Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of D'Arcy Bland Wentworth and Others v. *Fitzwilliam Wentworth and Others, from the Supreme Court of New South Wales; delivered 9th December* 1899.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD DAVEY.
LORD ROBERTSON.

[*Delivered by Lord Macnaghten.*]

William Charles Wentworth of Vaucluse near Sydney in New South Wales whose will has given rise to the questions which have been argued on this Appeal was a gentleman of considerable property. He died on the 20th of March 1872. His will was dated the 19th of October 1870. At the date of his will and at the time of his death his wife was alive and he had seven children living two sons and five daughters. Three of his daughters were unmarried.

His will stated shortly was to this effect:— After certain devises and bequests he gave the residue of his property real and personal to trustees of whom his wife and his eldest son Fitzwilliam Wentworth were two upon trust for conversion. He empowered his trustees to postpone the conversion of any part of his real or personal estates for such period not exceeding twenty-one years from his death as to them

should seem expedient and he directed that until such conversion and until the proceeds should be invested as therein directed the income arising from his estate from time to time remaining unsold and unconverted should during such period of twenty-one years be applied in paying his debts and the rent charges yearly sums and other payments thereinbefore directed to be paid out of his residuary estates or out of the annual proceeds thereof or so much thereof as the proceeds of any converted residuary estates or the income thereof should be insufficient to pay and that subject thereto the surplus if any of the annual proceeds of his unsold and unconverted estates during the said period of twenty-one years and all accumulations thereof should go in augmentation of the principal or capital of his residuary estates and be applied and disposed of as part thereof. The will contained directions for raising three sums of 25,000*l.* each for the benefit of his three unmarried daughters. The ultimate residue of his estate was to be divided between such of his seven children as should be living at his death in equal shares. The shares of the daughters were settled upon trusts which were in effect for the daughter for life with remainder for her husband for life with remainder for her children who being males should attain twenty-one or being females should attain that age or marry. The share of the testator's second son D'Arcy Bland Wentworth was settled upon trusts under which he is entitled to a protected life interest with remainder over for the benefit of his children. There was an ultimate gift upon failure of the trusts of any of the settled shares for the testator's children living at the time of such failure with a direction that any share accruing to D'Arcy Wentworth should belong to him absolutely and any share accruing to a daughter should be held upon the same trusts

as her original share. The testator declared that his trustees should have a discretionary power generally as to the sale calling in and conversion of any real and personal estate whatsoever forming part of his residuary estate and the times and manner of selling and converting the same for the purposes of his will. Among the powers conferred upon the trustees was a power authorising them to grant a lease or leases (with or without the surface) of the coals or other materials lying under any of his estates comprised in the residuary devise with all proper and necessary powers licences wayleaves easements privileges and authorities for getting and working the same for any term not exceeding 60 years.

The period of 21 years from the testator's death expired on the 20th of March 1893. The conversion of the testator's estate was not completed by that date.

Part of the testator's residuary real estate consisted of land in the county of Northumberland New South Wales which was known to contain valuable seams of coal though the coal was not worked or let or agreed to be let in the testator's lifetime. The trustees of the testator's will have retained this property unsold up to the present time. But in 1876 the then trustees granted a lease of the coal which they were authorised to let or the greater part of it with certain surface rights for the term of 40 years from the 1st of January 1876. Under this lease the coal has been extensively worked and the trustees have received large sums in respect of rents and royalties. For some years past their receipts have exceeded 7,000*l.* a year.

The present suit was instituted in November 1895 by the Respondent FitzWilliam Wentworth then the sole surviving trustee of the testator's will mainly for the purpose of determining

certain questions which had arisen as to the respective rights of the persons interested as tenants for life and remainder men in the shares of the testator's residuary estate settled by his will. The present Appeal has been brought by D'Arcy Bland Wentworth and his incumbrancers in the interest of the tenants for life. They challenge the judgment of the Chief Judge in Equity on two grounds. In the first place they say that the Chief Judge was wrong in holding as he did by his decree of the 11th of June 1897 that during the period of 21 years from the testator's death the trustees were bound to accumulate the income arising from the investment of the rents and royalties received under the mining lease of 1876. In the second place they contend that as from the expiration of the period of 21 years the tenants for life became and are entitled to a full share of the rents and royalties accruing under the mining lease or at any rate to something more than what the Chief Judge has held them entitled to. His opinion was that so long as the property remained unconverted the rents and royalties attributable to the settled shares ought to be invested and that the tenants for life were only entitled to the income arising from such investment.

As regards the first point their Lordships agree with the Chief Judge in Equity. They are of opinion that according to the true construction of the will the trustees were bound to accumulate the rents and royalties received under the mining lease by investing such rents and royalties and the income resulting from such investment during the period of 21 years from the date of the testator's death.

On the second question their Lordships take a different view from that which was taken by the Chief Judge in Equity. The period of accumulation was left to the discretion of the trustees

subject to the proviso that it was not to exceed the limit of 21 years from the testator's death. The trustees in the exercise of their discretion postponed the conversion of the testator's residuary estate for the full period of 21 years. But on the expiration of that period the whole of the estate according to the direction of the will ought to have been converted and invested and ready for division. It may be that owing to circumstances it would not have been practicable to have converted the whole estate within the prescribed period except at an undue sacrifice. In that case if the administration of the estate had been in the hands of the Court, the Court no doubt would have taken care that the property was not unduly sacrificed. But at the same time it would have been the duty of the Court as far as practicable to place the tenants for life in the same position in which they would have been if the direction of the will had been complied with. It does not seem fair or reasonable that the tenants for life should suffer because the circumstances of the case were such as to justify the trustees in departing from the strict letter of their instructions or because without any such justification the trustees have neglected the duty imposed upon them by the will.

In this country in the case of income-producing property directed by will to be converted but retained for a time unconverted for the benefit of the estate it has been the practice of the Court to put a value on the property and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value. That was the rule laid down by Parker V.C. in *Meyer* v. *Simenson*, 5 De G. and S. 723, and followed by Lord Cairns in *Brown* v. *Gellatley*, 2 Ch. 751.

Their Lordships think that the principle of those cases ought to be applied to the present

case. But they do not think that it would be expedient to hamper the Court by laying down any fixed rule as to the rate of interest to be allowed to the tenants for life on the estimated value of the capital of the property.

Their Lordships therefore think that the decree of the 11th of June 1897 ought to be varied by omitting the declaration that the trustees are under no obligation to immediately sell the lands still unsold belonging to the testator's estate and the declaration that such rents and royalties as have accrued from the said lands since the 20th day of March 1893 form part of the capital of the residuary estate and ought to be distributed or invested accordingly and by inserting in lieu of the last-mentioned declaration a declaration that until the testator's residuary real estate is sold and converted in accordance with the directions of the will the tenants for life of the settled shares are entitled as from the 20th of March 1893 to receive out of the rents and royalties accrued and accruing from the said lands such an annual sum as in the opinion of the Court would under all the circumstaces of the case be a fair equivalent for the annual income that would have been received by them if such residuary estate had been sold on the said 20th of March 1893 and the proceeds of such sale had been invested in accordance with the directions of the testator's will and that there ought to be a reference to the Master in Equity to ascertain the amount payable in accordance with such direction and that subject thereto the residue of such rents and royalties form part of the capital of the residuary estate and ought to be distributed and invested accordingly. It will of course be competent for the Court if it thinks it necessary to require security by insurance or otherwise in order to safeguard the interests of the persons entitled in remainder.

Their Lordships will therefore humbly advise Her Majesty that the decree ought to be varied accordingly. The costs of all parties as between solicitor and client will be paid out of the estate.