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No. 14 of 1950.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA IN ITS APPELLATE JURISDICTION.

UNIVERSITY OF LONDON
17 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE MATTER of the WILL of W[illegible] McD[illegible] deceased.

BETWEEN

STANLEY AUGUSTINE McDONNELL, INES MARIE AUGUSTA CAMPBELL and JOHN ARTHUR XAVIER McDONNELL (an infant) by his Guardian *ad litem* JOSEPH MICHAEL DUGGAN - - - - *Appellants*

AND

ENA GERTRUDE NEIL, ARTHUR JOSEPH MacDONALD, ANSTEY WITHERS ROCKWELL, SHEILA GRACE McDONNELL and MARIE FRANCES McDONNELL - - - - - *Respondents.*

Case for the Appellants

RECORD.

1. This is an Appeal (brought by special leave of His Majesty the King in Council granted by an Order dated the 3rd February 1950) from a judgment of the High Court of Australia pronounced on the 5th May 1949 by Dixon J. and Williams J. (Latham C.J. dissenting) and an Order made in pursuance thereof whereby it was declared that the corpus of the residuary estate of the above-named Testator had been divisible since the death of his daughter Grace McDonnell between the Respondent Ena Gertrude Neil as to one moiety thereof and the Appellants as to the other moiety thereof equally between them. pp. 33-34. pp. 21-31. pp. 31-32.

2. (A) The main question of principle arising on this Appeal is whether the rules of construction applicable to the bequest by the Testator of the residue of his estate (which was bequeathed upon trust "for my said two daughters Grace McDonnell and Emily Sarah McDonald for life in equal shares with remainder in fee to their issue in equal shares, their grandchildren if any taking per stirpes") were correctly stated and correctly applied by the majority of the High Court.

(B) If the Appellants' contention is correct, the residuary estate of the Testator (the present value of which is approximately £100,000) is divisible in equal fourths between the Appellants and the Respondent Ena Gertrude Neil; if the majority judgment of the High Court is correct, it is divisible in equal moieties, one moiety being held in trust for the Respondent Ena Gertrude Neil and the other in trust in equal shares for the Appellants.

p. 3, l. 8.

3. The Testator died on the 11th June 1904, leaving him surviving his daughters Grace, the widow of Percy Stanislaus McDonnell, and Emily, then a spinster.

p. 3, ll. 39-41.

4. (A) Probate of the Will of the Testator (hereinafter referred to as "the Will"), which was made on the 11th September 1902, was on the 29th July 1904 granted by the Supreme Court of New South Wales in its Probate Jurisdiction to Henry Gregory Quinlan, Charles Hepburn and the said Grace McDonnell, the executors named therein.

p. 4, ll. 19–20; p. 7, ll. 16–20.

(B) The Respondents Arthur Joseph McDonald and Anstey Withers Rockwell are the present trustees of the Will.

pp. 5–6.

5. By the Will the Testator:

(A) devised his residence and land at Inverary Concord upon trust for his said daughter Grace McDonnell for life with remainder in fee to her children and issue upon the trusts therein declared with a trust over in favour of his said daughter Emily and her children, and bequeathed his furniture horses carriages household effects and chattels in and about his said residence at Inverary (with certain specified exceptions) to his said daughter Grace McDonnell;

(B) devised his house and forty acres of land at Medlow to his said daughter Emily for life with remainder in fee to her children and issue upon the trusts therein declared with a trust over in favour of his said daughter Grace and her children therein named;

(C) devised and bequeathed the residue of his real and personal estate upon trust (subject to certain annuities thereinafter mentioned) "for my said two daughters Grace McDonnell and Emily Sarah McDonald for life in equal shares with remainder in fee to their issue in equal shares their grandchildren if any taking per stirpes";

(D) charged his residue with certain annuities (some of which are still subsisting) and made certain other provisions not material hereto.

6. At the date of the Will and at the date of the death of the Testator the state of his family was as follows:—

p. 4, ll. 21–33.

(A) His daughter Grace (who was born on the 20th December 1860) was a widow with three children, viz., the Appellant Stanley Augustine McDonnell (who was born on the 26th April 1893), Wilfred (who was born on the 10th March 1895), and the Appellant Ines Marie Augusta Campbell (who was born on the 14th April 1897). Grace had had one other child only, viz., Percy McDonnell who died an infant in 1892.

p. 4, ll. 34–40.

(B) His daughter Emily (who was born on the 11th August 1865) was a spinster.

7. (A) On the 21st September 1904 the Testator's daughter Emily married Gerard Ashley Darvall, by whom she had one child only, Ena Gertrude, who is the Respondent Ena Gertrude Neil. The said Respondent is over the age of 21 years and is the wife of John Newland Neil.

p. 4, ll. 34–38.

(B) The said Emily Darvall died on the 8th June 1937.

p. 4, ll. 43–4.

(C) The said Wilfred McDonnell died on the 12th December 1947, leaving one child only, the Appellant John Arthur Xavier McDonnell, who is an infant under 21 years of age. The Respondent Marie Frances McDonnell is the executrix of the Will of the said Wilfred McDonnell.

p. 8, ll. 1–7; p. 9, ll. 1–4.

(D) The Testator's daughter Grace McDonnell died, without having remarried, on the 4th July 1948.

p. 7, ll. 43–4.

(E) The Appellant Stanley Augustine McDonnell has six children only, one of whom is the Respondent Sheila Grace McDonnell, and the Appellant Ines Marie Augusta Campbell has one child only, Anne Campbell, who was born in the year 1941.

p. 8, ll. 8–16; p. 9, ll. 5–8.

8. (A) Effect was given to the specific bequests and devises contained in the Will, and the income of the residuary estate of the Testator was during the joint lives of the Testator's daughters Grace and Emily divided equally between them.

(B) On the death of Emily, doubts arose as to the trusts on which the corpus and the income of the residuary estate should be held, and on the 13th July 1937 an Originating Summons was taken out on behalf of the trustees of the Will in the Supreme Court of New South Wales in Equity by which it was asked whether upon the true construction of the Will and in the events which had happened the Respondent Ena Gertrude Neil was (subject to the annuities in the Will mentioned) entitled to (a) one half or any other and if so what proportion of the income of the residuary estate of the Testator, and (b) a vested interest in one half or any other and if so what proportion of the corpus of the said residuary estate.

pp. 1–2.

p. 2, ll. 6–15.

(C) On the 27th September 1937 judgment was given by Nicholas J. and a Decretal Order made on the said Originating Summons. Nicholas J. held that the Respondent Ena Gertrude Neil took no interest in the income of the residuary estate during the remainder of the lifetime of Grace, the survivor of the Testator's two daughters, and that Grace was entitled to the whole of such income during the remainder of her life. Nicholas J. observed that there was a rule of construction "that where there is a gift to two persons, with a gift over on the death of those two persons in such a way as to show that the whole fund is to go over on the death of the survivor then the Court infers either a life tenancy by implication in the whole income to the survivor during her life, or . . . controls the words that would have indicated a tenancy in common, and interprets them as creating a joint tenancy"; and after referring to cases to which a different rule of construction was applicable, the learned Judge continued: "The question then is, it appears to me, what is the construction of the words of this Will? Can I deduce from this Will, or should I deduce from this Will, an intention on the part of the Testator that the property should go over in a mass, or should I be influenced by

pp. 9–10.

pp. 37–40.

p. 37, l. 42, to p. 38, l. 6.

p. 39, ll. 28–35.

the circumstances . . . that the gift over here was to the children of the life tenant. I have come to the conclusion, taking the Will as a whole, that I do find an intention that the property goes over in a mass." The learned Judge then adverted to the provision made early in the Will by means of specific devises and bequests for each of the Testator's two daughters and their respective families, and concluded as follows : " Those words must be taken in conjunction with the words that follow, and I have come to the conclusion that what the Testator intended in this Will was that first of all he should divide up his estate in the form of two specific devises, keeping the residue intact, and leave the residue subject to certain charges made upon it, 'subject to the annuities hereinafter mentioned,' then when he has made this gift he used the gift of the residue as the property which is to bear the annuities he has charged upon it. I think those circumstances throw light on the meaning of the words 'remainder in fee' and further throw light on the words 'in equal shares their grandchildren if any taking per stirpes.' I infer from the scheme of the Will that the Testator meant that there would be one division and one class and that he meant that the residue should be given over at one time. That being so, I hold that the surviving life tenant takes the income of the whole for her life."

p. 40, ll. 8–21.

Nicholas J. made no express reference in his judgment to the question raised by the Originating Summons concerning the corpus of the estate, and it was ordered by the Decretal Order made on the Summons that that question should stand over generally.

p. 10, ll. 12–14.

pp. 34–7.

9. (A) On the 7th October 1937 a deed of arrangement and compromise was entered into between the then trustees of the Will of the first part, the Respondent Ena Gertrude Neil of the second part, the said Grace McDonnell of the third part and the Appellants Stanley Augustine McDonnell and Ines Marie Augusta Campbell and the said Wilfred McDonnell of the fourth part whereby in consideration of the Respondent Ena Gertrude Neil abandoning her right of appeal from the Decretal Order mentioned in the last preceding paragraph hereof it was agreed that the said Grace McDonnell should during her lifetime continue to receive one half share of the income of the residuary estate of the Testator but subject to the annuities bequeathed by the Will and that the remaining half of the said income should during the lifetime of the said Grace McDonnell and as from the date of the death of the said Emily Sarah Darvall be divided between the Respondent Ena Gertrude Neil, the Appellants Stanley Augustine McDonnell and Ines Marie Augusta Campbell, and the said Wilfred McDonnell in equal shares as tenants in common but subject to the said annuities. It was further agreed by the said deed that nothing therein should prejudice or affect the rights of the defendants to the said Originating Summons other than the said Grace McDonnell after her death in the corpus or the income of the said residuary estate, that the said deed was expressly limited to dealing with the income of the estate during the lifetime of the said Grace McDonnell, and that after her death all the parties to the said deed other than her were to be at liberty to prosecute any claim whatsoever in respect of the income of the estate after her death and in respect of the corpus thereof as if the said deed had never been executed.

(B) The income of the residuary estate of the Testator was dealt with during the remainder of the lifetime of the said Grace McDonnell in accordance with the provisions of the said deed.

10. (A) On the death of the said Grace McDonnell the aforesaid Originating Summons was revived by Order of Revivor dated the 27th August 1948 and was amended by making certain necessary alterations in the parties thereto and by striking out Question (b) thereof and substituting therefor the following questions, viz., whether :—

> "(b) The corpus of the residuary estate of the above-named Testator is divisible equally per stirpes or per capita among the children of Grace McDonnell deceased and of Emily Sarah Darvall deceased respectively and in the case of the children of Grace McDonnell, which of them. p. 2, ll. 16–23.
>
> (c) The grandchildren of the said Grace McDonnell and if so which of them take any interest in the corpus and if so what interest."

(B) On the 3rd December 1948 judgment was given by Sugerman J. on the Originating Summons as amended. pp. 10–17. In his Judgment Sugerman J. dealt first with the contention raised before him that the aforesaid Decretal Order of the 27th September 1937 created an estoppel which prevented the Respondent Ena Gertrude Neil from claiming that the corpus of the residuary estate was divisible per stirpes among the children of the daughters of the Testator. In dealing with this contention the p. 12, ll. 23–6. learned Judge applied the principle that such an estoppel as was contended for only covered matters which the judgment, decree or order creating it "necessarily established as the legal foundation of its conclusion," and in answer to the question "Can it be said that the prior judgment" p. 12, ll. 38–41. (i.e., the judgment of Nicholas J. concerning the income of the estate) "necessarily established, as the legal foundation of its conclusion, some matter wide enough to conclude the present question ?" (i.e., the question raised as to the proportions in which the corpus should be divided), he stated as his opinion "that the most that can be said is that it may have, and this is not enough." The Appellants do not now claim that the judgment of Nicholas J. created any estoppel.

The learned Judge then dealt with the question of the interests of the grandchildren of the said Grace McDonnell raised by paragraph (c) of the Originating Summons as amended, and concluded that such grandchildren "come in per stirpes, only to take the share of a parent p. 15, ll. 19–21. who has died before the period of distribution." This conclusion, in accordance with which the Appellant John Augustine Xavier McDonnell is the only grandchild of the said Grace McDonnell who is interested in the estate of the Testator, has not been challenged by any of the others of such grandchildren (all of whom the Respondent Sheila Grace McDonnell was appointed to represent, for the purpose of the Questions of the amended Originating Summons affecting their interests, by an Order of p. 19, ll. 44–51. Sugerman J. dated the 3rd December 1948).

p. 14, ll. 1–2.

p. 16, ll. 13–22.

Finally, the learned Judge dealt with the question whether the share of the Respondent Ena Gertrude Neil was to be determined by a stirpital or a capital division of the Testator's estate. Basing himself upon the conclusion reached earlier in his judgment that " Whatever else is obscure, it is at least clear that here there is but one gift of the remainder," the learned Judge proceeded " If the Testator had intended, as an incident of that gift, a stirpital division beginning with the children of the life-tenants, one would expect him to say so, since he has directed his mind to the distinction between a capital and a stirpital division as is shown by the provision as to grandchildren. But he has not said so. On the contrary he has expressly declared an intention in favour of a stirpital division postponed to the grandchildren of life-tenants and thus passing by the earlier generation. And he has used in the gift to issue the same phrase—' in equal shares '—as he has used in the gift to the daughters."

p. 17, ll. 1–6.

The learned Judge held that the express provisions to which he referred excluded any inference which might otherwise have been drawn (as in *Sumpton* v. *Downing*, 75 C.L.R., at page 88) that the several remainders following on the limitation to the life tenants were to their respective children per stirpes and not to the children of both of them as a composite class, and concluded " In the result, and viewing the gift as a whole, I think that what the Testator intended was a gift to the issue of his daughters in equal shares per capita, any question of stirpital division being postponed until the generation of grandchildren of daughters, and grandchildren then taking stirpitally in substitution for, and not in competition with, a parent."

p. 20.

11. (A) By a Notice of Appeal dated the 23rd December 1948 the Respondent Ena Gertrude Neil appealed against the said judgment of Sugerman J. to the High Court of Australia.

pp. 21–26.

(B) The said appeal was heard by the High Court who on the 5th May 1949 delivered judgment allowing the appeal by a majority (Dixon J. and Williams J., Latham C.J. dissenting).

p. 24, l. 25, to
p. 25, l. 3.

p. 25, ll. 20–28.

In his dissenting judgment, Latham C.J. drew attention (a) to the general rule stated in Hawkins on Wills (2nd Edition, page 149) to the effect that " under a devise or bequest to the children of A and B as tenants in common *prima facie* the children take per capita and not per stirpes " and (b) to the " exceptional rule " applied in *Re Hutchinson's Trusts* (21 Ch. D. 811), and in a number of cases therein referred to, from the consideration of which it appears that " where a gift is given after life tenancies an intention that a subsequent gift to children should take effect as a series of gifts upon the events of the deaths of the life-tenants may be shown by the appearance in the words preceding the later gift . . . of such expressions as ' after the decease,' ' after death,' ' at her death,' ' at their death,' ' for the period of their natural lives.' "

p. 25, l. 50, to
p. 26, l. 16.

Latham C.J. observed that " There must be some reference to the events of the deaths of the life-tenants before the exceptional rule which was stated in *Re Hutchinson* can be applied," and supported his observations by reference to the emphasis placed, both by Romer J. in *Re Errington* ([1927] 1 Ch. 425) and by the learned author of Jarman on Wills (7th Edition vol. III at page 1690), upon " the necessity of words referring to the death of the life-tenants as necessary to displace the operation of the *prime facie* rule of distribution per capita among the children of life-tenants where they take after the determination of the life tenancies."

p. 26, ll. 28–46.

The learned Chief Justice concluded " In the present case there is no reference to the death of either or both of the life-tenants. There are no words upon which to ground a contention that the Testator made two separate gifts to the respective issue of his daughters. The gift to the issue is not a gift at or after the deaths or respective deaths of the life-tenants. It is expressed simply in the words ' with remainder in fee.' Those words are apt to describe a single gift taking effect at a particular time and are not apt to describe two several gifts taking effect, the first at the death of the first life-tenant when one half of the corpus could be distributed, and the second taking effect at the death of the other life-tenant, when the other half of the corpus could be distributed." He expressed his agreement with Nicholas J. and Sugerman J. " that the Will shows an intention that the residue should be held together, that the whole income should be paid (as held by Nicholas J.) to the daughters or the survivor of them, and that the residue should then go over in one mass to the children of the life-tenants, their grandchildren taking by substitution," and with Sugerman J. " that the provision that the whole residue is subject to annuities and the express reference to stirpital distribution in the case of the grandchildren assist in some degree towards the exclusion of stirpital distribution in the case of the issue." He was therefore of opinion that the appeal should be dismissed.

p. 29, ll. 8–15.

(C) Dixon J. and Williams J. did not agree with Sugerman J. that it was clear that there was but one gift of the remainder. They considered that the trusts of residue were open to two interpretations : " (1) that the moieties given to Grace and Emily for life vested in possession in the remaindermen upon their respective deaths ; (2) that no part of residue vested in possession in the remaindermen until the deaths of both Grace and Emily." They urged in favour of the former interpretation " that it would be unreasonable to impute to the Testator an intention to leave the children of Emily or Grace, as the case might be, unprovided for during the life of the survivor."

In so urging the learned Judges appear to have left out of account the provision made by the Testator for the children of each of his daughters upon such daughter's death by means of the specific bequests and devises contained in the earlier portions of the Will.

p. 29, ll. 33–39.

p. 29, l. 41, to
p. 30, l. 8.

The learned Judges observed that " The trusts of residue as a whole appear to fall within the class of cases referred to in Jarman on Wills, 7th Edition, page 1690, where the learned author says ' Accordingly, where property is given to A, B and C for their lives as tenants in common, and " afterwards " or " at their death " it is given to their children in equal shares, this is generally construed to mean that " at their deaths " it is to go to their respective children ; that is, the division is per stirpes,' and they referred in particular to the case of *Wills* v. *Wills* (L.R. 20 Eq. 342) in which a bequest of the interest of a residue " to C and J the sons of the testator equally for their lives and ' at their death ' the principal to be divided equally between the children of C and J " was construed as a bequest of moieties of the principal to the families of C and J respectively

p. 30, ll. 8–12.

at the respective deaths of C and J. Dixon J. and Williams J. expressed the opinion that " the present Will appears to be open *a fortiori* to the construction that each moiety vests in possession in the remaindermen independently because there is no express reference to the deaths of Grace and Emily and there is therefore no necessity to put a gloss on any words of the Will." The learned Judges expressed as follows their view of the true construction of the relevant trusts :

p. 30, ll. 16–34.

" The first trust of residue in the present Will is a trust of residue to Grace and Emily for life in equal shares. It is not a trust of the income of residue but of residue for life in equal shares. The words ' for life ' fix the duration of their respective interests in residue. The use of the singular number is natural in describing estates for life although there may be more than one life. Residue is therefore separated into two undivided moieties from the date of the commencement of the trusts, and this suggests that there will be succeeding trusts under which interests in remainder will fall into possession on the termination of the preceding life estates. In the second trust, as we have said, there is no express provision that the remainder is to fall into possession at or after the death or deaths of Grace and Emily. An estate in remainder is an estate which is immediately expectant upon the natural determination of a preceding estate of freehold. The Will uses the word remainder in the singular and this led His Honour to hold that all the estates in remainder vested in possession at the same time, but the words ' for life ' are also used in the singular when they plainly mean respective lives, and the word remainder is in our opinion used in the same sense to mean the remainders expectant upon the deaths of Grace and Emily respectively."

p. 31, ll. 1–6.

Finally Dixon J and Williams J. stated that if it had not been for the declarations made by Nicholas J. they would have been prepared to declare that the Respondent Ena Gertrude Neil became entitled to a moiety of residue upon the death of Emily, but that since the rights of the parties until the death of Grace were *res judicata*, they could only make a declaration from that date.

pp. 31–2.

(D) A Decretal Order was made on the 5th May 1949 pursuant to the aforesaid majority judgment containing a declaration to the effect set out in the first paragraph of this Case, and it is from this Order that the Appellants now appeal.

12. The Appellants humbly submit that the Order of the High Court was erroneous and should be reversed and that the Order of the Full Court of the Supreme Court of New South Wales should be restored, for the following among other

REASONS.

(1) BECAUSE upon the true construction of the bequest of the residue of the Testator's estate—

  (i) There is no gift over until the death of the surviving life tenant ;

(ii) The gift to issue upon the death of the surviving life-tenant is not expressed to be per stirpes and is therefore per capita ;

(iii) The only gift expressed to be per stirpes is to the grandchildren of the life-tenants and that expression does not apply to children of the life-tenants.

(2) BECAUSE the said bequest of residue is one to which the general rule stated in Hawkins on Wills (2nd Edition, page 149) and referred to by Latham C.J. in his judgment, applies.

(3) BECAUSE the so-called " exceptional rule " referred to in *Re Hutchinson's Trusts* (*ubi supra*) does not apply to the said bequest.

(4) BECAUSE the so-called " exceptional rule " if applicable is unsound and based on convenience and not on any principles of construction and ought not to be followed.

(5) BECAUSE the majority of the High Court were wrong—

(i) in holding that there was no single gift of the remainder and no sufficient indication that residue was to go over in a mass or as a whole ;

(ii) in applying the so-called " exceptional rule " in *Re Hutchinson's Trusts* to a case where there was no reference to the death of either life-tenant ;

(iii) in holding that the language creating the limitation in remainder afforded a ground for inferring a stirpital rather than a capital distribution between the children of the Testator's daughters ;

(iv) in drawing the aforesaid inference in spite of the presence of the positive indications to which attention was drawn in the judgment of Sugerman J. and of Latham C.J. that the distribution between the children (as opposed to the grandchildren) of the Testator's daughters was intended to be made per capita and not per stirpes ;

(v) in disregarding completely, in their construction of the Will, the provision made for the respective families of the Testator's two daughters by the earlier provisions of his Will.

(6) BECAUSE the judgments of Sugerman J. and Latham C.J. were right and the judgment of Dixon J. and Williams J. was wrong.

GERALD R. UPJOHN.
JOHN SPARROW.

No. 14 of 1950.

In the Privy Council.

ON APPEAL

from the High Court of Australia in its Appellate Jurisdiction.

IN THE MATTER of the WILL of WILLIAM McDONALD, deceased.

BETWEEN

STANLEY AUGUSTINE McDONNELL, INES MARIE AUGUSTA CAMPBELL and JOHN ARTHUR XAVIER McDONNELL (an infant) by his Guardian *ad litem* Joseph Michael Duggan - - - - - - *Appellants*

AND

ENA GERTRUDE NEIL, ARTHUR JOSEPH MacDONALD, ANSTEY WITHERS ROCKWELL, SHEILA GRACE McDONNELL and MARIE FRANCES McDONNELL - *Respondents*

Case for the Appellants

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