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 McDONALD, ANSTEY WITHERS ROCKWELL, SHEILA GRACE McDONNELL and MARIE FRANCES McDONNELL - *Respondents.*

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
W.C.1.
17 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

G. & G. KEITH,
13 SOUTHAMPTON PLACE,
HOLBORN, LONDON, W.C.1,
Solicitors for the Appellants.

YOUNG, JONES & CO.,
2 SUFFOLK LANE,
LONDON, E.C.4,
Solicitors for the First Respondent.

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AND

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

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AND

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

RECORD OF PROCEEDINGS

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 1. Amended Originating Summons (as further amended), 23rd September 1948.

No. 1.

AMENDED ORIGINATIONS SUMMONS (as further amended.)

LET ENA GERTRUDE NEIL the wife of John Newland Neil of Hardiman Avenue Randwick near Sydney in the State of New South Wales GRACE McDONNELL of 1 York Road Waverley near Sydney aforesaid STANLEY AUGUSTINE McDONNELL of St. George in the State of Queensland WILFRED McDONNELL of 1 York Road Waverley and INES MARIE AUGUSTA ~~McDONNELL~~ CAMPBELL of 1 York Road Waverley SHEILA GRACE McDONNELL of St. George, Queensland, MARIE FRANCES McDONNELL (Executrix of the Will of WILFRED FRANCIS McDONNELL of Roslyn Gardens, Elizabeth Bay, Sydney, and JOHN ARTHUR XAVIER McDONNELL (an infant) of Roslyn Gardens, Elizabeth Bay, Sydney within eight days after service of this summons upon them inclusive of the day of such service cause appearances to be entered for them respectively to this summons which is issued upon the application of Alfred Newmarch of High Street Manly near Sydney and Arthur Joseph McDonald of Newcastle Street Rose Bay

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 1. Amended Originating Summons (as further amended), 23rd September 1948, *continued.*

near Sydney who claim to be the Trustees of the above-mentioned Will of the said Testator for the determination of the following questions and the making of the following orders :—

Whether upon the true construction of the above-mentioned Will and in the events which have happened

(A) the Defendant Ena Gertrude Neil is (subject to the annuities in the said Will mentioned) entitled to

(i) one half ; or

(ii) any other and if so what proportion of the income of the residuary estate of the above-named testator ; and

~~(B) the Defendant Ena Gertrude Neil is (subject to the said~~ annuities) entitled to a vested interest in

(i) one half ; or

(ii) any other and if so what proportion of the corpus of the ~~said residuary estate.~~

(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 McDonnel, 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.

And for the following orders :—

1. That Messieurs Salwey & Primrose be and be deemed to have been at liberty to act as Solicitors for the Defendants herein as well as for the Plaintiffs.

2. That the costs of all parties of this suit may be provided for.

3. That the Decretal Order of the 27th September, 1937 made herein be varied by substituting the name of Sheila Grace McDonnell for the name of Stanley Augustine McDonnell.

And for such further or other declaration or order as the nature of the case may require.

Appearances may be entered at the office of the Master in Equity, Elizabeth Street, Sydney.

Dated this Thirteenth day of July One thousand nine hundred and thirty-seven.

C. D. IRWIN,
Chief Clerk in Equity.

This Summons is taken out by Messieurs SALWEY AND PRIMROSE of 84 Pitt Street, Sydney, the Solicitors for the above-named Plaintiffs.

NOTE.—If the Defendants do not enter appearances within the time and at the place above-mentioned such order will be made and proceedings taken as the Court thinks fit and expedient.

No. 2.

AFFIDAVIT of Alfred Newmarch with Annexure.

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 2. Affidavit of Alfred Newmarch, with Annexure, 16th July 1937.

On this Sixteenth day of July in the year One thousand nine hundred and thirty-seven ALFRED NEWMARCH of High Street Manly in the State of New South Wales Chartered Accountant being duly sworn maketh oath and saith as follows :—

1. I am one of the Plaintiffs herein.

2. The above-named William McDonald died on or about the Eleventh day of June One thousand nine hundred and four having duly made his last Will and Testament dated the Eleventh day of September One thousand nine hundred and two whereby he appointed Henry Gregory Quinlan, Charles Hepburn and the Defendant Grace McDonnell to be his Executors and Trustees and after making various devises and bequests not material to be herein referred to devised and bequeathed the residue of his real and personal estate upon trust (subject to the annuities hereinafter mentioned) for his two daughters the Defendant Grace McDonnell and Emily Sarah Darvall (then 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* and the Testator charged his said residue with the life annuities thereinafter mentioned that is to say to his son Arthur McDonald Two hundred Pounds a year (subject to the proviso thereinafter referred to) to his daughter Annie Redgate Fifty Pounds a year to his grandson Cecil Fitzpatrick One hundred Pounds a year to his granddaughter Evelina Barnard (then Evelina Fitzpatrick) One hundred Pounds a year to his granddaughter Eileen Ryan Fifty Pounds a year if the said Trustees should think she was in need of it and the Testator declared that the said annuity given to the said Arthur McDonald should only be so given until he became bankrupt or insolvent or until any judgment order or decree should be made against him under which he might become liable to pay any money or until anything should happen or be done by virtue of which but for the said provisions the said annuity might be applied for any purpose but for his own personal maintenance and benefit and that upon such event the said annuity should cease and should be paid to his wife for life and after the death of the said Arthur McDonald the Testator empowered his Trustees to pay Fifty Pounds a year to the eldest son of the said Arthur McDonald for his life if the Trustees should think he was in need of it as will appear by the said Will. A copy of the said Will is hereunto annexed marked with the letter "A."

3. Probate of the said Will was on or about the Twenty-ninth day of July One thousand nine hundred and four duly granted to the said Executors by this Honourable Court in its Probate Jurisdiction.

4. By a Decree made by this Honourable Court in its Equitable Jurisdiction bearing date the Fourteenth day of December One thousand nine hundred and eight Registered No. 513 Book 876 it was ordered (*inter alia*) that John William McDonald and Frank McDonald therein described be and they were thereby appointed new Trustees of the said Will of the said William McDonald deceased in the place and stead of the said Henry Gregory Quinlan the Defendant Grace McDonnell and Charles Hepburn And it was further ordered that the lands then subject to the

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 2. Affidavit of Alfred Newmarch, with Annexure, 16th July 1937, *continued.*

trusts of the said Will should vest in the said John William McDonald and Frank McDonald for the Estate therein vested in the said Henry Gregory Quinlan the Defendant Grace McDonnell and Charles Hepburn to be held by the said John William McDonald and Frank McDonald upon the trusts of the said Will.

5. The said John William McDonald died on or about the Third day of November One thousand nine hundred and eleven.

6. By Indenture made the Sixteenth day of April One thousand nine hundred and twelve between Frank McDonald of the one part and me this deponent of the other part I this deponent was duly appointed a Trustee of the said Will in the place and stead of the said John William McDonald deceased.

7. By Indenture dated the said Sixteenth day of April One thousand nine hundred and twelve and made between me this deponent of the first part the said Frank McDonald of the second part and the Plaintiff Arthur Joseph McDonald of the third part the said Arthur Joseph McDonald was duly appointed a Trustee of the said Will in the place and stead of the said Frank McDonald who retired from the trusts thereof.

8. The Plaintiffs Arthur Joseph McDonald and I are still the Trustees of the said Will.

9. The Defendant Grace McDonnell was married once only namely on or about the Eighth day of April One thousand eight hundred and ninety-one to Percy Stanislaus McDonnell who died on or about the Twenty-fourth day of September One thousand eight hundred and ninety-six. There has been issue of the said marriage four children and no more that is to say the Defendants Stanley Augustine McDonnell Wilfred McDonnell and Ines Marie Augusta McDonnell and another son Percy William McDonnell. All the said children are alive and over the age of twenty-one years except the said Percy William McDonnell, who died unmarried and intestate on or about the Tenth day of March One thousand eight hundred and ninety-two. No representation has been taken out to the Estate of the said Percy William McDonnell. The Defendant Grace McDonnell was born on the Twentieth day of December One thousand eight hundred and sixty.

10. The said Emily Sarah Darvall was married once only namely on or about the Twenty-first day of September One thousand nine hundred and four to Gerard Ashley Darvall and there has been issue of the said marriage one child and no more namely the Defendant Ena Gertrude Neil who is over the age of twenty-one years. The said Emily Sarah Darvall was born on the Eleventh day of August One thousand eight hundred and sixty-five.

11. The Defendant Gertrude Neil formerly Ena Gertrude Darvall is now the wife of John Newland Neil.

12. The said Emily Sarah Darvall died on the Eighth day of June One thousand nine hundred and thirty-seven.

13. The residuary real and personal estate under the provisions of the Will of the above-named Testator comprises real estate of the value of Forty-two thousand nine hundred and eight pounds or thereabouts

and personalty of the value of Six thousand two hundred and thirty-two pounds or thereabouts. The said residuary real and personal estate at present yields annually an income of Four thousand five hundred and seventy-five pounds or thereabouts. The annual net income available from the said residuary real and personal estate of the said Testator is the sum of Three thousand three hundred and forty-four pounds after payment of the said annuities.

Sworn by the Deponent on the day and year first before-mentioned at Sydney Before me, C. ALLEN, J.P. } ALFRED NEWMARCH.

ANNEXURE.

"A"—COPY WILL of William McDonald.
Dated 11th September 1902.

THIS IS THE LAST WILL AND TESTAMENT of me WILLIAM MACDONALD of Inverary Concord in the State of New South Wales Esquire I give all my cash in hand or on current account in Bank to my daughters Grace Macdonnell Widow and Emily Sarah Macdonald Spinster in equal shares I give my furniture horses carriages household effects and chattels in and about my residence at Inverary to my said daughter Grace Macdonnell except the furniture of the bedroom occupied by my daughter Emily Sarah Macdonald which I leave to her I give all my furniture horses carriages and household effects in and about my house at Medlow to my said daughter Emily Sarah Macdonald I give all other my real and personal estate to my Trustees and Executors hereinafter named As to my residence and land Inverary Concord Upon trust for my daughter Grace Macdonnell for her life with remainder in fee to her children Stanley Macdonnell, Wilfred Macdonnell and Inez Macdonnell or such of them as shall attain the age of twenty-one years or have issue before attaining that age which issue shall survive him or her in equal shares But if all of them shall die under age leaving no issue then Upon trust for my daughter Emily Sarah Macdonald for life with remainder in fee to her children if any in equal shares And as to my house and forty acres of land at Medlow Upon trust for my daughter Emily Sarah Macdonald for her life with remainder in fee to her children (if any) who shall attain the age of twenty-one years or have issue before that age which issue shall survive him or her in equal shares But if she has no issue or they all die under age leaving no issue then Upon trust for my daughter Grace Macdonnell for life with remainder in fee to her children Stanley Macdonnell Wilfred Macdonnell and Inez Macdonnell or such of them as shall attain the age of twenty-one years or have issue before that age which issue shall survive him or her in equal shares And as to the rest and residue of my real and personal estate Upon trust (subject to the annuities hereafter 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 hereinafter mentioned To my son Arthur Macdonald Two hundred pounds a year subject to the proviso hereinafter contained To my daughter Annie Redgate Fifty pounds a year To my grandson Cecil Fitzpatrick

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 2. Affidavit of Alfred Newmarch, with Annexure, 16th July 1937, *continued.*

One hundred pounds a year To my granddaughter Evelina Fitzpatrick One hundred pounds a year To my granddaughter Eileen Ryan Fifty pounds a year if my Trustees think she is in want of it, this allowance to be in the absolute discretion to give or withhold I empower my Trustees in their discretion to sell my vacant lands and my property at the Haymarket known as Maguires the nett proceeds to be invested and held upon the trusts of this my Will I empower my Trustees to lease any part of my landed property for terms not exceeding thirty years I direct that if any bonus be obtained upon renewing a lease of the Crystal Palace Hotel it shall be treated and invested as Capital I empower my Trustees to employ the income of any infant taking under this Will for his or her maintenance and education I declare that the annuity of Two hundred pounds for my son Arthur Macdonald is given upon this condition that it shall be paid to him only until he shall become bankrupt or insolvent or until any judgment order or decree shall be made against him under which he may become liable to pay any money or until anything shall happen or be done by virtue of which but for this clause the said annuity might be applied for any purpose but for his own personal maintenance and benefit And upon any such event the said annuity shall cease and shall be paid to his wife during her life And after his death I empower my Trustees to pay Fifty pounds a year to the eldest son of my said son for life if and as my Trustees shall think he is in need of it this allowance to be in their absolute discretion to give or withhold I appoint Henry Gregory Quinlan Insurance Broker my daughter Grace Macdonnell and Charles Hepburn Patent Agent my Executors and Trustees I direct them to employ Mr. Henry Massy Makinson as Solicitor in all the business of my estate.

IN WITNESS whereof I have hereunto set my hand this eleventh day of September in the year of our Lord One thousand nine hundred and two.

(Sgd.) W. MACDONALD.

SIGNED by the said William MacDonald as and for his last Will and Testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

(Sgd.) H. M. MAKINSON,
Solicitor,
Sydney.

(Sgd.) JAMES HARKNESS,
Clerk to
Messrs. Makinson & Plunkett.

This is the annexure marked " A " mentioned and referred to in the annexed Affidavit of Alfred Newmarch sworn on the 16th day of July 1937 at Sydney.

Before me,
C. ALLEN, J.P.

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 3.
Affidavit of Thomas Bruce Warren, 24th August 1948.

No. 3.

AFFIDAVIT of Thomas Bruce Warren.

On the Twenty-fourth day of August One thousand nine hundred and forty-eight, THOMAS BRUCE WARREN of Sydney, in the State of New South Wales, Solicitor, being duly sworn makes oath and says as follows :—

1. I crave leave to refer to the Affidavit of Alfred Newmarch sworn on the Sixteenth day of July One thousand nine hundred and thirty-seven and filed herein.

2. Since the institution of this suit and on or about the Fifth day of June One thousand nine hundred and forty the above-named Plaintiff Alfred Newmarch died and by a Deed of Appointment of New Trustee dated the Fifth day of July One thousand nine hundred and forty Wilfred McDonnell one of the above-named Defendants was appointed a Trustee in his place and stead.

3. On or about the Twelfth day of December One thousand nine hundred and forty-seven, the said Wilfred McDonnell died and by a Deed of Appointment of New Trustee dated the Fourth day of February One thousand nine hundred and forty-eight Anstey Withers Rockwell of Sydney Chartered Accountant was appointed a Trustee in his place and stead.

4. Since the institution of this suit the Defendant Grace McDonnell has died. Neither the Estate of the said Wilfred McDonnell or the Estate of the said Grace McDonnell has any further interest in the subject matter of this suit.

5. The said Wilfred McDonnell left him surviving an infant son who is a member of the class consisting of the grandchildren of the Defendant Grace McDonnell which class by an Order of this Honourable Court made on the Twenty-seventh day of September One thousand nine hundred and thirty-seven is represented for the purposes of this suit by the Defendant Stanley Augustine McDonnell.

Sworn by the Deponent on the day and year first hereinbefore mentioned at Sydney. } T. B. WARREN.

Before me,
A. G. KEEN, J.P.

No. 4.
Affidavit of Anstey Withers Rockwell, 15th September 1948.

No. 4.

AFFIDAVIT of Anstey Withers Rockwell.

On the Fifteenth day of September One thousand nine hundred and forty-eight ANSTEY WITHERS ROCKWELL of Sydney in the State of New South Wales Chartered Accountant being duly sworn makes oath and says as follows :—

1. I am one of the Plaintiffs herein.

2. The above-named Defendant Grace McDonnell died on the 4th day of July, 1948.

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 4. Affidavit of Anstey Withers Rockwell, 15th September 1948, *continued.*

3. The above-named Defendant Wilfred McDonnell died on the 12th day of December, 1947, and Probate of his Will was granted to his Widow Marie Frances McDonnell by the Supreme Court of New South Wales in its Probate Jurisdiction on the 8th day of June, 1948.

4. The said Wilfred Francis McDonnell left him surviving one son John Arthur Xavier McDonnell an infant under the age of twenty-one years.

5. There has been issue of the marriage of the above-named Defendant Stanley Augustine McDonnell six children namely Sheila Grace, Patricia, Betty, Percy, Ann and Michael. Three of the said children namely Sheila Grace, Patricia and Betty are over the age of twenty-one years.

6. There has been issue of the marriage of Ines Marie Augusta Campbell (formerly Ines Marie Augusta McDonnell) one of the above-named Defendants one child only namely Ann an infant under the age of twenty-one years.

7. There have been no children of the marriage of the Defendant Ena Gertrude Neil.

8. Subsequent to the making of the Decretal Order herein on the 27th December, 1937, a Deed was executed by all persons who were then parties to this Originating Summons. The said Deed is exhibited to me at the time of swearing this my Affidavit and is marked with the letter " A."

Sworn by the deponent on the day and year first before mentioned at Sydney } A. W. ROCKWELL.

Before me :

N. HAYTON, J.P.

No. 5. Affidavit of Anstey Withers Rockwell, 21st October 1948.

No. 5.

AFFIDAVIT of Anstey Withers Rockwell.

On the Twenty-first day of October One thousand nine hundred and forty-eight ANSTEY WITHERS ROCKWELL of Sydney in the State of New South Wales Chartered Accountant being duly sworn makes oath and says as follows :—

1. I am one of the Plaintiffs herein.

2. I refer to my Affidavit sworn on the Fifteenth day of September One thousand nine hundred and forty-eight and filed herein.

3. With further reference to paragraph 4 of my said Affidavit I say that the said Wilfred Francis McDonnell was married once only and had issue of his marriage one child only to wit the infant Defendant John Arthur Xavier McDonnell.

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 5.
Affidavit of Anstey Withers Rockwell, 21st October 1948, *continued.*

4. With further reference to paragraph 6 of my said Affidavit I say that the infant Ann Campbell daughter of the Defendant Ines Marie Augusta Campbell was born prior to the death of the Defendant Grace McDonnell and is now aged about seven or eight years.

Sworn by the deponent on the day and year first hereinbefore appearing. } A. W. ROCKWELL.

Before me :

R. STEWART, J.P.

No. 6.

DECRETAL ORDER.

No. 6.
Decretal Order, 27th September 1937.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 727 of 1937.

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 ALFRED NEWMARCH and ARTHUR JOSEPH McDONALD - - - - *Plaintiffs*

and

ENA GERTRUDE NEIL, GRACE McDONNELL, STANLEY AUGUSTINE McDONNELL, WILFRED McDONNELL and INES MARIE AUGUSTA McDONNELL *Defendants.*

THIS SUIT instituted by Originating Summons coming on to be heard before the Honourable Harold Sprent Nicholas a Judge of the Supreme Court sitting in Equity on the Seventeenth and Twenty-fourth days of September instant and this day WHEREUPON AND UPON HEARING read the said Originating Summons and the two several affidavits of Alfred Newmarch sworn respectively on the Sixteenth and Thirtieth days of July last and filed herein AND UPON HEARING what was alleged by Mr. H. A. Henry of Counsel for the Plaintiff by Mr. Weston of King's Counsel and Mr. E. W. Street of Counsel for the Defendant Ena Gertrude Neil by Mr. R. K. Manning of Counsel for the Defendant Grace McDonnell and by Mr. D. Maughan of King's Counsel and Mr. B. Maughan of Counsel for the Defendants Stanley Augustine McDonnell, Wilfred McDonnell and Inez Marie Augusta McDonnell THIS COURT DOTH ORDER that the

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 6. Decretal Order, 27th September 1937, *continued.*

Defendant Stanley Augustine McDonnell be and he is hereby appointed to represent for the purposes of this suit the class consisting of all the grandchildren of the Defendant Grace McDonnell AND THIS COURT DOTH DECLARE that upon the true construction of the above-mentioned Will and in the events which have happened the Defendant Ena Gertrude Neil is entitled to no portion of the income of the residuary estate of the above-named testator during the lifetime of the Defendant Grace McDonnell AND THIS COURT DOTH FURTHER DECLARE that upon the true construction of the above-mentioned Will and in the events which have happened the Defendant Grace McDonnell is entitled during her life to the whole of the income of the residuary estate of the above-named testator available for distribution AND THIS COURT DOTH FURTHER ORDER that Question (B) of the said Originating Summons do stand over generally AND THIS COURT DOTH FURTHER ORDER that Messieurs Salwey & Primrose be and be deemed to have been at liberty to act as Solicitors for all the Defendants herein as well as for the Plaintiffs AND THIS COURT DOTH FURTHER ORDER that it be referred to the Deputy Registrar in Equity or to such officer of this Court as the Master in Equity may appoint to tax as between solicitor and client and certify the costs of all parties of this suit and that such costs when so taxed and certified as aforesaid be retained or paid by the Plaintiffs out of the estate of the said testator to the parties hereto respectively or to their solicitors AND all parties are to be at liberty to apply as they may be advised.

Settled,

R. T. C. STOREY,

C.C. in Eq.

21.10.37.

Passed this 27th day of October, 1937.

W. A. P.

Entered same day.

S. R.

W. A. PARKER (L.S.),
Master in Equity.

No. 7. Judgment of His Honour Mr. Justice Sugerman, 3rd December 1948.

No. 7.

JUDGMENT of His Honour Mr. Justice Sugerman.

HIS HONOUR: By his Will made in 1902 the Testator gave his residuary estate to his Trustees "Upon trust (subject to the annuities hereafter 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*." The Testator died in 1904. His daughter Emily Sarah married after his

death and became Emily Sarah Darvall. She died in 1937, leaving one child, the Defendant Ena Gertrude Neil, and no grandchildren. His daughter Grace was, when the Will was made, a widow with three children. One of these, Wilfred, survived Emily Sarah, but predeceased Grace, leaving one child, John Arthur Xavier. The other two, Stanley Augustine and Ines Marie Augusta (now Mrs. Campbell) are still living. Stanley has six children and Ines had one child.

The amended Originating Summons states the following questions which were argued before me, namely whether on the true construction of the Will and in the events which have happened (i.e., have now happened) including the death of Grace :—

"(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."

In its original form, the Originating Summons stated two questions, namely whether upon the true construction of the Will and in the events which had happened (i.e., had then happened, including the death of Emily Sarah but not the death of Grace) :—

"(A) The Defendant Gertrude Neil is (subject to the annuities in the said Will mentioned) entitled to

(i) one half ; or

(ii) any other and if so what proportion of the income of the residuary estate of the above-named Testator ;

(B) The Defendant Ena Gertrude Neil is (subject to the said annuities) entitled to a vested interest in

(i) one half ; or

(ii) any other and if so what proportion of the corpus of the said residuary estate."

The Originating Summons in its original form came on before Nicholas, J., in 1937. His Honour made a Decretal Order declaring that upon the true construction of the Will and in the events which had happened Ena Gertrude Neil was entitled to no portion of the income of the residuary estate during the lifetime of Grace and Grace was entitled during her lifetime to the whole of the income available for distribution. By the same Decretal Order, His Honour ordered that question (B) of the Originating Summons do stand over generally.

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 7. Judgment of His Honour Mr. Justice Sugerman, 3rd December 1948, *continued.*

The persons who were parties to, or represented by parties to, the proceedings before Nicholas, J., are the same persons as are parties, or represented in, the proceedings before me, except that Wilfred's executrix is now a party in his place and Grace's estate, having no further interest, is not now represented.

On behalf of Mrs. Neil it has been claimed before me that the corpus is divisible equally *per stirpes* amongst the children of Grace and of Emily Sarah, grandchildren taking by substitution. On this footing her claim is to take one-half of corpus.

Mrs. Neil's claim would require application of the method of construction set out in the judgment of Dixon, J., in *Sumpton* v. *Downing* (75 C.L.R. 76 at p. 88). The argument is that she was entitled, as the only issue of Emily Sarah, to a remainder in one-half of corpus, which became vested on the death of Emily Sarah. For the other Defendants it is said that Nicholas, J's Decretal Order of 1937 creates an estoppel which prevents this claim from being made. Counsel have referred me to a number of cases—*Badar Bee* v. *Habib Merican Noordin* ((1909) A.C. 615); *Blair* v. *Curran* (62 C.L.R. 464 at pp. 502 (Rich, J.) and 531–4 (Dixon, J.); *Plomley* v. *Shepherd* (32 S.R. 61); *Re Finkelstein* ((1944) V.L.R. 123); *Hoysted* v. *Federal Commissioner of Taxation* (37 C.L.R. 290); and *New Brunswick Railway Co.* v. *British and French Trust Corporation* ((1939) A.C. 1 at pp. 36–37).

The estoppel " only covers those matters which the prior judgment, decree or order necessarily established as the legal foundation of its conclusion " (*per* Dixon, J., *Blair* v. *Curran*, at p. 531). Is that test satisfied here ?

It appears from the first four cases, or the portions of the judgments therein which I have referred to, that the doctrine of issue-estoppel applies in the construction of wills, even though different interests in property are involved, if there is an identical question of construction. Its application involves a process of reasoning from the decision affecting one interest to the decision affecting the other. The foundation for that reasoning may be absent if the question affecting that other interest arose in the prior proceedings, but was expressly left undetermined. That is the situation here when one compares the matter debated before me with part (i) of question (B) in the Originating Summons as it originally stood, and has regard to the standing over generally of that question by Nicholas, J. Can it be said that the prior judgment necessarily established, as the legal foundation of its conclusion, some matter wide enough to conclude the present question ? I think that the most that can be said is that it may have, and this is not enough.

The circumstances against estoppel are stronger than those which led to a difference of opinion in *Plomley* v. *Shepherd* (*supra*). Here it is not merely that the present question was not, or may not, have been, present to the mind of the Court which gave the prior decision. It was before that Court, and was expressly left undetermined—no doubt for some good

reason, but what it was does not appear. It is consistent with this that question (A) was decided on some view of the construction restricted to, and sufficient for, its determination but not capable of affording a basis for the determination of question (B) (i). It is therefore impossible to say that the decretal order of 1937 necessarily established as the legal foundation of its conclusion some matter which would also conclude the present question.

I have said that the reason why question (B) was not answered does not appear. The question does not seem to have been premature in the strict sense of the term, for it concerned the existence of a then vested interest. Nevertheless, on the answer given to question (A), it may have been considered that an answer to question (B) was not immediately necessary, for in any event Mrs. Neil could not receive the income of the one-half share during Grace's lifetime. This still leaves open the possibility that question (A) was answered on some view of the construction of the Will not going to Mrs. Neil's interest in *corpus*; indeed it strengthens that possibility.

The conclusions stated above are arrived at by restricting consideration to the Decretal Order itself and to the Originating Summons. I think that I am required so to restrict myself. I believe that it may be fairly said that this was common ground during argument but in any event it is well settled. They are also arrived at independently of any considerations arising out of the deed of compromise made between certain of the parties (Grace, and the children of life-tenants) after the Decretal Order of 1937, the consideration for which was expressed to be the abandonment of Mrs. Neil's right of appeal to the High Court. On the view I have taken, it is unnecessary to discuss these considerations. I do no more than to point out that not all the persons interested were parties to that deed and that, so far at any rate as its express terms are concerned, the deed does not purport to relate to the effect of the Decretal Order as an estoppel. That may be (and it is only speculation) because the parties to the deed considered that the Decretal Order did not affect any question of the distribution of *corpus*. In terms the deed is restricted to the disposition of income during Grace's lifetime, and leaves the parties free to pursue their claims to both *corpus* and income after her death.

I may look at the reasons for judgment of Nicholas, J., as a matter of authority as distinct from any question of estoppel. I think that I should follow those reasons, so far as they go, for this is more than a matter of following the decision of another judge on identical language in a different will (*Re Masson* 117 L.T. 548 cf. *Re Lart* (1896) 2 Ch. 788). I say so far as they go, because the questions before me involve matters not necessary to be considered under the summons as it came before His Honour and, therefore, not considered by him. At the same time, I find it necessary to examine independently certain aspects of the whole question, even on some points which may overlap with those considered by Nicholas, J., who thought that the testator intended " one division and one class." For there is but one problem of construction of this unusual collocation of words and it must be considered as a whole.

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Whatever else is obscure, it is at least clear that here there is but one gift of the remainder. There is not, that is to say, a gift of the remainder to children of the daughter followed by a separate substitutional gift to their grandchildren. There is but one gift to their " issue "—at least up to and including grandchildren—into which is introduced a qualification affecting the interests of grandchildren. This is apparent from the grammatical construction adopted. The use of the present participle " taking " is inapt if " issue " means only " children," that is to say, a class different from grandchildren. It is apt only if " issue " includes grandchildren, the sub-class for whom the qualifying clause makes special provision. In face of this indication I am helped neither by cases on the meaning of " issue " as used in other contexts nor by inferences drawn from the use of " issue " interchangeably with children elsewhere in the Will. The distinction between one gift and two may not affect the question what interests are taken by the grandchildren, but it may be significant on the question whether the children of the life-tenants were meant to take stirpitally. I shall deal with the question of the interests of grandchildren, and the question of Mrs. Neil's interest, in that order.

The phrase " *per stirpes* " may or may not include the idea of substitution and absence of competition between successive generations according to the context in which it is used. If it is found in a simple gift to persons who are all members of the same generation, but are of different stocks, the effect of the phrase can only be to define the respective shares of the takers, e.g., gift " to the children of A and of B *per stirpes*." Where, however, the gift is to a class of persons described by a word or phrase which is descriptive of a succesion of generations, e.g., " issue," the position is more complex. In such a case the phrase " *per stirpes* " takes the case out of the *prima facie* rule of division *per capita* amongst all " issue," of whatever generation (*Sidey* v. *Perpetual Trustees Estate and Agency Co. of N.Z.* (1944) A.C. 194 at p. 201), and imports substitution and absence of competition between members of successive generations. See *Dick* v. *Lacey* (8. Beav. 214); *In re Rawlinson* ((1909) 2 Ch. 36); *Sidey's* case (*supra*, at p. 201). " I am obliged to consider, that the words " *per stirpes* " not only import distribution, but also import succession or some species of representation. If that be so, and the children are excluded from taking concurrently with the parents, as I think they are, the question then is, in what species of succession are they to take? and I think they can only take by substitution "—*Dick* v. *Lacey* per Lord Langdale, M.R., at pp. 221–2. And, more generally, " it is certainly not very probable, *a priori*, that a testator should intend that parents and children and grandchildren should take together as tenants in common *per capita*; and the Court will not very willingly adopt such a construction "—Sir R. T. Kindersley, V.C., in *Cancellor* v. *Cancellor* (Dr. & Sm. 194 at p. 198).

The reasoning of the cases which I have cited is, I think, applicable here, where the phrase " grandchildren if any taking *per stirpes* " is used in a scheme of provisions for descendants of the Testator at least up to and including great-grandchildren, and, within that scheme, forms part of a gift to the " issue " of his daughters. Some force is added to this reasoning

by the use of the phrase " if any," which, in a gift so economically worded, cannot be regarded as referring merely to the possibility that the daughters might not have grandchildren at all, and indicates rather that the Testator had in mind the possibility that there might not be grandchildren in existence at the period of distribution.

A construction whereby grandchildren take substitutionally is, I think, more consonant with the intention of the Testator as disclosed by the Will than is any of the alternative constructions, whereby grandchildren take originally, advanced on behalf of the grandchildren other than John Arthur Xavier McDonnell. These involve competition between parents and children. But it is apparent, I think, that the Testator intended in some way to exclude grandchildren from competition with other issue— he gives to issue " in equal shares," but grandchildren are to take " *per stirpes.*" The reconciliation of these provisions is, I think, to be found in a substitutional construction rather than in any of the methods of construction advanced for the grandchildren. On a substitutional construction those of issue who take originally do take " in equal shares." Whatever events happen, the shares remain equal and fixed, competition from grandchildren being excluded. Grandchildren come in, *per stirpes*, only to take the share of a parent who has died before the period of distribution.

I come now to the question of Mrs. Neil's share. That question turns essentially upon whether, as amongst children of the life tenants, the division intended was in equal shares *per stirpes* or in equal shares *per capita*. Once that question is determined, it does not matter for present purposes whether the *corpus* was wholly distributable on the death of the longest liver of the life-tenants or whether it was distributable as to one-half on the death of each life-tenant.

Much stress has been laid on the argument that there should not be imputed to the Testator an intention that the children of one life-tenant should be left without provision until the death of the other. That is an argument affecting primarily the question whether there one distribution was intended or two, rather than the criticial question whether division was to be stirpital or capital. In so far as these are matters proper to be considered, there is a countervailing consideration of the same type but going to the question whether the division was intended to be capital or stirpital. When the Will was made Grace was a widow with three children and Emily Sarah was a spinster. The distinction between their respective circumstances was in the mind of the Testator; it is reflected in the differing provisions of the specific devises. If a stirpital division were intended, it is to be expected that the Testator would have provided for the contingency of one of his daughters dying without issue, just as he has expressly adverted to the possibility that there might be no grandchildren.

Many cases have been cited, but the relevant reasoning is sufficiently set out in the judgment of Dixon, J., in *Sumpton* v. *Downing* (*supra*), especially at pp. 87–89. The essential step for the purposes of Mr. Wallace's argument is the last step in the method of construction stated on page 88: " Thus a gift to A, B and C for their lives and at their deaths to their children in equal shares is construed as a limitation to A, B and C for their respective lives as tenants in common with remainders severally

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expectant upon their respective lives. It is easy to take the next step and say that the several remainders are to their respective children *per stirpes* and not to the children of all of them as a composite class."

The last step is a separate step. It rests upon inference, and therefore cannot be taken in face of some express provision sufficient to exclude inference. "At bottom," His Honour said (p. 89), "the principle must be that a division of a fund maintained or repeated through successive generations is ground for inferring a final stirpital distribution and with other circumstances may justify the conclusion." I do not think that any such inference can be drawn where, within the framework of the final distribution, the Testator has expressly stated the limited extent to which he intends a stirpital division to be made.

Here, as I have said, there is but one gift of the remainder. 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.

Whether or not the earlier steps in the suggested method of construction are applicable here it is for present purposes unnecessary to determine. In many cases the method of construction may be applicable as a whole. But its several parts do not necessarily go together. It is all a question of the construction of the particular Will. The terms of the present Will are such as to exclude the inference of a stirpital division amongst children of life-tenants. And that alone is sufficient to negative Mrs. Neil's claim to take one-half of the *corpus*. For no other ground than the adoption of the method of construction set out in Dixon, J's judgment in *Sumpton* v. *Downing*, in its entirety and necessarily including the final step of a stirpital division, has been suggested for taking the gift to issue out of the *prima facie* rule, otherwise applicable, in favour of a division *per capita*. I should add a reference to *In re Foster* ((1946) 1 Ch. 135) where the cases cited by Mr. Wallace are gathered together and discussed and where, at p. 141, Romer, J., states some conditions governing the application of what His Lordship calls "the rule in *In re Hutchinson's Trusts* (21 Ch. D. 811)" which corresponds to what I have referred to as the method of construction set out in Dixon, J's judgment in *Sumpton* v. *Downing* (*supra*). The first and second of those conditions support, I think, the views hereinbefore expressed; and I refer to one other statement in the judgment namely that "a too rigid application of the rule would in many cases destroy what Romer, J., recognised as its general merit, namely, that it gives effect to the probable intention of testators." That, I think, is the whole point. The rule, by appropriate implications of words and by inferences from the circumstances, does no doubt give effect to the probable intention of testators in many possibly in most cases of a gift to two or more life-tenants with remainder to their children. But, as a rule dependent for its application upon implication

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and inference, it must yield to express provisions. 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. This is a considerable expansion of the language of the gift; but the language is very elliptical and must be considerably expanded on any view of its construction.

The conclusion is that a one-fourth share of *corpus* is taken by each of the Defendants, Mrs. Neil, Stanley Augustine McDonnell, Mrs. Campbell and John Arthur Xavier McDonnell (who takes by way of substitution for his father Wilfred and to the exclusion of Wilfred's estate). The other grandchildren, children of living parents, take no interest.

No. 8.

DECRETAL ORDER.

No. 8.
Decretal Order, 3rd December 1948.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 727 of 1937.

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 ALFRED NEWMARCH and ARTHUR JOSEPH McDONALD - - - - *Plaintiffs*

and

ENA GERTRUDE NEIL, GRACE McDONNELL, STANLEY AUGUSTINE McDONNELL, WILFRED McDONNELL and INES MARIE AUGUSTA McDONNELL *Defendants.*

BY ORDER OF REVIVOR.

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 ARTHUR JOSEPH McDONALD and ANSTY WITHERS ROCKWELL - - - - *Plaintiffs*

and

ENA GERTRUDE NEIL, STANLEY AUGUSTINE McDONNELL and INES MARIE AUGUSTA McDONNELL - - *Defendants.*

AND BY AMENDMENT.

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.

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 8. Decretal Order, 3rd December 1948, *continued.*

Between ARTHUR JOSEPH McDONALD and ANSTY WITHERS ROCKWELL - - - - - *Plaintiffs*

and

ENA GERTRUDE NEIL, STANLEY AUGUSTINE McDONNELL, INES MARIE AUGUSTA McDONNELL, SHEILA McDONNELL and MARIE FRANCES McDONNELL - - - - - - - - *Defendants.*

AND BY FURTHER AMENDMENT.

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 ARTHUR JOSEPH McDONALD and ANSTY WITHERS ROCKWELL - - - - - *Plaintiffs*

and

ENA GERTRUDE NEIL, STANLEY AUGUSTINE McDONNELL, INES MARIE AUGUSTA McDONNELL, SHEILA McDONNELL and MARIE FRANCES McDONNELL, JOHN ARTHUR XAVIER McDONNELL - - - - - - - - *Defendants.*

THIS SUIT instituted by Originating Summons coming on to be further heard before the Honourable Bernard Sugerman a Judge of the Supreme Court sitting in Equity on the Tenth day of September last WHEREUPON AND UPON HEARING read the said Originating Summons AND UPON HEARING what was alleged by Mr. Henry of Counsel for the Plaintiffs by Mr. Wallace of King's Counsel and Mr. Stuckey of Counsel for the Defendant Ena Gertrude Neil and by Mr. Hardie K.C. and Mr. Kerrigan of Counsel for the Defendants Stanley Augustine McDonnell and Inez Marie Augusta McDonnell THIS COURT DID ORDER that the Plaintiffs be at liberty to amend the said Originating Summons by adding parties and generally AND this Court did by Consent ORDER the hearing of the said Originating Summons to stand over to the Seventeenth day of September last AND UPON the said Originating Summons having been amended by adding the names of Sheila Grace McDonnell and Marie Frances McDonnell as additional Defendants and by deleting question (B) and the word "and" immediately preceding it therefrom and by substituting therefor the following :—

(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

AND by adding a further question as follows :—

(C) The grandchildren of the said Grace McDonnell deceased and if so which of them take any interest in the said *corpus* and if so what interest

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No. 8. Decretal Order, 3rd December 1948, *continued.*

AND by adding to the orders asked for the following namely :—

3. That the Decretal Order of the 27th September 1937 made herein be varied by substituting the name Sheila Grace McDonnell for the name Stanley Augustine McDonnell.

AND UPON the said Amended Originating Summons coming on to be heard again on the Seventeenth day of September last AND UPON HEARING what was alleged by the said Counsel for the said respective parties AND UPON HEARING what was alleged by Mr. R. C. Smith for the Defendant Sheila Grace McDonnell and by Mr. MacFarlan for the Defendant Marie Frances McDonnell THIS COURT DID BY CONSENT of all parties then present in the case order that the Originating Summons stand adjourned to the Twenty-fourth day of September last with leave to the Plaintiff to join other parties if so advised AND the said amended Originating Summons having been further amended by adding as a Defendant John Arthur Xavier McDonnell UPON the said amended Originating Summons coming on to be heard again on the 8th, 15th, 22nd and 29th days of October last and the 5th, 19th and 26th days of November last THIS COURT DID ORDER that the Plaintiffs be at liberty to amend the amended Originating Summons by substituting the name of " Inez Marie Augusta Campbell " for the name " Inez Marie McDonnell " and to add the word " Grace " between the words " Sheila " and " McDonnell " and the said amended Originating Summons having been amended accordingly WHEREUPON AND UPON HEARING read the said amended Originating Summons the Decretal Order made on the 27th day of September, 1937, the Affidavit of Alfred Newmarch sworn the 16th day of July, 1937, the Affidavit of Thomas Bruce Warren sworn the 24th day of August last and the Affidavit of Anstey Withers Rockwell sworn the 15th day of September last and all filed herein AND UPON READING Exhibit " A " put in evidence on behalf of the Plaintiffs and Exhibit 1 put in evidence on behalf of the Defendant Ena Gertrude Neil and Exhibit 2 put in evidence on behalf of the Defendant Marie Frances McDonnell AND UPON HEARING what was alleged by the said Counsel for the parties aforesaid and by Mr. Benjamin of Counsel for the Defendant John Arthur Xavier McDonnell THIS COURT DID ORDER that this suit should stand for judgment and the same standing in the paper this day for judgment accordingly THIS COURT DOTH DECLARE that upon the true construction of the Will of the above-named Testator William McDonald deceased and in the events which have happened the *corpus* of the residuary estate of the Testator is divisible amongst the Defendants Ena Gertrude Neil Stanley Augustine McDonnell Ines Marie Augusta Campbell and John Arthur Xavier McDonnell in equal shares AND THIS COURT DOTH ORDER that Messrs. Salwey and Primrose be and be deemed to have been at liberty to act as Solicitors for the Defendants herein as well as for the Plaintiffs AND THIS COURT DOTH FURTHER ORDER that for the purposes of so much of this suit as was left undetermined by the Decretal Order made on the 27th day of September, 1937, and in particular for the purpose of questions (B) and (C) in the amended Originating Summons the Defendant Sheila Grace McDonnell be and she is hereby appointed in lieu of the Defendant Stanley Augustine McDonnell appointed by the said Decretal Order to represent the grandchildren of Grace McDonnell and Emily Sarah Darvall other than the Defendant John Arthur Xavier

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No. 8. Decretal Order, 3rd December 1948, *continued.*

McDonnell AND THIS COURT DOTH FURTHER ORDER that it be referred to the Deputy Registrar in Equity or to such officer of this Court as the Master in Equity may appoint to tax as between Solicitor and client and certify the costs of all parties of this suit and that such costs when so taxed and certified as aforesaid to be paid out of the Estate of the above-named William McDonald deceased in manner following that is to say: The costs of the Plaintiffs be retained by them or paid to their Solicitors and the costs of the Defendants be paid to them respectively or to their Solicitors AND all parties are to be at liberty to apply as they may be advised.

Passed this 14th day of January, 1948.

R. T. C. S.

Entered same day.

J. A.

R. T. C. STOREY,
Deputy Registrar in Equity.

In the High Court of Australia in its Appellate Jurisdiction.

No. 9. Notice of Appeal, 22nd December 1948.

No. 9.

NOTICE OF APPEAL to High Court of Australia.

TAKE NOTICE that the Appellant herein appeals to the High Court of Australia from so much of the Decretal Order of the Supreme Court of New South Wales in its Equitable Jurisdiction made by the Honourable Bernard Sugerman a Judge of the said Supreme Court sitting in Equity on the Third day of December instant in the suit instituted by Originating Summons No. 727 of 1937 in which the present Respondents Arthur Joseph McDonald and Anstey Withers Rockwell were by order of revivor dated the Twenty-seventh day of August One thousand nine hundred and forty-eight the Plaintiffs and the present Appellant and the Respondents Stanley Augustine McDonnell Ines Marie Augusta Campbell Sheila McDonnell Marie Frances McDonnell and John Arthur Xavier McDonnell were Defendants by amendments made respectively the Fifteenth and Twenty-third days of September One thousand nine hundred and forty-eight as declared that upon the true construction of the Will of the above-named Testator William McDonald deceased and in the events which had then happened the *corpus* of the residuary estate of the Testator is divisible amongst the Appellant and the Respondents Stanley Augustine McDonnell Ines Marie Augusta Campbell and John Arthur Xavier McDonnell in equal shares upon the following amongst other grounds, namely :—

1. That the said Judge was in error in declaring that upon the true construction of the Will of the said Testator and in the events which had happened the *corpus* of the residuary estate of the Testator is divisible amongst the Appellant and the Respondents Stanley Augustine McDonnell Ines Marie Augusta Campbell and John Arthur Xavier McDonnell in equal shares.

2. That the said Judge should have declared that upon the true construction of the said Will and in the events which have happened the *corpus* of the said residuary estate was divisible upon the death of the

No. 9. Notice of Appeal, 22nd December 1948, *continued.*

said Testator's daughter Grace McDonnell equally between the Appellant as to one moiety thereof and the Respondents Stanley Augustine McDonnell Ines Marie Augusta Campbell and John Arthur Xavier McDonnell as to the other moiety thereof, equally between them.

3. That the said Judge was in error in holding that he should follow the reasons for judgment of the Honourable Harold Sprent Nicholas Chief Judge in Equity upon the determination of question 1 of the said Originating Summons for making the declaration in the Decretal Order made in the said suit by the said Chief Judge in Equity on the Twenty-seventh day of September One thousand nine hundred and thirty-seven whereby it was declared that upon the true construction of the said Will and in the events which had then happened the Appellant was entitled to no portion of the income of the residuary estate of the said Testator during the lifetime of the said Grace McDonnell and that the said Grace McDonnell was entitled during her life to the whole of the income of the residuary estate of the said Testator available for distribution.

4. That the said Judge was in error in holding that there was but one gift of the remainder after the deaths of the Testator's daughters Grace McDonnell and Emily Sarah McDonald.

5. That the said Judge was in error in the meaning he attached to the use by the Testator of the present participle " taking."

6. That the said Judge was in error in holding that the terms of the Will were such as to exclude the inference of a stirpital division amongst children of life-tenants.

7. That the said Judge should have applied the rule in *Re Hutchinson's Trusts* (21 Ch. D. 811) to the construction of the said Will.

Dated this Twenty-second day of December One thousand nine hundred and forty-eight.

G. P. STUCKEY,
Counsel for the Appellant.

NOTE.—This Notice of Appeal is filed by Messieurs SALWEY AND PRIMROSE of 155 King Street, Sydney, Solicitors for the Appellant.

No. 10.

No. 10. Reasons for Judgment of Sir John Latham, C.J., 5th May 1949.

REASONS FOR JUDGMENT—Sir John Latham, C.J.

The Will of William McDonald, after providing for certain bequests and specific devises of lands, gave to his Trustees the rest and residue of his real and personal estate " Upon trust (subject to the annuities hereafter mentioned) for my said two daughters Grace McDonnell 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."

The Testator died in 1904, being survived by his daughter Grace McDonnell and his daughter Emily, who became Mrs. Darvall. Emily died in 1937, leaving one child, Ena Gertrude Neil, the Appellant. Grace died in 1948. Her son Percy had died without issue in 1892. Another son Wilfred Francis, who died in 1947, left a son John Arthur Xavier, an infant,

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No. 10. Reasons for Judgment of Sir John Latham, C.J., 5th May 1949, *continued.*

and another son Stanley is still alive and has six children. A daughter Inez, who became Mrs. Campbell, is alive, and has an infant daughter, Ann, who was born in the life of her grandmother Grace.

It has been held by Sugerman, J., that the *corpus* of the residue is divisible equally between the children of the daughters, namely Mrs. Neil, Mrs. Campbell, Stanley and the son of Wilfred, John Arthur Xavier, who takes the share which his father would have taken if he had survived his mother Grace. It was held that the children of Stanley and the daughter of Mrs. Campbell took no interest. Mrs. Neil appeals to this Court, contending that she is entitled to one half of the residue in succession to her mother Emily.

The Will provided that, subject to certain annuities which have not yet all fallen in, the residue of testator's estate should be held upon trust (1) for his daughters Grace and Emily for life in equal shares; (2) with remainder in fee to their issue in equal shares; (3) their grandchildren, if any, taking *per stirpes*. The form of the gift to the grandchildren shows that grandchildren (that is, grandchildren of Grace and Emily) are included in "issue" of Grace and Emily. Thus Sugerman, J., has held that the gift to grandchildren is substitutional, and that grandchildren who were alive at the time of the death of the last life tenant, that is Grace, take their parent's share by substitution only and do not take in competition with their parents. There is no appeal against this decision, which is plainly supported by the words of the Will. Thus John Arthur Xavier McDonald takes the share of his father Wilfred Francis McDonnell, but the children of Stanley, Mrs. Neil and Mrs. Campbell do not take any interest. The question which arises upon this appeal is whether the ultimate gift of the residue is a gift to the issue of Grace and Emily in equal shares, that is *per capita*, or whether, on the other hand, the issue of Grace take one-half and the issue of Emily the other half of the residue, that is *per stirpes*. Sugerman, J., has held that the division of the residue among the issue should be *per capita* and not *per stirpes*.

When Grace and Emily were both alive the income was paid in equal shares to them. After the death of Emily there was no doubt that Grace was entitled to at least one-half of the income. But a question arose as to whether the other half of the income should be paid to the Appellant Mrs. Neil, the issue of Emily, or whether it should be paid to Grace, the surviving life tenant. Mrs. Neil contended that she was entitled to take the whole of her parent's share of income. In proceedings by way of originating summons before Nicholas, C.J. in Eq., it was decided that Grace took the whole of the income for her life, His Honour taking the view that the Will dealt with the residue as a single mass. Nicholas, C.J. in Eq., drew attention to the fact that in the earlier part of the Will there were specific devises to the daughters separately with provisions relating to the issue of each of them, but that in the case of the residue there was only a single gift constituted by the words "with remainder in fee to their issue in equal shares" and that the whole of the residue was given "subject to the annuities hereafter mentioned." He held that the Testator meant that there should be only one division and one class of ultimate beneficiaries, and that the residue should be given over at one time. The result of this construction of the Will was that the surviving life-tenant Grace took the income of the whole of the residue for her life.

The originating summons with which Nicholas, C.J. in Eq., dealt enquired as to the disposition of the income, and also as to the disposition of the *corpus*, but His Honour answered only the question with respect to the disposition of the income, leaving unanswered the question as to the *corpus*. Mrs. Neil proposed to appeal from the decision, which excluded her from any share in the income. She claimed that she was entitled to one-half of the income of the residue during the lifetime of Grace. A compromise was arranged whereby Grace continued to receive one-half of the income and the remaining half during the lifetime of Grace was, as from the date of the death of Emily, divided between Mrs. Neil and the then living children of Grace, namely, Stanley, Wilfred and Ines. In the case of each half of the income, it was declared to be subject to the annuities for which the will provided. It was expressly agreed that nothing in the compromise should prejudice or affect the rights of the parties in respect of the income of the residuary estate after the death of Grace and in respect of the *corpus* thereof.

The decision of Nicholas, C.J. in Equity, was a decision only as to income, but the reasoning upon which that decision was based depended upon the construction of the whole Will and in particular upon the view which His Honour took that the *corpus* was dealt with as one mass, so that it should be retained undivided while either of the life-tenants was alive, and that the provision relating to the income dealt with the whole income up to the period of division of the *corpus*. The actual decision, however, was a decision only as to the disposition of the income and does not estop the parties from submitting any contention as to the *corpus*. The decision of Nicholas, C.J. in Eq., therefore does not operate by way of estoppel, but it is a decision to which other courts will naturally pay respect in relation to any question affecting the construction of the Will which may come before them.

The Originating Summons was amended and Sugerman, J., on 3rd September, 1948, answered the following questions :—

> " . . . whether on the true construction of the Will and in the events which have happened (i.e., have now happened) including the death of Grace :—
>
> (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."

The answers given have already been stated.

Sugerman, J., made an independent investigation of the questions which arose, regarding the reasons for judgment of Nicholas, C.J. in Eq., as a matter of authority, not as creating an estoppel. Sugerman, J., was of opinion that it was at least clear that there was only one gift of the remainder. The gift was a single gift to the children of the daughters of the Testator in equal shares, " their grandchildren if any taking *per stirpes*." His Honour called attention to the fact that an express

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No. 10. Reasons for Judgment of Sir John Latham, C.J., 5th May 1949, *continued.*

provision was made for stirpital division in the case of the grandchildren of the daughters of the Testator, but that no such provision was made in the case of the children of the daughters.

When there is a gift to A for life followed by a gift to a class in equal shares it is obvious that the members of the class take equally. Where there is a gift to A and B for life and then in equal shares to a class which is not defined by reference to relationship to A and B the position is the same. Where the gift is to A and B for life and then to the children of A and B, and A and B are either of the same sex, so that they cannot have children in common (as in the present case), or A and B do not marry each other but each have children, the question arises as to whether the children are entitled *per capita* or *per stirpes*. If the terms of the disposition show that the Testator intended that the property which is the subject of the gift should be kept together in a single mass until its ultimate disposition the answer to the question will be that the children take *per capita* under the ultimate gift. If, on the other hand, the terms of the disposition show that separate gifts of undivided parts of the property were made to the parents and that it was intended that the children should take separate subsequent interests upon the several events of the deaths of their respective parents, then the ultimate division will be *per stirpes* and not *per capita*.

In the present case the gift to the issue of the daughters of the Testator is a gift to the issue as tenants in common—the direction is express that the property is to be held for " their issue in equal shares."

The general rule as stated in Hawkins on Wills, 2nd Edition, p. 149, is: " Under a devise or bequest to the children of A and of B as tenants in common *prima facie* the children take *per capita*, not *per stirpes*: *Lady Lincoln* v. *Pelham*, 10 Ves. 166." In *Sumpton* v. *Downing*, 75 C.L.R. 76, at p. 87, the rule was stated by Dixon, J., in the following words :—

> " *Prima facie*, under a gift to the children of named persons as a class, the children take *per capita* and not *per stirpes*. It has been said that no man who was guided only by a knowledge of English speech would suppose that a direction to distribute money between the children of A and of B equally could mean anything but a division in which each child took a share equal with that of every other child, whether his parent was A or B. However this may be, it is enough that at least the *prima facie* legal meaning of such a direction is that the distribution should be *per capita*. . . . ' But this mode of construction will yield to a very faint glimpse of a different intention in the context ' : Jarman on Wills, 7th ed. (1930), p. 1688. The intention to the contrary has been discerned in gifts to several for life with remainder to their children when the form of the gift creates a tenancy in common in those taking for life and remainders expectant upon the determination severally of the interest of each tenant in common. Thus a gift to A, B and C for their lives and at their deaths to their children in equal shares is construed as a limitation to A, B and C for their respective lives as tenants in common with remainders severally expectant upon their respective deaths. It is easy to take the next step and say

that the several remainders are to their respective children *per stirpes* and not to the children of all of them as a composite class taking *per capita.*"

The *prima facie* rule can therefore be displaced if the words of the Will disclose an intention to make separate gifts upon the separate events of the deaths of the parents of the children who take after them. Thus, as Dixon, J., said in *Sumpton* v. *Downing* (*supra*) at pp. 88–89 :—

> "A gift to A, B and C for their lives as tenants in common and 'at' their deaths remainder to their children suggests more strongly that a distinct future interest is expectant upon the death of each. An expression denoting no more than that the future interest takes effect at a time when the previous takers are dead is consistent with, if not indicative of, an intention that the subsequent estate or interest must await the death of all."

Thus in many cases attention is drawn to the fact that the interest given to the children is not given merely as a future interest which follows upon the termination of a preceding estate, but that it is given as at or after or upon the deaths of the parents of the children who are the ultimate beneficiaries.

In the case of *Re Hutchinson's Trusts*, 21 Ch. D. 811, a catalogue of a number of cases will be found. A consideration of these cases shows 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" (I quote from pp. 814–816 of the report in *Hutchinson's* case) 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 period of their natural lives." In *Hutchinson's* case the life-tenants were both males (in the present case they are both females—Emily and Grace), therefore no child could be a child of both the life-tenants. The gift was "after the decease" of the said F. H. S. and R. S. to their children "share and share alike." It would have been unreasonable to construe the former words as applying only to a single event of contemporaneous death of the life-tenants. It was therefore held that the words "after the decease" should be read as meaning "after the death of each," and "to their children" as "to their respective children." Accordingly one moiety belonged to the representatives of F. H. S. and the other moiety was divisible equally between the children of R. S. and the persons claiming under them. The decision depended upon the facts that there was not merely a provision that the ultimate interest awaited the termination of the prior interests, but that there was an express reference to the death of the life-tenants, and that the death of the life-tenants was constituted by two separate events, so that an intention to make two several gifts was disclosed—each taking effect upon the death of a life-tenant.

In *In re Errington, Gibbs* v. *Lassam* [1927] 1 Ch. 421, Romer, J., explained the exception to the *prima facie* rule which has already been stated. The manner in which the exception is stated indicates the importance of there being something more in the provision than a mere subsequent interest. There must be some reference to the events of the deaths of the

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life-tenants before the exceptional rule which was stated in *Re Hutchinson* can be applied. Romer, J. (at p. 425), stated the exception in the following terms :—

> " Where a testator gives the income of his estate to two people, A and B, for their lives and follows that gift by a direction that at their death, or at their deaths, or at or after the death or deaths of A and B the property is to go to their issue, the Court does not construe the gift as a gift only to take effect on the death of both in favour of the issue of both, but construes it as a gift, to take effect on the death of each, of the share to the income of which the deceased was entitled, to the issue of the deceased."

In Jarman, 7th Edn., Vol. III, at p. 1690, the same emphasis is placed upon the necessity of words referring to the deaths of the life-tenants as necessary to displace the operation of the *prima facie* rule of distribution *per capita* among the children of life-tenants where they take after the determination of the interests of the life-tenants. In Jarman the rule is stated in the following words :—

> " 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*. But of course this construction is inadmissible if the income is expressly disposed of until the death of all the tenants for life, and the capital is then given to all the children in equal shares ; in such a case the division will be *per capita*, unless there are words in the ultimate gift requiring a division *per stirpes*."

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. I agree with Nicholas, C.J. in Eq., 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, C.J. in Eq.) 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. I agree also 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. In my opinion the general rule and not the exception rule applies, the decision of Sugerman, J., was right and the appeal should be dismissed.

My brethren are of opinion that the appeal should be allowed. I agree with the order proposed as to costs.

No. 11.

REASONS FOR JUDGMENT--Dixon and Williams, JJ. (Joint Judgment).

In the High Court of Australia in its Appellate Jurisdiction.

No. 11. Reasons for Judgment of Dixon and Williams, JJ. (Joint Judgment), 5th May 1949.

This is an appeal from a Decretal Order made by Sugerman, J., sitting as the Supreme Court of New South Wales in Equity, whereby he declared that upon the true construction of the Will of William McDonald and in the events which have happened the *corpus* of the residuary estate of the Testator is divisible amongst the Appellant Ena Gertrude Neil and the Respondents Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell in equal shares. The Appellant claims that His Honour should have declared that this *corpus* is divisible one-half to herself and the other half among these Respondents in equal shares. The Testator died on 11th June, 1904, having duly made his last Will and testament on 11th September, 1902, whereby, after certain specific bequests and devises, he gave his real and personal estate to his Trustees and executors upon trust as to the rest and residue thereof (subject to certain annuities) "for his 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*."

At the dates of the Will and death Grace McDonnell was a widow with three surviving children, Stanley, Ines and Wilfred, a fourth child Percy having died without issue on 10th March, 1892. Grace died on 4th July, 1948, survived by Stanley and Ines but predeceased by Wilfred who died on 12th December, 1947, survived by one child, the Respondent, J. A. X. McDonnell. At the date of the Will the other daughter, Emily, was aged 37 and unmarried but she married Gerard Ashley Darvall soon after the death of the Testator on 21st September, 1904, and died on 8th June, 1937, survived by one child, the present Appellant.

The suit in which the declaration under appeal was made was first instituted by Originating Summons soon after the death of Emily on 31st July, 1937, and came on for hearing before Nicholas, C.J. in Eq., on 27th September, 1937, when His Honour declared that the present Appellant was entitled to no portion of the income of residue during the life of Grace and that Grace was entitled to the whole of the income of residue between the death of Emily and her own death. His Honour thought that the scheme of the Will was that there should be only one division of *corpus* upon the death of both life-tenants amongst one class of remaindermen which meant that the whole of the residue should vest in possession in all the remaindermen at the same time, that is to say on the death of both tenants for life, and that in the meantime the share of income of the daughter who first dies should vest in the survivor for her life. His Honour ordered that the second question asked in the Originating Summons, which raised the questions decided by Sugerman, J., should stand over generally. The Originating Summons was amended before it was heard by Sugerman, J., and the questions which he was asked to answer were as follows: whether upon the true construction of the above-mentioned Will and in the events which have happened, (B) the *corpus* of the residuary estate of the above-mentioned Testator is divisible equally *per stirpes* or *per capita* among the children of Grace

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McDonnell deceased and of Emily Sarah Darvall deceased and in the case 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.

It was implicit in the declaration of Nicholas, C.J. in Eq., that the class of remaindermen should be ascertained upon the death of the survivor of the life-tenants and Sugerman, J., considered that he should follow this reasoning of Nicholas, C.J. in Eq. He was independently of opinion that, whatever else was obscure, it was at least clear that there was but one gift of the remainder to the issue of Grace and Emily (which we understand to mean a devise and bequest *in futuro* of the *corpus* of the estate as a whole to a single class of beneficiaries) into which was introduced a qualification affecting the interests of grandchildren, and this led him to hold that residue then became divisible *per capita* amongst the children of both tenants as a single class with a substituted gift to their children of the share of any of them who died before the period of distribution leaving children. In this way J. A. X. McDonnell succeeded to the one-fourth share which his father would have taken if he had survived Grace. In this Court we are not bound by the reasoning of Nicholas, C.J. in Eq., although we must give it careful attention and we are therefore able to approach the true construction of the Will free from any fetters.

The trusts of residue are (1) to Grace and Emily for life in equal shares ; (2) remainder in fee to their issue (that is the issue of Grace and Emily) in equal shares ; (3) with a substituted gift to their grandchildren (that is the grandchildren of Grace and Emily) *per stirpes*, so that the children of Grace and Emily who lived after the Testator would take vested interests in remainder in residue with a substitutional gift to his or her child or children of the share of any child who died before his or her interest in residue vested in possession leaving issue. " Issue " in the second trust may mean children and it is so used in this sense in other parts of the Will, but we prefer to construe the word as meaning children and grandchildren of Grace and Emily.

There is no appeal from the declaration of Sugerman, J., that J. A. X. McDonnell is entitled to the share which his father would have taken if he had survived Grace. The question at issue before us is whether he and the two surviving children of Grace are each entitled to a one-fourth or one-sixth share of residue. His Honour thought and we agree with him that the words " *per stirpes* " in the trusts of residue refer to the children of Grace and Emily as the stirps and not to Grace and Emily themselves, but it by no means follows from this that residue as a whole only became divisible on the deaths of both Grace and Emily amongst the children of Grace and Emily *per capita* with a substituted gift *per stirpes* to the children of any such children who died before the period of distribution leaving issue. The stirpital provision would operate equally effectively if one-half of residue became divisible amongst Grace's children on her death *per capita* with a similar substituted gift *per stirpes* to their children and the other half of residue became divisible on Emily's death amongst her children *per capita* with a similar substituted gift *per stirpes* to their children. The question at the root of the matter is

whether Nicholas, C.J. in Eq., and Sugerman, J., were right in thinking that on the true construction of the Will no part of residue vested in possession in the remaindermen until the deaths of both Grace and Emily.

We cannot agree with Sugerman, J., that it is clear that there is but one gift of the remainder. We think that the Will raises problems of interpretation similar to those recently discussed in this Court in *Sumpton* v. *Downing*, 75 C.L.R. 76. We consider that the trusts of residue are certainly 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, an interpretation which found favour with their Honours in the Court below. It can be said in favour of the first 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. On the other hand Emily was thirty-nine and unmarried at the death of the Testator (although she married shortly afterwards and may have then been engaged) and the interpretation contended for by the Appellant would mean that if Emily had not married and had a child there would have been an intestacy after her death of a moiety of residue. These considerations would appear at least to balance one another. Since, however, Grace was a widow with three children, perhaps more weight should be attached to the former than the latter consideration. It was also contended that the fact that the trusts of residue were expressly made subject to the payment of the annuities indicated an intention that residue should vest in possession in the remaindermen as a whole. It was said that in this respect the Will resembled the will in *Sumpton* v. *Downing*, but in that will it was the gift of *corpus* which was subjected to the charge of the annuity and of income to one or both of the sisters, whereas in the present Will the whole of the trusts of residue including those in favour of Grace and Emily are made subject to the payment of the annuities. No light is thrown on the crucial question by this provision.

The trusts of residue as a whole appear to fall within the class of cases referred to in Jarman on Wills, 7th Edit., p. 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*. The rule applies to substitutional gifts." So many of the cases on this point were recently discussed in *Sumpton* v. *Downing*, *supra*, that it is unnecessary to cite them again. A typical case is *Wills* v. *Wills*, L.R. 20 Eq. 342, where there was a bequest of residue, the interest thereof to be paid 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. At pp. 344 and 345 Jessel, M.R., said: " In the first place, the will makes a provision for the testator's two children primarily, and then for his grandchildren. The natural course would be, under these circumstances, that after the death of either of the children, his children should be provided for. It is, therefore, very unlikely that he intended that there should be no provision for one branch until the head

In the High Court of Australia in its Appellate Jurisdiction.

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of the other branch should be dead. The testator gives the income of the residue of his estate to his two sons equally for their lives. That would not give to either of them more than a moiety " . . . " The expression ' at their death ' cannot be literal " . . . " There are two possible constructions. The literal construction will not do. The natural and probable construction is that by the children he means the respective children. This was the view taken in *Arrow* v. *Mellish*, 1 De G. & Sm. 355, where the words ' their children ' were held to mean ' their respective children '." 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*, *supra*, and *Abrey* v. *Newman*, 16B 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 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. 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 grandchildren 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 implying 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 therefore only make a declaration from that date.

No. 11.
Reasons for Judgment of Dixon and Williams, JJ. (Joint Judgment), 5th May 1949, *continued.*

We are of opinion the appeal should succeed and that the Decretal Order of the Court below should be varied by striking out the declaration appealed from and inserting in lieu thereof a declaration that upon the true construction of the Will of the Testator and in the events which have happened the *corpus* of the residuary estate has been divisible since the death of the Testator's daughter Grace McDonnell between the Appellant as to one moiety thereof and the Respondents Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell as to the other moiety thereof equally between them. The costs of the appeal remain to be dealt with. It is clear that they must be ordered to be paid out of the estate, those of the Respondent Trustees as between solicitor and client and those of Sheila McDonnell and Marie Frances McDonnell as submitting Defendants. The practice of this Court has not been uniform with respect to directing that the costs of Appellants and Respondents other than Trustees which are ordered to be paid out of the estate should be paid as between party and party or as between solicitor and client. We consider that the ordinary practice when an appeal of this kind is allowed should be to make the same order as is usually made in the Supreme Court of the State from which the appeal comes. In this case, following what we believe to be the general practice in the Supreme Court of New South Wales on appeals in its Equity Jurisdiction, we order that the costs of the Appellant and of the Respondents, Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell should also be paid out of the estate as between solicitor and client.

No. 12.
Order allowing Appeal, 5th May 1949.

No. 12.

ORDER ALLOWING APPEAL

WHEREAS by a Decretal Order of the Supreme Court of New South Wales in its Equitable Jurisdiction made by the Honourable Bernard Sugerman a Judge of the said Supreme Court sitting in Equity on the Third day of December One thousand nine hundred and forty-eight pursuant to an Originating Summons filed in the said Court and subsequently amended wherein the above-mentioned Arthur Joseph McDonald and Anstey Withers Rockwell were Plaintiffs and the above-mentioned Ena Gertrude Neil, Stanley Augustine McDonnell, Ines Marie Augusta Campbell, John Arthur Xavier McDonnell and Sheila McDonnell and Marie Frances McDonnell were Defendants IT WAS DECLARED that upon the true construction of the Will of the above-named Testator

No. 12. Order allowing Appeal, 5th May 1949, *continued.*

William McDonald deceased and in the events which had happened the *corpus* of the residuary estate of the said Testator was divisible amongst the said Ena Gertrude Neil, Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell in equal shares AND WHEREAS on the Twenty-third day of December last the Appellant filed a Notice of Appeal to this Court from so much of the said Decretal Order as declared as aforesaid upon the grounds in the said Notice set forth AND the said appeal coming on to be heard before this Court on the Seventh and Eighth days of April One thousand nine hundred and forty-nine WHEREUPON AND UPON READING the certified copy documents transmitted by the Master in Equity of the said Supreme Court to the New South Wales District Registry of this Court AND UPON HEARING what was alleged by Mr. Wallace of King's Counsel with whom was Mr. Stuckey of Counsel for the Appellant and by Mr. Hardie of King's Counsel with whom was Mr. Kerrigan of Counsel for the Respondents Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell and by Mr. Slattery of Counsel appearing for the Respondents Sheila McDonnell and Marie Francis McDonnell and by Mr. Henry of Counsel for the Respondents Arthur Joseph McDonald and Anstey Withers Rockwell THIS COURT DID ORDER that the said appeal should stand for judgment and the same standing in the list this day for judgment accordingly THIS COURT DOTH ORDER that the said appeal be and the same is hereby allowed AND THAT the Decretal Order of the said Supreme Court appealed from be and the same is hereby varied by striking out the declaration with respect to the division of the *corpus* of the residuary estate of the said Testator and inserting in lieu thereof a declaration that upon the true construction of the Will of the said Testator and in the events which had happened the *corpus* of the residuary estate has been divisible since the death of the Testator's daughter, Grace McDonnell, between the Appellant as to one moiety thereof and the Respondents Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell as to the other moiety thereof equally between them AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs as between solicitor and client of all parties of and incidental to this appeal those of the Respondents Sheila McDonnell and Marie Frances McDonnell as submitting Defendants AND that such costs when so taxed and certified be paid out of the estate of the said Testator the said William McDonald deceased.

By the Court,

F. C. LINDSAY (L.S.),
District Registrar.

No. 13.

ORDER IN COUNCIL Granting Special Leave to Appeal.

In the Privy Council

No. 13. Order in Council granting special leave to appeal, 3rd February 1950.

AT THE COURT AT SANDRINGHAM

The 3rd day of February, 1950

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD CHANCELLOR — SIR ALAN LASCELLES

VISCOUNT HALL

L.S.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 11th day of January 1950 in the words following, viz. :—

" Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) Stanley Augustine McDonnell (2) Ines Marie Augusta Campbell (3) John Arthur Xavier McDonnell (an infant) by his Guardian *ad litem* Joseph Michael Duggan in the matter of an 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 the Petitioners Appellants and (1) Ena Gertrude Neil (2) Arthur Joseph MacDonald (3) Anstey Withers Rockwell (4) Sheila Grace McDonnell (5) Marie Frances McDonnell Respondents setting forth (amongst other matters) : that this is an application for leave to appeal from an Order of the High Court of Australia made on the 5th May 1949 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 Petitioners as to the other moiety thereof equally between them : that the main question 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 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 : that if the Petitioners' contention is correct the residuary estate of the testator is divisible in equal fourths between the Petitioners and the Respondent Ena Gertrude Neil while 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 Petitioners : And humbly praying Your Majesty in Council to grant the

In the Privy Council

No. 13. Order in Council granting special leave to appeal, 3rd February 1950, *continued.*

Petitioners special leave to appeal from the Order of the High Court dated the 5th May 1949 or for further or other relief :

" The Lords of the Committee in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Order of the High Court of Australia dated the 5th day of May 1949 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs :

" And their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

Exhibits

" A " Deed of Family Arrangement, 7th October 1937.

PLAINTIFFS' EXHIBIT.

Exhibit " A "—DEED OF FAMILY ARRANGEMENT.

New South Wales
One Pound
Stamp Duty

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 727 of 1937.

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 ALFRED NEWMARCH and ARTHUR JOSEPH McDONALD - - - - - *Plaintiffs*

and

ENA GERTRUDE NEIL, GRACE McDONNELL, STANLEY AUGUSTINE McDONNELL, WILFRED McDONNELL and INES MARIE AUGUSTA McDONNELL *Defendants.*

THIS DEED OF ARRANGEMENT AND COMPROMISE is made the Seventh day of October One thousand nine hundred and thirty-seven

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"A"
Deed of Family Arrangement, 7th October 1937, *continued.*

Between the above-named PLAINTIFFS of the first part the above-named Defendant ENA GERTRUDE NEIL of the second part the above-named Defendant GRACE McDONNELL of the third part and the above-named Defendants STANLEY AUGUSTA McDONNELL WILFRED McDONNELL and INES MARIE McDONNELL of the fourth part Whereas the facts and circumstances relating to the Will of the above-named Testator are fully set out in the above-mentioned Originating Summons and the Affidavits filed in connection therewith And whereas the parties hereto are the parties in the said Originating Summons And whereas the said Originating Summons came on to be heard and was heard before the Honourable Harold Sprent Nicholas a Judge in the Supreme Court sitting in Equity on the Seventeenth Twenty-fourth and Twenty-seventh days of September last And whereas by Decretal Order made herein on the said Twenty-seventh day of September last the said the Honourable Harold Sprent Nicholas declared in answer to question (A) in the said Originating Summons that the said Defendant Ena Gertrude Neil was not entitled to any share of the income of the residuary estate of the said Testator during the lifetime of the said Defendant Grace McDonnell and further declared that the said Defendant Grace McDonnell was entitled by survivorship to the whole of the income of the said residuary estate subject to the annuities in the Will of the Testator mentioned And whereas no declaration was made in respect of question (B) in the said Originating Summons but the same was ordered to stand over generally And whereas the said Defendant Ena Gertrude Neil claims that notwithstanding the said Decretal Order she is entitled to one-half of the whole of the income of the said residuary estate of the Testator during the lifetime of the said Defendant Grace McDonnell as from the death of her mother Emily Sarah Darvall subject to the said annuities or in the alternative that she and the said Defendants Stanley Augustine McDonnell Wilfred McDonnell and Ines Marie Augusta McDonnell are entitled to one-half of the whole of the income of the said residuary estate of the Testator during the lifetime of the said Defendant Grace McDonnell as from the date of the death of the said Emily Sarah Darvall in equal shares as tenants in common subject to the said annuities and the said Defendant Ena Gertrude Neil has been advised by Counsel that she is entitled to and should appeal to the High Court of Australia against the said Decretal Order And whereas in consideration of the said Defendant Ena Gertrude Neil abandoning her said right of appeal against so much of the said Decretal Order made herein as declares that she is not entitled to any share of the income of the said residuary estate of the said Testator during the lifetime of the said Defendant Grace McDonnell and in order to save the costs and uncertainty of an appeal and to avoid delay it has been agreed by and between the whole of the parties hereto by way of Family Arrangement and Compromise that—

1. The said Defendant Grace McDonnell shall during her lifetime continue to receive a one-half share of the income of the said residuary estate of the Testator as heretofore but subject to the said annuities.

2. The remaining half of the income of the said residuary estate of the Testator shall during the lifetime of the said Defendant Grace McDonnell and as from the date of the death of the said Emily Sarah Darvall be divided between the said Defendants Ena Gertrude Neil,

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"A"
Deed of Family Arrangement, 7th October 1937, *continued.*

Stanley Augustine McDonnell, Wilfred McDonnell and Ines Marie Augusta McDonnell in equal shares as tenants in common but subject to the said annuities.

3. Nothing herein shall prejudice or affect the rights of the other Defendants after the death of the said Defendant Grace McDonnell in—

(A) The income of the said residuary estate of the Testator or

(B) The corpus of the said residuary estate of the Testator.

4. That these presents are expressly limited to dealing with the income of the said residuary estate during the lifetime of the said Defendant Grace McDonnell and after the death of the said Defendant Grace McDonnell all the said Defendant parties hereto other than the said Defendant Grace McDonnell are to be at liberty to prosecute any claim whatsoever which they may wish to prosecute in respect of the income of the said residuary estate after the death of the said Defendant Grace McDonnell and in respect of the corpus of the said residuary estate as if these presents had never been executed.

5. That subject as aforesaid this Deed shall bind all the parties hereto their and each of their executors administrators and assigns and shall take effect in substitution for and variation of the said Will and the said Decretal Order if and so far as this Deed on the one hand and the said Will and/or Decretal Order on the other hand are mutually inconsistent.

IN WITNESS whereof these presents have been executed the day and year first before mentioned.

Signed Sealed and Delivered by the said Alfred Newmarch and Arthur Joseph McDonald in the presence of
A. W. ROCKWELL.

ALFRED NEWMARCH (seal)
ARTHUR J. McDONALD (seal)

Signed Sealed and Delivered by the said Ena Gertrude Neil in the presence of
H. B. PRIMROSE.

ENA G. NEIL (seal)

Signed Sealed and Delivered by the said Grace McDonnell in the presence of
H. B. PRIMROSE.

GRACE McDONNELL (seal)
GRACE McDONNELL

Signed Sealed and Delivered by the said Stanley Augustine McDonnell in the presence of
W. G. HELLAND.

STANLEY A. McDONNELL (seal)

Signed Sealed and Delivered by the said Wilfred McDonnell in the presence of
H. B. PRIMROSE.

WILFRED FRANCIS McDONNELL (seal)

Signed Sealed and Delivered by the said Ines Marie Augusta McDonnell in the presence of } INES M. A. McDONNELL (seal)

H. B. PRIMROSE,
Solicitor,
Sydney.

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This is the Deed marked "A" referred to in the Affidavit of Anstey Withers Rockwell and produced and shown by me to him at the time of swearing his said Affidavit on the 15th day of September, 1948, at Sydney.

Before me,

N. HAYTON, J.P.

DEFENDANTS' EXHIBIT.

JUDGMENT of His Honour Mr. Justice Nicholas.

Judgment of His Honour Mr. Justice Nicholas, *Newmarch* v. *Neil*, 27th September 1937.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

Newmarch v. *Neil.*

JUDGMENT OF His Honour Mr. Justice NICHOLAS.

Monday, 27th September, 1937.

In this case I have to construe a provision in the Will of the late William McDonald, which is contained in very few lines, although it has led to considerable controversy. The lines which I have to construe are: "And as to the rest and residue of my real and personal estate Upon trust (subject to the annuities hereinafter mentioned) for my said two daughters Grace Macdonnell 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."

In the events which have happened one of those daughters has died leaving a daughter, party to this suit, and the other daughter is surviving, and the question which arises is whether the survivor shall take the whole income of the fund or whether the fund should now be divided between the two persons in such a way that the daughter of the life tenant who has died should take her share in capital and the survivor take the income only of one share.

A very great number of authorities have been cited and I should have taken time to consider my decision and put it into writing but for the fact that there have been some intervals between the days on which the argument has been heard and I have had an opportunity of considering the very full argument which has been addressed to me on the case. Having had that opportunity I have come to the conclusion that there is a rule of construction—perhaps there are two rules of construction which have to be considered in interpreting the provisions of this Will. One of those rules is the rule which was stated by Mr. Manning, and which is to be found also in Hawkins on Wills and other authorities, and comes to this, that where there is a gift to two persons, with a gift over on the death of those two

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Judgment of His Honour Mr. Justice Nicholas, *Newmarch* v. *Neil*, 27th September 1937, *continued.*

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, as it was said in some of the other cases, the Court controls the words that would have indicated a tenancy in common, and interprets them as creating a joint tenancy. That is one rule, and the only difference between Counsel in their discussion of that rule was, I think, as to the degree of clearness with which the gift over should be shown in order that the intention of the testator should be inferred.

I do not propose at present to go through all the cases in detail—they have been gone through in so many cases that I think it would be useless for me to do so. There are the cases which have been cited, such as *Pearce* v. *Edmeades*, 3 Y. & C. Ex. 246, *Re Richason* [1892] 1 Ch. 379, where the Court gathered from the words of the gift itself that it was the intention of the Testator that the fund should go over in one mass. There are other cases such as *Begley* v. *Cook*, 3 Drew 662, in which the Court inferred that intention from the Will taken as a whole. There are cases such as *Re Stanley*, which I think is the latest of those cases, in which it was, as I should have thought, perfectly clear that the Testator intended the gift to go over as a whole, and I think when the Court finds that indication given by a Testator the inference as to the implication of a life tenancy of the whole income follows almost as a matter of course. That is, I think, the rule of construction which the Courts have laid down in such cases.

Now as I have said the question that has given rise to a great deal of discussion in this case was to the degree of clearness with which the Court finds such indication and Mr. Weston relied on a statement of Sargent, J., in *In re Browne's Will* [1915] 1 Ch. at 694, in the following terms :—

> " The real difficulty lies in choosing between the first construction and the fourth. On the one hand, in all the cases such as those just cited, where life interests in remainder have been implied between the original tenants for life, the gift in remainder has been subsequently expressed as being a gift of the whole fund on the death of the survivor of the tenants for life or of all the tenants for life. On the other hand, the cases such as *Willes* v. *Douglas* (10 Beav. 47); *Turner* v. *Whittaker* (23 Beav. 196); or *In re Hutchinson's Trusts* (21 Ch. D. 811)—where a gift in remainder of the fund on some such semi-equivocal or ambiguous expression as ' on the decease of the tenants in common for life ' has been construed distributively, so as to carry the share of each tenant for life on his death—have all been, so far as I can find, cases where the donees in remainder have been the children of the respective tenants for life, a circumstance which in most of the cases, though perhaps not all, aided such a contention."

I think it is impossible to lay down a test of clearness beyond saying this, that the Court must be convinced from the Will as a whole that the Testator did intend the fund to go over in one lump, if he did so intend, and if the Court found that intention after taking into consideration not only the words of the gift, not only such words as " for my said

daughters in equal shares" or not only the words of equality and of division, but when the Court takes into consideration the whole of the Will then the Court does find a tenancy by implication for life in the survivor.

Mr. Weston, in his reply, relied on cases which lead to a different result. Those were cases of which a great number are considered in *Re Hutchinson* (21 Ch. D. 811) but which are summarised in the latest case in the decision of Romer, J., in *Re Errington* ([1927] 1 Ch. 421 at 425) where he said: "The rule, stated in its simplest way, is this: Where a Testator gives the income of his estate to two people A and B for their lives and follows that gift by a direction that at their death, or at their deaths, or at or after the death or deaths of A and B the property is to go to their issue, the Court does not construe the gift as a gift only to take effect on the death of both in favour of the issue of both, but construes it as a gift to take effect on the death of each, of the share to the income of which the deceased was entitled, to the issue of the deceased." Then His Lordship in that case gives instances of the application of the rule, and one of those instances is the Will which was construed in *Re Hutchinson*, where a great number of earlier cases are discussed. It is quite obvious from that rule that if I had a gift here which contained the words "at their deaths" or "at their death" or even words so close to those as the words which were interpreted by Kay, J., in *Re Hutchinson*, then if I did not find an indication that this property was to go over in a mass I should hold that the child of the life tenant who has died should take her share now, and that the children of the surviving life tenant should take her share at her death and not until her death.

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 the circumstances on which Sargent, J., relied in *Browne's* case, and on which Mr. Weston laid great stress, that the gift over here was to the children of the life tenant. I have come to the conclusion, taking this Will as a whole, that I do find an intention that the property goes over in a mass, and I have found that by taking the Will as a whole and in interpreting the Will as I think it was interpreted in the case which seems to be the law on this, that is *Begley* v. *Cook* (3 Drew) in the decision of Page Wood, V.C.

I first of all come to the specific devises in the Will and I find that there the Testator provided: "As to my residence and land Inverary Concord Upon Trust for my daughter Grace McDonnell for her life with remainder in fee to her children Stanley McDonnell Wilfred McDonnell and Inez McDonnell or such of them as shall attain the age of twenty-one years or have issue before attaining that age which issue shall survive him or her in equal shares but if all of them shall die under age leaving no issue then Upon Trust for my daughter Emily Sarah McDonald for life with remainder in fee to her children if any in equal shares And as to my house and forty acres or land at Medlow Upon Trust for my daughter Emily Sarah McDonald for her life with remainder in fee to her children

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(if any) who shall attain the age of twenty-one years or have issue before that age which issue shall survive him or her in equal shares But if she has no issue or they all die under age leaving no issue Then Upon Trust for my daughter Grace McDonald for life with remainder in fee to her children Stanley McDonnell Wilfred McDonnell and Inez McDonnell or such of them as shall attain the age of twenty-one years or have issue before the age which issue shall survive him or her in equal shares."

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.

J. D. EVANS,
Associate.