~~C.1.66~~ 7/1951 ~~14 of 1950~~

31298

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

IN THE MATTER of the TRUSTS of the WILL of WILLIAM McDONALD late of Inverary Concord in the State of New South Wales Gentleman 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 FRANCIS McDONNELL *Respondents.*

CASE

FOR THE RESPONDENT ENA GERTRUDE NEIL.

REFERENCE TO RECORD.

1. This is an appeal from a judgment of the High Court of Australia pronounced on the 5th of May, 1949, by Dixon J. and Williams J. (Latham C.J. dissenting) whereby the judgment of Sugerman J. sitting as a judge of the Supreme Court of New South Wales upon the construction of the Will of the above-named Testator William McDonald was reversed. pp. 21-31. pp. 10-17.

2. The question of construction raised by this Appeal is whether under a gift by the Testator of his residuary estate in trust for his two daughters "for life in equal shares with remainder in fee to their "issue in equal shares their grandchildren if any taking per stirpes" the children of the two daughters take per capita or per stirpes.

REFERENCE TO RECORD.

3. The Will of the Testator was made on the 11th day of September, 1902. By his Will the Testator gave:—

(i) his cash to his daughters Grace and Emily Sarah in equal shares;

(ii) his furniture effects &c. at his residence "Inverary" to Grace (except the furniture in Emily Sarah's bedroom, which he gave to the latter);

pp. 5, 6.

(iii) his furniture and effects at his house at Medlow to Emily Sarah;

(iv) all other his real and personal estate to his trustees upon trust—

(a) as to his residence "Inverary" and land at Concord for Grace for life with remainder in fee to her children Stanley, Wilfred and Inez, or such of them as should attain twenty-one or have prior issue, with a cross remainder if all should die under age leaving no issue for Emily Sarah for life with remainder in fee to her children if any;

(b) as to his house and 40 acres of land at Medlow for Emily Sarah for her life with remainder in fee to her children (if any) who should attain twenty-one or have prior issue with a similar cross remainder for Grace and her children and issue;

(c) "And as to the rest and residue of my real and "personal estate upon trust (subject to the annuities here-"after mentioned) for my said two daughters Grace "Macdonnell and Emily Sarah Macdonald for life in equal "shares with remainder in fee to their issue in equal shares "their grandchildren if any taking per stirpes I CHARGE "my residue with life annuities hereafter mentioned . . . ." then follow five annuities to other children and grandchildren some of which are still subsisting.

p. 3, l. 8. 4. The Testator died on the 11th of June, 1904, and probate of
p. 3, l. 39. his Will was on the 29th of July, 1904 granted by the Supreme Court of New South Wales to the Executors named therein. The value of the Testator's residuary estate was approximately £100,000 and greatly exceeded the value of the specific devises mentioned in paragraph 3 hereof.

p. 4, ll. 21-38. 5. Both at the date of the Will and at the date of the Testator's death the Testator's daughter Emily was a spinster and his daughter Grace was a widow with three children, namely the two first named Appellants, Stanley Augustine McDonnell and Ines Marie Augusta Campbell, and Wilfred McDonnell. The said Wilfred McDonnell died on the 12th of December, 1947, leaving one child only him surviving namely the Appellant John Arthur Xavier McDonnell.

REFERENCE TO RECORD.

6. On the 21st of September, 1904, a little more than three months after the death of the Testator, his daughter Emily married Gerard Ashley Darvall by whom she had one child only, Ena Gertrude, who subsequently married John Newland Neil and is the Respondent Ena Gertrude Neil (hereinafter called "Mrs. Neil"). p. 1, ll. 31-42

7. The Testator's daughters Emily and Grace died on the 8th of June, 1937, and the 4th of July, 1948, respectively without having had any further children. p. 1, l. 13. p. 7, l. 11.

8. On the 13th of July, 1937, shortly after the death of Emily the Trustees of the Testator's Will took out an Originating Summons in the Supreme Court of New South Wales in Equity for the determination of the questions whether upon the true construction of the Will and in the events which had happened Mrs. Neil was entitled (subject to the annuities in the Will mentioned) 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.

9. On the 27th of September, 1937, Nicholas J. gave judgment on the said Originating Summons to the effect that Mrs. 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) but that the whole of such income was payable to Grace during the remainder of her life subject to the said annuities. The main ground of the learned judge's decision was that he inferred from the Will and in particular from the charging of the annuities upon the residue as a whole that the Testator meant that the residue should be given over at one time in a single mass. The learned judge did not decide the second question raised by the Summons as to the destination of the corpus of the residue but ordered that that question should stand over generally. pp. 37-40. p. 10, ll. 12-14.

10. By a Deed of Family Arrangement dated the 7th of October, 1937, in consideration of Mrs. Neil abandoning her right of appeal from the judgment of Nicholas J. aforesaid it was agreed that the half share of income the destination of which was determined by the said judgment should be equally divided during the lifetime of Grace between Mrs. Neil the said Stanley Augustine McDonnell, Marie Augusta Campbell and the said Wilfred McDonnell. It was further agreed by the said Deed that nothing therein should prejudice or affect the rights of the parties other than Grace in the corpus of the said residuary estate after the death of Grace. pp. 34-37.

11. On the 27th of August, 1948, shortly after the death of Grace the said Originating Summons was revived and was amended by making certain necessary alterations in the parties thereto and by striking out question (b) and substituting therefor the following questions namely whether:— pp. 1, 2.

"(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.

"(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".

pp. 10-17. 12. On the 3rd of December, 1948, Sugerman J. gave judgment on the Originating Summons as amended and in answer to the question raised by paragraph (c) thereof he held that the grandchildren of Grace did not take in competition with their parents but only took the share of a parent who had died before the date of p. 17, ll. 9-13. distribution. There has been no appeal from his decision upon this question.

Upon question (b) of the Originating Summons the learned judge decided that the corpus of the Testator's residuary estate subject to the said annuities was divisible equally per capita in quarter shares among Mrs. Neil and the present Appellants, the Appellant John Arthur Xavier McDonnell taking by way of substitution for his father Wilfred McDonnell. In reaching this p. 12, l. 14-p. 13, l. 48. conclusion the learned judge regarded the judgment of Nicholas J. upon question (a) of the Originating Summons as matter of authority p. 15, l. 22-p. 17, l. 8. but not by way of estoppel. The learned judge proceeded nevertheless to give his own reasons for coming to the same conclusion as Nicholas J. and based his decision chiefly on the ground that the express reference to a stirpital distribution among the grandchildren of the life tenant excluded by implication such a division among their children.

pp. 20, 21. 13. Mrs. Neil appealed from the said judgment of Sugerman J. to the High Court of Australia which delivered judgment on the 5th pp. 21-31. of May, 1949, allowing the appeal by a majority, Latham C. J. dissenting.

14. In his dissenting judgment Latham C. J. was of opinion that there was a rule of construction exemplified by and stated in p. 25, ll. 20-39. *re Hutchinson's Trusts*, 21 Ch. D. 811 to the effect 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 gifts of such expressions as "after the "decease", "after death", "at her death", "at their decease". "from "and after the decease", "at the death", "at their death", "for the p. 25, ll. 39-45. "period of their natural lives". He was of opinion that the decision in that case depended upon the fact that there was not merely a provision that the ultimate interests awaited the termination of the prior interests but that there was an express reference to the death

of the life tenants, and that there must be some reference to the events of the deaths of the life tenants before the rule stated in *re Hutchinson's Trusts* could be applied. He then cited Jarman on Wills, 7th Ed. Vol. III at page 1690 as placing the same emphasis upon the necessity of words referring to the death of the life tenants. The passage cited begins as follows:— p. 26, ll. 12-22.

> "Where property is given to A, B and C for their lives as "tenants in common and 'afterwards' or 'at their death' 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*."

In view of the inclusion of the expression "for the period of their "natural lives" (following *Abrey v. Newman* (1853) 16 Beav. 433) as one of the alternatives in the statement of the rule in *re Hutchinson's Trusts* by the learned Chief Justice and of the inclusion of the word "afterwards" as one of the alternatives in the statement thereof in Jarman on Wills it is submitted that the learned Chief Justice was wrong in supposing that a reference to the death of a life tenant is necessary in order that the rule in *re Hutchinson's Trusts* may apply.

By way of additional reasons for his judgment the learned Chief Justice also thought that the words "with remainder in fee" are apt to describe a single gift taking effect at a particular time but not apt to describe several gifts taking effect at different times; and he agreed with Sugerman J. that the provision that the whole residue was 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 children. p. 26, ll. 38-48.

15. The majority judgment of the High Court of Australia was delivered by Dixon J. and Williams J. The learned judges pointed out that in order to come to the conclusion that the children of the life tenant take per stirpes it is not necessary to find in the Will any express provision directing a stirpital distribution among the children as offered to the grandchildren of the life tenants; but that if one-half of residue became divisible on Grace's death among her children per capita and the other half became similarly divisible upon Emily's death amongst her children per capita, subject in each case to a substitutional gift in favour of grandchildren, then the practical effect of such gifts would be to extend the stirpital distribution through both generations. They observed that the question at the root of the matter is whether Nicholas J. and Sugerman J. were right in thinking that upon the true construction of the Will no part of residue vested in possession in the remaindermen until the deaths of both Grace and Emily. They did not agree that it was clear that there was but one gift of the remainder but thought that the moieties given to Grace and Emily for life vested in possession in the remaindermen upon their respective deaths. p. 27. p. 28, ll. 36-50. p. 28, l. 50–p. 29, l. 3. p. 29, l. 4.

p. 30, l. 8–p. 31, l. 6.

The reasoning of the learned judges on this point appears from the following extract from their joint judgment: "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. In this respect the Will resembles those in *Arrow v. Mellish* "[(1847) 1 De G. & Sm. 355] and *Abrey v. Newman*, 16 Beav. 431. It "is after all a question in the case of every Will of ascertaining the "Testator's intention from the language of the particular Will. 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 com-"mencement 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. The only interposed estates that "prevent the estates in remainder from immediately falling into "possession are the life estates given to Grace and Emily. These are "each life estates in one half of residue so that *prima facie* one half "of residue would become an estate in possession on the death of "Grace and the other half would become an estate in possession on "the death of Emily. In the third trust the words 'their children' "and 'their grandchildren' are apt to refer to the children and grand-"children of Grace and Emily respectively because they cannot be "the children and grandchildren of both of them. There is therefore "no difficulty in dividing the trusts so that there is one series of "trusts of one moiety of residue for Grace for life with remainder to "her issue and a second series of trusts of the other moiety to Emily "for life with remainder to her issue.

"This is, we think, the true meaning of this particular Will and "one which is in line with authority. It does not involve choosing

"between holding that there would be an intestacy of one half of the "income of residue during the life of the surviving sister and imply- "ing cross remainders of the income of the deceased sister in favour "of the surviving sister during the balance of the life of the latter on "very fragile material. If it were not for the declarations made by "Nicholas C.J. *in Eq.* we would be prepared to declare that the "appellant became entitled to a moiety of residue upon the death of "Emily. But these declarations are *res judicata* and settle the rights "of the parties until the death of Grace. We can therefor only make "a declaration from that date."

16. By Order in Council dated the 3rd of February, 1950, the Appellants were granted special leave to appeal from the said judgment of the High Court of Australia. pp. 33, 34.

17. The Respondent Mrs. Neil humbly submits in the premises that this appeal should be dismissed with costs for the following amongst other

REASONS.

(1) Because the true construction of the Testator's Will can only be properly ascertained by consideration of the unusual and particular language used in the bequest of his residuary estate, and such language for the reasons cited in paragraph 15 of this Case shows an intention to separate the residue into two moieties from the date of the commencement of the trusts thereof and that thereafter there shall be two separate remainders expectant upon the determination of two separate life interests.

(2) Because if and so far as authorities are of assistance in the construction of this Will such authorities are in favour of the stirpital construction. The rule of construction stated in and exemplified by *Re Hutchinson's Trusts*, 21 Ch. D. 811 does not depend for its application upon any express reference to the death or deaths of the life tenants, and Latham C.J. was led to the conclusion which he reached in his dissenting judgment largely by wrongly supposing that such a reference was an essential ingredient of the rule.

(3) Because the express reference in the Will to the grandchildren of the life tenants taking per stirpes is wholly innocuous to the construction which Mrs. Neil seeks to establish if it is once conceded that she is right in her primary contention that there are two remainders of residue taking effect at different times and not one remainder; and such reference to taking per stirpes is

not relevant for the purpose of determining the correctness of such primary contention. If the Testator had only in mind to deal with a separate moiety divisible among children and grandchildren, then it would be necessary and apposite to say that the grandchildren should take per stirpes but inapposite to say that the children should take per stirpes.

(4) Because the charging of annuities upon the residue as a whole provides no indication that the residue was intended to vest in possession in the remaindermen as a single mass.

(5) Because the use of the phrases "for life" and "with remainder" in the singular does not indicate that there is to be only one remainder. These phrases are used as words of limitation applicable to each share into which the Testator divided his residue.

(6) Because to construe the words "for life" as meaning "for their joint lives" and to imply cross remainders during the remainder of the life of the survivor of the life tenants does greater violence to the language used than to construe them as words of limitation applicable to the respective moieties constituted by the use of the words "in equal shares".

(7) Because the stirpital construction is the more reasonable and probable having regard to the Testator's circumstances. It is true that such construction involves a possible intestacy with respect to her share in the event of Emily having no children. But there is much greater difficulty in supposing that the Testator contemplated leaving the three children of his daughter Grace wholly unprovided for out of his residuary estate, which was by far the most valuable part of the assets therein, during the remainder of the life of Emily in the event of Grace predeceasing Emily.

(8) Because the judgment of Dixon J. and Williams J. was right and the judgments of Sugerman J. and Latham C.J. were wrong for the reasons appearing in such first mentioned judgment.

RAYMOND JENNINGS.

MICHAEL ALBERY.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

IN THE MATTER of the TRUSTS of the WILL of WILLIAM McDONALD late of Inverary Concord in the State of New South Wales Gentleman deceased.

BETWEEN—

STANLEY AUGUSTINE McDONNELL and Others - - - *Petitioners*

— AND —

ENA GERTRUDE NEIL and Others *Respondents.*

CASE

for the Respondent ENA GERTRUDE NEIL.

YOUNG JONES & Co.,
2, Suffolk Lane,
Cannon Street,
London, E.C.4.

11572 WITHERBY & CO. LTD., 15, NICHOLAS LANE, LONDON, E.C.4.