

Will—Construction—Gift in trust for such son (living at his death) of testator's son as first or alone attains twenty-one — Contingent or vested interest — Intermediate rents and profits.

In re Astor, Astor v. Astor 1922, 1 K.B. 364, (Court of Appeal). This was an appeal from the judgment of Russell J. By his will the late Viscount Astor devised certain lands "upon trust in fee simple or absolutely for such son (living upon my death) of my son W. A. as first or alone attains the age of twenty-one years, or, failing any such son, then upon trust as part of my residuary estate." He gave his residue in trust for both or either of his sons W. A. and J. J. A. who should survive him, and if both, in equal shares. When the testator died he left surviving four sons of W. A. the eldest of them being then thirteen years of age. One of the questions which Russell, J. was asked to answer, on an originating summons, was whether the plaintiffs W. A. and J. J. A. had until one of the four grandsons of the testator should have attained the age of twenty-one years the powers of a tenant for life. It was held by Russell, J. following *In re Francis*, 1905, 2 Ch. 295, that a devise of real estate to a devisee, when he shall attain a certain age, or if he shall attain a certain age, without any further context to assist, is contingent, and the attainment of the prescribed age is a condition precedent to the estate vesting in him. He declared further that such further context might be found, for example, in a gift over in the event of the devisee not attaining the required age. In this case there was a gift over, but was there any person in whom the estate could be said to be vested? If the gift had been "for the eldest son (living at my death) of my son W. A. when he attains 21, and if he dies under 21 then for the next eldest son" (and so on with a gift over on the death of all such sons of W. A. under 21 years, there would be no difficulty in holding that the eldest son took a vested estate in fee simple, liable to be divested if he died under the age of 21 years). (See *Phipps v. Achers* (1842), 9 Cl. & F. 583). In this case, however, the gift is to such member of a class as first attains a specified age. There is no gift to anyone who does not answer the whole of the description. The devisee cannot be ascertained until one of the grandsons of the testator attains the age of twenty-one years. The persons entitled to the intermediary rents and profits for the period until one of the grandsons attains twenty-one years are the residuary