there would be a balance available for charity, the provision he made was carefully framed so as not to disturb the family benefits primarily given. He said:- "When some of my grandchildren^{or} pass away and funds accumulate and are sufficient then my executors are to commence building in ^{or} near Parra-matta suitable tenements for free occupation of poor persons" &c. and he added:- "And as funds further accumulate more of these houses are to be built". If the gift were so ambiguously framed that I

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could apply the principle ut res magis valeat quam pereat I should do so. But I regret that I cannot find such ambiguity.

I entertain no doubt that the testator was anxious that his family ^{be} should/secure to the extent limited by the will, and only when that was seen to be sufficiently certain after some of the grandchildren died, ~~would~~ there arise any obligation -in other words any trust or gift- whatever in favour of the charity he conditionally sought to benefit. That inevitably throws the time of vesting of interest into the fatal uncertainty struck by the rule against perpetuities. Though the grandchildren must have come into existence within the necessary period, ^{would} none of them / necessarily die within that period.

The result is that the gift to charity is void and the appeal succeeds.

There was pro tanto intestacy.

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JUDGMENT.

RICH J.

SAGER v. GOWARD.

JUDGMENT.

RICH J.

This appeal is concerned only with the provisions of the will in favour of the charity. The appellant attacks the validity of the gift mainly on the ground that it infringes the rule against perpetuities. The time of vesting in interest of the gift determines its validity and the question then is what is the meaning of the words used by the testator. And (obscurity and ambiguity apart as to which other considerations apply) one must construe the words without intruding the rule as if the intended gift were valid and effectual. The testator expressed clearly enough his intention that the funds of his estate available for his relatives should not be diminished by the provisions in his will in favour of the charity. And he emphasises his intention by prefacing the gift for charitable purposes by these conditions viz (1) "When some of my grandchildren pass away and (2) funds accumulate and (3) are sufficient there is no present gift to the charity: the gift if there be any is to be found only in the direction to the executors to commence building etc.

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which follows and comes into operation upon the events to which I have referred. These are too indefinite and too remote and the gift as it transgresses the perpetuity rule fails. In the result the testator died intestate as to his residuary real and personal estate.

I agree that the appeal should be allowed.