Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rhodes v. *Rhodes and others, from the Supreme Court of New Zealand; delivered 8th March* 1882.

Present:

LORD BLACKBURN.
LORD WATSON.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The Plaintiff, Mary Anne Rhodes, brought a suit in the Supreme Court of New Zealand against the executors and trustees of the will of William Barnard Rhodes, deceased, and the parties who took interests under that will adverse to her own, which will had been proved, as it was executed, and she "claims that the probate of "the said will be recalled, and an amended pro- "bate granted, omitting from the residuary clause "of the said will the words 'and from and after "'the decease of my said wife without leaving "'issue of our said marriage.'

"And further, that it may be declared by the "decree of this Honourable Court that the Plain- "tiff is entitled, under the trusts of the said will, "to the immediate possession and enjoyment of "the moneys arising and to arise from the resi- "duary estate of the testator."

The Court pronounced against both claims, and dismissed the suit. Against this decision the present appeal is brought. It is necessary, first, to consider whether the Plaintiff is entitled to have the probate amended by omitting the words referred to; for the second claim which depends on the true construction of the will cannot properly be disposed of till it is ascertained what forms the will.

And their Lordships, at the close of the argument for the Appellants, intimated that they had no doubt that this part of the decision of the Court was right, and that no ground had been shown for altering the probate.

The law of New Zealand, like that of England, requires that a will should be in writing, and executed by the testator, before witnesses, in a particular manner.

When an instrument purporting to be the will of a deceased person has been executed by the deceased in the proper manner, but it is sufficiently proved that though he executed the instrument, yet that from fraud he executed that which was not his will, there is no difficulty in pronouncing that the instrument is not his will. And it has been held that when it is sufficiently proved that the instrument comprised his will, but that from fraud, or perhaps from inadvertence, such as that in the goods of Douane, 2 Sw. and Tr., 590, the instrument which he actually executed contained also something which was not his will, this latter part is to be rejected. And in such a case, if this latter part is so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the statute of wills, the execution of what was shewn to be the true will, and something more, may be treated as the execution of the true will alone. A much more difficult question arises

where the rejection of words alters the sense of those which remain. For even though the Court is convinced that the words were improperly introduced, so that if the instrument was *inter vivos*, they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the 9th section of the 7 W. IV. and 1 Vict., c. 26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning. It has never, as far as their Lordships are aware, been necessary to decide as to this, though the judgment of Sir James Hannen in Harter *v.* Harter, 3 Prob. & D. 11, has some bearing on it. And their Lordships think it unnecessary and therefore improper now to express any opinion on this question, for the evidence does not raise it.

Mr. Hart, who drew the will, was called as a witness, and it is agreed that all he said was quite true. He had received instructions and prepared a draft will in which, thinking it impossible that the dying man could have children, he made no provision for them. The testator, on this draft being brought to him, desired that the provisions in a former will in favour of his issue should be restored. As it turned out, the testator died two days afterwards and there was no posthumous child, and those provisions took no effect. Mr. Hart not only inserted the provisions required, but prefaced them by the words, "and "from and after the decease of my said wife "leaving issue of our marriage," and at the end united them to the subsequent part of the draft will by inserting the words, "and from and after "the decease of my said wife without leaving "issue of our said marriage." This he did without any directions from the testator to insert

such words, and having no particular reason for inserting them, except that he thought they would come in in an ordinary will. He took the will, when fairly copied, to the testator for execution, and it was read over to him, he being then of disposing mind, though very ill. It is now said that the effect of those latter words was to change the whole effect of the subsequent part of the will, and so defeat the testator's intentions. Whether those words had that effect or not is a question on which the Supreme Court of New Zealand, consisting of five Judges, have been divided in opinion, and the same question has occupied several days of elaborate argument before their Lordships. It is impossible to suppose that the testator had an intelligent appreciation of the effect of these words at all, and Mrs. Rhodes, his widow, who is called as a witness, says that just after the execution of the will he told her that he could hardly say he had heard the will read at all, adding, "But I think it is "sure to be all right, because Mr. Hart is an "honest man, and I trust him." This is exactly the state of mind which, without any such evidence, ther Lordships would have inferred to be that of the testator.

Their Lordships think that there is no difference between the words which a testator himself uses in drawing up his will, and the words which are *bonâ fide* used by one whom he trusts to draw it up for him. In either case there is a great risk that words may be used that do not express the intention. There probably are very few wills in which it might not be contended that words have been so used. However this may be, the Court which has to construe the will must take the words as they find them.

Their Lordships therefore proceed to consider the claim of the Plaintiff that it may be declared that the Plaintiff is entitled, under the

trusts of the will, to the immediate possession and enjoyment of the moneys arising and to arise from the residuary estate of the testator.

Whether she is or is not so entitled depends on the true construction of the will. The same will had been before the Court of Appeal in New Zealand on a case stated under the provisions of the New Zealand Stamp Act. The statement in that case is concise, and is as follows :—

"On the 9th February 1878 the said William Barnard Rhodes made his last will and testament, a copy of which is hereunto annexed. Whereby, after making certain dispositions in favour of his wife, Sarah Ann Rhodes, and others, not affecting the question at issue, directed that from and after the decease of his said wife without leaving issue of his said marriage, his trustees should stand possessed of all the undisposed of residue of his real and personal estate in trust for his natural daughter, Mary Ann, for and during the term of her natural life, with further provision in case of her death or marriage.

"The testator died on the 11th day of February 1878, without having revoked his will, and the same has been duly proved in the Supreme Court at Wellington.

"There is no issue of the marriage of the testator with the said Sarah Ann Rhodes, who is still living.

"The testator's natural daughter is still unmarried and is of the age of twenty-six years or thereabouts.

"The executors of the said will have filed with the Commissioner of Stamp Duties the statement of property required under Part III. of the said Act, and by this statement it appears that the value of residuary estate which is alleged to be the subject of the above-mentioned trust has been assessed at 272,796*l.* 0*s.* 5*d.*

"The dutiable value of this sum on a life of 26 years of age, at 10*l.* per centum, in accordance with the Third Schedule of the said Act, is 18,405*l.* 5*s.* 5*d.*

"This duty has been so assessed by the Commissioner in accordance with the provisions of Part III. of 'The Stamp Act, 1875,' on the ground—

"That there being no life interest immediately preceding that taken by the natural daughter of the testator, the duty is payable immediately on his death, and has been paid by the executors accordingly.

"The Heaton Park estate, valued at 74,970*l.* 17*s.* 6*d.*, and Highland Park estates, valued at 10,600*l.*, have been included in the foregoing valuation.

"The executors are dissatisfied with this assessment, and appeal against the same on the grounds following :—

"1. That, looking to the terms of the will, the alleged life interest of the natural daughter of the testator is not

in possession but is contingent upon her surviving the widow of the testator, and that, pending the determination of that contingency, the income should be accumulated for the benefit of the person or persons who would then be entitled thereto.

"2. That 'The Stamp Act, 1875,' makes no provision for the immediate payment of duty in respect of unascertainable and contingent future interests.

"The Commissioner adheres to the assessment already made, and the executors have requested him to state a case as provided by the said Act.

"The questions for the decision of the Court under the said Act are,—

"1. Whether the assessment made by the Commissioner can be sustained under Part III. of the said Act, or whether he is precluded from making such assessment on the grounds alleged by the executors, or any of them?

"2. If the assessment made by the Commissioner cannot be sustained, what duty ought he to have assessed under the said Act in respect of the interest appearing to be taken by the natural daughter of the testator under his said will?"

The copy of the will annexed to this case was, for convenience of reference, divided into paragraphs which were numbered. The will itself was not so divided, and, unless this is remembered, the division into paragraphs may mislead, especially as, in more instances than one, the gentleman who divided the will into paragraphs has broken into several sentences what in the will was obviously one sentence. But the numbers of the paragraphs afford a convenient mode of referring briefly to the particular passage in the will to which it is desired to call attention, and this convenience has, in the present record, been retained, without any disadvantage, by printing the will as it actually was drawn up, and printing on the margin opposite to each passage which had been made a paragraph the number which had been attached to that paragraph, thus affording facility by use of the figures to refer to the passages meant, without any risk of misleading by its being supposed that the testator had broken up these passages into separate sentences.

In the Court of Appeal in New Zealand,

Williams, J., answered the questions put in the case on the Stamp Act, thus:—1. The assessment made by the Commissioner cannot be sustained. 2. The duty should be assessed only on the life interest taken by the natural daughter in the Bank shares and corporation bonds mentioned in para. 40, and in the land mentioned in paras. 52 and 53. Gillies, J., answered them,—1. That the assessment made by the Commissioner cannot be sustained on the ground that the testator's natural daughter takes no life interest in the residue until the decease of the widow, and even then takes no life estate in Highland Park or Heaton Park estates.

The latter part of this answer was on a point which, as far as regards Highland Park estate, cannot arise so long as Mrs. Rhodes continues to fulfil the conditions under which by the parts of the will which, for convenience, may be referred to as paras. 46, 47, 48, and 49, she enjoys that estate. Miss Rhodes can on no construction of the will take an estate in possession in what is enjoyed by the widow, though she may take a vested estate in Highland Park subject to the widow's interest. As far as regards Heaton Park estate the question does not yet arise, if what is given to Miss Rhodes is not to vest in possession till after the decease of the widow. But if what is given to Miss Rhodes in other property than Highland Park vests at once in her on the death of the testator, it is necessary to say whether Heaton Park estate is given to her or not, and both points may be material in construing the will. Gillies, J., answers the second question as Williams, J., did.

Johnston, J., did not give specific answers to the two questions, but with considerable hesitation expresses his opinion thus:—

"On the whole I do not see on the face of the will itself any such distinct evidence of the intention of the testator, that

his daughter (already provided for by paras. 40, 49, and 52) should enjoy the residue before the death of the widow, as ought, in my opinion, to override the application of the words of para. 64 in their ordinary sense to the provisions of para. 65.

"I do not feel quite sure that para. 65 applies to the Highland and Heaton Park estates, or that if it does, the authorities on distributive construction warrant the application of the doctrine to paras. 64 and 65.

"In conclusion, I wish it to be understood that I have formed, and that I express, my opinion upon this embarrassing case with much diffidence and uncertainty."

Richmond, J., in whose opinion Prendergast, C. J., concurred, says :—

"In this case the question is whether Miss Rhodes is entitled under the will of her father to an immediate life interest in his residuary, real, and personal estate. This, again, depends upon the interpretation of words which occur in more than one part of the will, and which, literally understood, would postpone the vesting in possession of Miss Rhodes' estate until the death of the testator's widow."

After an elaborate examination of the will and the authorities, he says :—

"On these grounds, I am of opinion that Miss Rhodes takes a life interest in possession in the whole estate, except Highland Park, and that duty is to be assessed upon this basis."

So that on the construction of this will three of the Judges against two held that the words referred to did postpone the vesting in possession of Miss Rhodes' estate until the death of the widow. This decision was not between the same parties, and is not in any way *res judicata*. But it was properly considered by the Judges in New Zealand an authority binding on them, and therefore they refused to make the declaration asked for. On the appeal before this Board the opinions of these learned Judges were properly relied on as weighty authorities in favour of the Respondents and the Appellants respectively, but they were not and could not be relied on as binding upon this Board; nor is that decision now before their Lordships, so that they can reverse it. If the decision of their Lordships in the case now before them should show that the opinions of Richmond, J., was the right one, it will follow

that the Revenue authorities in New Zealand have not received payment of a large sum which they ought to have received; but the Revenue authorities must take what steps they think fit to obtain payment of it, notwithstanding the previous decision of the Court of Appeal. If the revenue laws of New Zealand are framed as carefully as those of this country, there will be little difficulty in their doing so.

The general rule as to the construction of wills has often been laid down, and generally in terms not substantially differing from each other. About thirty years ago there did arise a great difference in opinion amongst the noble and learned Lords who then sat in the House of Lords as to the manner in which that rule should be applied.

In Grey *v.* Pearson, 6 H. of L. Cases, 61, Lord Cranworth and Lord Wensleydale came to one conclusion and Lord St. Leonards to another. The opinion of the majority prevailed, and that decision is binding on all Courts (including the House of Lords itself) on any will similar to that then in question.

Soon after, in Abbott *v.* Middleton, 7 H. of L., 68, a question arose respecting the construction of a will, in which the then Lord Chancellor, Lord Chelmsford, and Lord St. Leonards applied the rule one way, and Lords Cranworth and Wensleydale applied it the other way; and consequently, there being an equal division of the House, according to the rule of the House of Lords, the decision appealed against stood affirmed. But there was not any difference of opinion as to what was the rule; indeed, it is curious to observe that Lord St. Leonards, who was for construing the particular words as expressing an intention different from that which was the *primâ facie* meaning of those words, lays down the rule, at p. 94, more stringently

than Lord Wensleydale, who went as far as any one in adhering to the literal meaning, does at p. 114, where he makes his favourite quotation from Warburton *v.* Loveland. The same question came again before the Lords in Thelluson *v.* Rendlesham, 7 H. of L., 429. There was there a difference of opinion among the Judges who were consulted, but there was none amongst the Lords. Lord Cranworth says (p. 494) :—

"The rule on which the Appellant relies is that universally recognized and acted on, namely, that words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is, perhaps, involved in the former, for, supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to show that the words could not have been used in their ordinary sense."

Lord Wensleydale once more repeated the rule as laid down in Warburton *v.* Loveland, 1 Hudson & B., 648, but it is worth observing that by "an absurdity" can hardly be meant a result which the Court who construe the will thought ought not to have been the intention of the testator. If that had been so, the Thelluson will itself would have been upset. Lord St. Leonards says, p. 509, that much thought and learning had been bestowed for the purpose of endeavouring "to counteract, and properly too, if it could be "done, the ambitious views of the testator," but the intention was too clearly expressed. Lord Cranworth, therefore, seems quite correct when he says that the latter branch of the rule is but a means by the context of showing that the words were not used in their ordinary sense, as it is not to be presumed that the testator meant an absurdity; but that if it is shown that it was intended to use them so as to work this absurdity, that intention, if it be not illegal, must be carried out.

Taking this as the rule, it must in every will

where the point arises be a question of more or less. The Court has to say what was the intention as appearing from the whole will. Cases can be of but little use, for the words of one will are seldom the same as those of another; but, no doubt, when it has been held that a particular devise indicates an intention so strong that other words must be strained to give way to it, that is a great help to those who argue that other words must give way to a similar devise; and where it has been held that some particular words indicate so strongly an intention that they cannot be strained to give way to a general indication of intention, it is a help to those who argue that they should not give way now.

Starting with this as the rule of law, it seems that the question now raised is whether there is an indication of intention on the whole will that certain interests should be vested immediately on the testator's death, as regards the bulk of his property in possession, and as to Highland Park estate subject to the life interests given in it, sufficiently clear to require the Court which has to construe that will to say that words which, literally understood, would express an intention to postpone the vesting of those interests till after the death of Mrs. Rhodes, must be construed as expressing an intention consistent with those interests being vested, though that intention is not that which, but for the context, would be understood from the words used in their ordinary sense, and is one which would have been more aptly expressed in other words; or whether the intention to postpone is so clearly and strongly expressed that the Court is required to give the words that effect, notwithstanding the other parts of the will, which tend to the conclusion that the intention was to vest.

And it seems impossible to answer this question

without examining the whole will at perhaps tedious length. For every indication of intention that those interests should vest adds great strength to those that go before or come after. The force of the whole of such indications taken together is far greater than the sum of the forces of each taken separately.

Their Lordships think that there is enough to produce not a mere conjecture that the intention was to make the estates vested, but to produce in their minds a conviction that this was intended.

In order to explain their reasons for this, it is necessary to examine the whole will.

It is not necessary to notice the earlier part of the will, further than to say that the testator, by a part of the will called paragraphs 40 to 44, both inclusive, directs his trustees to pay the income arising from some Bank of New Zealand shares and some debentures to the separate use of the now Appellant, and from and after her death to divide the capital amongst her issue, but if she die without leaving any such issue, the capital to fall into his residuary estate, with powers for the maintenance and advancement of her issue during their minority. It is material to observe that no power is hitherto given to settle anything for the benefit of the husband of the Appellant. The testator next makes provisions for his widow, Mrs. Rhodes, of which it is only necessary to observe that he gives her an interest in Highland Park estate, and an annuity of 2,000*l.*, so long as she should continue his widow, which interest would necessarily come to an end on her death; though it might come to an end sooner. There is an optional power to set aside ten acres of Highland Park estate for the purpose of building a house to be settled on his daughter, the Appellant, for life, and on her husband for life, if he survived her. The re-

mainder in Highland Park estate is not yet disposed of, nor is Heaton Park estate disposed of, nor the residue of the testator's real and personal estate, which was large.

And here, before examining the will further in detail, it may be well to state what seems to have been the general scheme of the will. The testator was married but had no children, and there was not much prospect of his having any. He had a natural daughter, Mary Ann, the now Appellant, for whom he makes a provision in the part of the will just stated, such as to show that she was the object of his care and affection, and that he expected that on his death she would live with his widow, and be treated by her as she would have treated a legitimate stepdaughter. He had also collateral relatives. He had two landed estates, Highland Park estate, where he lived, and Heaton Park estate, and other real and personal estate of great value.

After creating by the earlier part of the will trusts which do not affect the great bulk of his property at all, and which do not affect the inheritance of Highland Park estate, the testator makes a variety of provisions (from what is called para. 54 to what is called 63 inclusive), all dependent on there being issue of his wife of their marriage, but as there never was such issue none of those ever came into operation. But from this it clearly appears that he preferred his issue by his wife, if he should have any, to Mary Ann. Next he proceeds to make a series of provisions (from what is called para. 64 to what is called para. 70) all for the benefit of Mary Ann, her future husband, and her future children. As Miss Rhodes is not yet married, the only question which yet arises is as to what she takes under this set of provisions, and the principal question is whether she takes anything under them so long as Mrs. Rhodes, the widow, lives.

But those provisions clearly show that the testator preferred Mary Ann and her children to his collateral relatives. Next by provisions (in what is called para. 71 to the end of the will) he gives his whole property in five shares to different collateral branches of his family. But they are not to take anything till Miss Rhodes' death, nor unless Miss Rhodes' children, if there should be any, have died, if sons, under twenty-one, or, if daughters, under that age and unmarried. And one thing clear in paras. 71 and 78 is that, supposing the testator's own issue and Mary Ann and her issue all out of the way, the collaterals are to take the ultimate residue, whatever that may include, at once, and not to wait for the death of the widow, unless some words in para. 67 postpone their right to Heaton Park and Highland Park till her death. Now the collaterals are postponed to all the testator's issue and to Mary Ann and her issue. Why persons so postponed in the order of gifts should be preferred in the one respect that, if they take at all, they are not to wait for the widow's death, is so difficult to understand, that it would of itself suggest a serious doubt whether the will does really direct the prior takers so to wait.

It is necessary, before going further, to dispose of one question. The testator begins a portion of his will by the words "and from and after the "decease of my said wife leaving issue of our "marriage," and follows this by a series of provisions none of which could come into operation at all unless there were some issue of their marriage, and then begins a subsequent set of provisions with the words "and from and after the "decease of my said wife without leaving issue "of our said marriage." Their Lordships think that, whatever be the effect of those words preliminary to the introduction of the provisions for the issue of the marriage, they must affect all

such provisions. It might be a question if this would be so if there had not been such a marked division of the will into two parts, but, as it is, they think the words at the beginning of what is called para. 54 must be considered as a preamble to, and affecting, all the provisions down to what is called para. 63 inclusive.

And this brings us to the part of the will which requires detailed examination. The testator has made provisions for numerous issue. As it has turned out, no such issue ever came into existence, but it is proper to examine what provisions he did make for his issue by his wife, in order to ascertain his intentions, and it is the more necessary to consider this, because the preamble to the provisions in favour of his issue, "and from and after the decease of my said wife leaving issue of our marriage," and that which is called paragraph 64, "and from "and after the decease of my said wife without "leaving issue of our said marriage," which forms the preamble to the subsequent devises and bequests which have come into operation, and which have now to be construed, are evidently relative to each other, and must be construed on the same principle. The testator, by the latter part of what is called para. 54, and by 55, and 56, makes provisions which, but for the preamble at the beginning of 54, would be perfectly clear and sensible. He gives Highland Park, subject to the life interests already created, and Heaton Park estate to his sons successively in tail male, with remainder to his sons successively in tail general, with remainder to his daughters successively in tail male, with remainder to his daughters successively in tail general, and in default of such issue directs that Highland Park and Heaton Park estates "shall, after the decease of my said "wife, and such last mentioned failure of issue,

" go and be as herein-after in that behalf set " forth." There can be no doubt, if the preamble were not there, that these successive estates tail would all be vested estates tail. Then he gives " all " the residue of my real and personal estate " (and it appears that he had real estate besides Highland Park and Heaton Park estates, and large personal estate), " upon trust for my children " by my said wife who being a son or sons " shall attain the age of twenty-one years, or " being a daughter or daughters shall attain that " age or be married previously with the consent " of my wife, and the issue of such of these as " may be dead leaving issue, in equal shares and " proportions." There can be no doubt (but for the preamble) that, if an only child, being a daughter, married when under age with the consent of the widow (which could only be given during her life), the whole of this fund would then become vested in the daughter, the very object of making it vest then being that a proper settlement might be made on her marriage. But the preamble, " and from and after the decease of my said wife leaving issue of our marriage," is there, and giving these words their natural and ordinary sense none of the estates given to the issue are to vest till the widow dies. So that, in the possible event of her surviving to see her grandchildren, neither Highland Park in which she had an interest, nor Heaton Park and the rest of his real and personal estate in which she had nothing, would vest so long as she lived. So far as regards the estates tail, this would prevent any dealings with the land, though she had a son who attained 21, and wished to marry, and on his marriage to settle these estates, and the rents of Heaton Park estate would accumulate for the benefit of those who ultimately took the residue, until the period prescribed by the Thelluson Act had elapsed,

and then go to the heir-at-law. There are express provisions as to the accumulations of income for Mary Ann's children after her death and during their minorities, and to those for his own children after the widow's death and for some period not so precisely defined. These directions are not easily to be reconciled with his total silence about accumulation during the supposed suspension of enjoyment for the widow's life. The testator was alive to the propriety of accumulation while there could be no complete enjoyment of the property. The fact that he has directed none during the life of his widow points strongly to the conclusion that accumulation of income for that period is no part of his plan. Besides this, such a scheme would at least be exceedingly inconvenient, and such a devise would be eminently injudicious; whether it would amount to an obvious absurdity within the meaning of the rule as laid down in Warburton *v.* Loveland or not, might be made a question. Considering how many very strong decisions there are for construing wills so as to favour early vesting, their Lordships are by no means prepared to say that this alone would not be a sufficient ground for modifying the sense of the words of the preamble. But when it is found that the testator has declared his intention to be that his daughter, if he has one, should, on marrying with the consent of his widow (and consequently in her lifetime), take a vested interest in the rest of the real estate and the personal estate, to put the construction on that preamble that this possible daughter shall take nothing till the widow dies, is not merely an absurdity, but a repugnance and inconsistency such as to justify a modification of the words of the preamble so far as to avoid these consequences, and these consequences are avoided by construing these words as meaning "if there "shall be issue of our marriage, then when the

"interest of my wife in Highland Park ter-
"minates, which it will, at all events, do on her
"decease as to the Highland Park estate, and
"as to the rest in which she takes no interest
"at once." It is quite true that thus understood the words are quite useless, merely idle; but their Lordships think this is no more than an example of the maxim "*superflua non nocent.*" It is also true that this makes the estates given in Highland Park estate to commence on the termination of the widow's interest, which may happen whilst she yet lives. It is not, perhaps, necessary to decide what would be the case in an event which has not yet happened, and may never happen; but the provisions in the portion of the will divided into the paragraphs 58 to 63, inclusive, are strong to show that the testator thought that his widow, whilst she remained such, would have the means to provide for his and her children during their minority, along with an allowance of 200*l.* a year, for each child during its infancy; but on her death or marriage he makes provisions for the advancement and maintenance of his children during their minority, to provide for such children, indicating that he supposed that her ability to provide for them would cease, not only on her death, but on her marriage. But there is no provision whatever for any advance for the benefit of a child having attained twenty-one after the widow's marriage whilst she still lives. This looks as if he thought that on her marriage as well as on her death the child would come into possession of what had been given her during widow hood; and also that the portions which were vested in the children on attaining twenty-one would come into possession, so that the children would need no further advance though the widow still lived. Certainly strengthening the inference to be drawn from the earlier provisions.

The draftsman evidently supposed that by the two provisions, "from and after the decease of "my wife leaving issue of our marriage," and "from and after the decease of my wife without "leaving issue of our said marriage," he had provided for everything. Taking these words in their literal sense, it would follow that if Mrs. Rhodes had had a posthumous child which died before her this large property was to go to Miss Rhodes; but if the posthumous child survived Mrs. Rhodes, though only for a few seconds, no portion of it was to go to her. This is so capricious and absurd that it was hardly contested on the argument that the words "without leaving issue of our said marriage" must be read as meaning "in case there never "shall be such issue, or if there be any such issue, "on the estates given to such issue failing," but it was strongly urged that all was postponed till Mrs. Rhodes died. If the construction of the words forming the preamble to the devises and bequests to the testator's own children, which has been already indicated, is the correct one, it would follow that a similar construction should be put on those words here. And the subsequent provisions in the will greatly fortify this.

The part of the will which is referred to as paragraphs 64, 65, 66, and the beginning of what is referred to as paragraph 67, is as follows:—

"And from and after the decease of my said wife without leaving issue of our said marriage And subject to the foregoing devises legacies bequests and directions I direct that my said trustees shall stand possessed of all the undisposed of reside of my real and personal estate in trust for my said natural daughter Mary Ann for and during the term of her natural life But if she shall marry then I direct that my said trustees shall stand possessed as well of the said last mentioned trust property as of the said four hundred and one New Zealand Bank shares and sum of ten thousand pounds herein-before mentioned in trust to pay the annual income arising therefrom to my said reputed daughter for the term of her natural life for her sole and separate use but without power to alienate or anticipate the same and her receipts alone to be sufficient dis-

charges for such payments And from and after her decease upon trust to pay her husband if he shall survive her during his life the sum of six hundred pounds per annum payable quarterly. And from and after the decease of my said natural daughter leaving issue subject as aforesaid I direct &c."

And then follow trusts for the sons and daughters of Miss Rhodes successively in tail; and then the will proceeds "and, in default of "such issue, then I declare and direct that the "said several properties shall, after the death "of the survivor of them my said wife and re-"puted daughter, and such failure of issue as "aforesaid, become and be part of my residuary "estate." Reliance was, in the argument, placed for the Appellant on the word "several" as indicating an intention to use words distributively, and for the Respondents on the words "the survivor" as indicating a contrary intention. It is rather too narrow a ground for drawing a conclusion either way.

There then follow provisions, designated as paragraphs 68 and 69, which it is not necessary to set out at length, though they must be referred to afterwards, and then follow important provisions designated as paragraphs 70, 71, and 72, which it is as well to set out in their very words :—

"(70) And subject and except as aforesaid as to all the residue of my real and personal estate and the annual income arising therefrom I direct that from and after the decease of my said daughter and subject to the payment of the annuity to her husband during his life the same shall be held in trust for all and every the child and children of my said reputed daughter who being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or previously marry as tenants in common and also during the minorities or respective minorities of any child or children of my said reputed daughter I direct that the trusts for maintenance education and bringing up of child or children out of income of expectant share or shares and accumulation and investment of surplus and use of expectant income of shares in common and raising and applying not exceeding half of expectant share for advancement in the world herein-before set forth as applicable to the expectant shares or succession of the children or child of my said daughter herein-before set forth shall be herein

implied and made applicable to the expectant shares or succession of the children or child of my said daughter last hereinbefore provided (71) And in case there shall be no children or child of my said marriage who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or marry and there shall be no children or child of my said daughter who shall being a son live to attain the age of twenty-one years or being a daughter shall live to attain that age or marry (72) then subject to the preceding provisions of this my will as to the ultimate residue of my real and personal estate"

he makes a bequest over. This completes the will as far as regards the bequests for the benefit either of his widow, and his issue by her, or of his reputed daughter, and her husband, should she marry, and her issue, and contains all to which it is necessary to refer for the purpose of deciding the question now before their Lordships.

And now it is proper to consider how the testator disposes of the reversion in Highland Park estate subject to the life interests created in it, and the reversion in Heaton Park estate in which there are no estates for life granted after the estates tail have come to an end. Those reversions have not, down to that part of the will which is designated as para. 65, been disposed of further than by saying that they are "to "go and be as herein-after in that behalf set "forth." Are they to be included in "the un- "disposed of residue of my real and personal "estate" which is left to Miss Rhodes for life? They certainly are, in the ordinary natural sense of the words, so included, and as both reversions are after her decease settled in tail on her children, there seems every reason for construing the words in their natural sense. Mr. Justice Gillies says that "herein-after in "that behalf set forth" cannot possibly have any meaning unless they refer to the devises of estates tail in these estates to the children of his reputed daughter. Their Lordships are unable to agree in this. They think they naturally refer

to the estate for life given to his daughter, subject to which those estates tail are given.

Then it is to be observed that the income arising from the Bank shares and the 10,000*l.* had already, by what is referred to as paragraph 41, been settled to the separate use of Miss Rhodes, and the income from them was certainly payable to her whether Mrs. Rhodes was alive or not. It seems to their Lordships that when the testator directs his trustees to stand possessed as well of the last mentioned trust property as of the Bank shares and 10,000*l.* in trust to pay the annual income, &c., he almost expressly declares that the income arising from the trust property shall like the income arising from the Bank shares be paid to her whether Mrs. Rhodes is alive or not. It is true that this cannot be done with regard to any property the income of which is given to Mrs. Rhodes, so long as Mrs. Rhodes lives and is entitled to receive it, and this is provided for by the words "subject "to the foregoing devises, legacies, bequests, and "directions." It is also provided for by the words of the preamble, "from and after the decease "of my said wife," which if applicable only to such property as she took an interest in may be useless tautology; but if applicable also to the income of Heaton Park estate, and of the large residue of his real and personal estate, are in direct conflict with the direction to treat it like the income of the Bank shares, and this affords a strong argument that these words were not meant to have the effect of postponing Miss Rhodes' interest till Mrs. Rhodes' death. The provisions designated as paragraphs 68 and 69 have a tendency the same way, but as these provisions are not very clear, and apparently interfere with the life interest of the daughter, as soon as a son attains twenty-one, their Lordships do not so

much rely on that. But the provisions as to the distribution, after the death of his daughter, of the residue of his real and personal estate amongst the children of his reputed daughter who attain the age of twenty-one, or being daughters previously marry, are, their Lordships think, very strongly in favour of the Appellant. All that has been already said in commenting on what are called paragraphs 54 and 55, as to the incongruity of giving estates tail, and vesting portions at a period when Mrs. Rhodes, who took no interest in the bulk of this property, might be alive, and yet making them all contingent till her death, is applicable here, except that there is not in this part of the will an express reference to Mrs. Rhodes being alive at the time when the portion of a daughter vested on her marriage, for it is not here provided that the marriage shall take place with Mrs. Rhodes' assent.

And the bringing down and applying to the expectant shares of the children in the residue of the real and personal estate of the maintenance and education clauses, already given in what are called paragraphs 43 and 44, as to the Bank shares and 10,000*l.* are also strongly in favour of the Appellant. Those clauses were very properly made applicable to the case of children being minors after the death of their mother, the testator's daughter, and had not and could not have any reference to the life of Mrs. Rhodes. If the words of the so-called paragraph 64 are construed as confining the application of the words "after the decease of my wife" to the bequests and devises of property in which she took an interest, those maintenance and advancement clauses are very properly brought down and applied to the shares given to the children in the residue of the real and personal estate in which Mrs. Rhodes took no interest. If the

words in the preamble are read as applying to all, and postponing the shares so long as Mrs. Rhodes lives, they are not applicable, and a child of the daughter who is left a minor on the death of her mother, though likely to have a very large portion, is left unprovided for so long as Mrs. Rhodes lives. This seems to their Lordships what the testator did not intend.

All absurdity and incongruity is removed if the words "leaving issue" and "without leaving issue" in the two preambles are construed as having been from the rest of the will shown to have been used in the sense already indicated, and if the words "from and after the decease of my said wife" are construed as having been shown to have been used as confined to such property as she took an interest in terminable at her death; construing it, as it is commonly said, distributively, or as it is perhaps more properly said, *reddendo singula singulis*. Whether it is proper to construe them as also meaning on the failure of the interest before her death is a question which does not arise yet, and may never arise, as Mrs. Rhodes may never marry. Their Lordships do not therefore decide this, though they wish to say that they are not to be understood as expressing an opinion against this construction.

Their Lordships do not think that, to construe a particular set of words *reddendo singula singulis* is properly to be called putting on them a meaning contrary to the plain and natural sense of the words; the subject matter and context may be such as to make such a construction the most obvious and natural construction, though probably it requires some context to justify it. Much of the argument of the Respondent was based upon Rex. *v.* Ringstead, 9 B. and C., 218, which was the joint judgment of Bayley, J., Littledale,J., and Parke, J. (afterwards Lord Wensleydale). It is said, "there is no doubt

"that, in furtherance of the manifest in-
"tention of the testator, general words which,
"taken in their ordinary grammatical sense,
"apply to the whole property devised, may be
"taken distributively, and that, *reddendo sin-*
"*gula singulis*, they may be applied to that part
"of the property to which they appear by the
"context to be applicable, so as to suffer other
"property to which, in their grammatical sense,
"they would apply, to pass immediately. But,
"in order to warrant such a construction, it
"must appear manifestly from the other parts
"of the will that that was the intention." In Rex. *v.* Ringstead the Court thought it was not the intention. Their Lordships do not intend to express any opinion as to whether the Court were or were not right in so holding, nor as to whether they succeeded in reconciling their decision with others. It is enough for their Lordships to say that they are convinced that in this will it does appear manifestly from other parts of this will that such was the intention.

The result is that, in the opinion of their Lordships, the decree dismissing the Appellant's suit should be reversed, and that instead thereof the Court should declare that, according to the true construction of the will, and in the events which have happened, the Appellant has become entitled to the present enjoyment of the interest by the said will given to her for her life in all the undisposed of residue of the testator's real and personal estate, including therein Heaton Park estate, subject only to the foregoing devises, legacies, bequests, and directions. They further think that the costs of all parties to all the proceedings in the Colony, as well as of this appeal, as between solicitor and client, should be paid out of the estate. And they will humbly advise Her Majesty in accordance with this opinion.