[HIGH COURT OF AUSTRALIA.]

BUTLER . . . . . APPELLANT;
DEFENDANT,

AND

THE TRUSTEES EXECUTORS AND AGENCY CO. LTD. AND OTHERS . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 28, 29.

Griffith C.J., Barton and O'Connor JJ.

Will—Construction—Gift of fee on attaining 21—*Gift over in event of dying under* 21, *or unmarried, or without male issue—"Or" read as "and."*

A testator by his will directed that, upon his eldest son T. becoming 21, the whole of his estate should belong to and be vested in him, and should such son die before becoming 21, or unmarried or without male issue, his said estate should belong to and be vested in his second son B., and should his second son B. die before becoming 21, or unmarried or without male issue, his said estate should belong to and be vested in his third son C., with a similar provision in respect of the fourth son D., and a gift over if D. should die before becoming 21, or unmarried, or without male issue.

Held, that the will showed that the provisions under which B. or C. or D. was to inherit were to be determined before A. attained 21, and therefore that when A. attained 21 he took an absolute interest.

The rule as to the circumstances in which the disjunctive meaning of the word "or" may be controlled by the context considered.

Decision of Full Court (*The Trustees Executors and Agency Co. Ltd.* v. *Butler*, (1905) V.L.R., 650; 27 A.L.T., 63), affirmed.

APPEAL from the Supreme Court of Victoria.

By his last will Tobias Butler devised and bequeathed to trustees therein named all his real and personal estate, after payment of his debts and funeral and testamentary expenses, upon trust for the benefit and support of his wife and children, expressing his will to be that the income should be paid to his wife

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during her widowhood for the maintenance of herself and his children, and on her death or remarriage should be applied by the trustees to the maintenance of his children during their minority. The will then continued:—"and upon my eldest son Thomas Butler becoming of age it is my will that the whole of my said estate should belong to and be vested in him and I further charge my said eldest son Thomas Butler to properly maintain and support all my other children out of the proceeds of my said estate until each of them shall become of age respectively And should my said eldest son Thomas Butler die before becoming of the age of twenty-one years or unmarried or without male issue then it is my will that my said estate should belong to and be vested in my second son George Butler and upon my second son George Butler dying before becoming of the age of twenty-one years or unmarried or without male issue then it is my will that my said estate shall belong to and be vested in my third son John Butler and should my said third son John Butler die before becoming of the age of twenty-one years or unmarried or without male issue then the said estate to vest in and belong to my fourth son Tobias Butler and should my said fourth son Tobias Butler die before becoming of the age of twenty-one years or unmarried or without male issue then it is my will that my said estate shall belong to and be vested in my two daughters Julia Butler and Ann Butler or the survivor or survivors of them in equal proportions upon an equal distribution of the property between them And I further charge any of my said children who under this my will shall inherit my said estate to properly maintain and support my other children out of the income of the said estate until each of them shall become of the age of twenty-one years respectively." He further desired that his wife during her widowhood should reside on his freehold property at Woodstock, and have the sole management and control of his said estate.

The testator died in October, 1871, being then seised (*inter alia*) of a piece of land, part of section 6, parish of Merriang, county of Bourke, described in the Register Book, vol. 339, folio 67,779.

Ann Butler, the widow, died on the 29th July, 1904, and there

were surviving at the date of the action the four sons named in will, and two daughters.

One William Brahe alleged that, under a writ of execution issued in an action in which he was plaintiff, and Thomas Butler, the eldest son of the testator, was defendant, he purchased from the sheriff all the right, title and interest of the said Thomas Butler in the piece of land before mentioned, and that on 28th July, 1890, the same was duly granted and assigned to him by the sheriff.

An action was now brought by the Trustees Executors and Agency Co. Ltd., the trustee of the estate of the testator, for the determination of the following questions:—

1. Whether the defendant Brahe, as purchaser under the writ of *fi. fa.* from the sheriff of all the right, title and interest (if any) of the defendant Thomas Butler in the said land, is entitled to a transfer from the plaintiff of an estate in fee simple free from encumbrance or of any and what estate in the said land.

2. To what estate or interest in the land did the defendant Thomas Butler become entitled under the testator's will in the events which happened?

3. Was the conveyance, expressed to be made the 28th day of July, 1890, between the sheriff and the defendant Brahe effectual to vest in the said defendant Brahe any and what estate of or interest in the said land?

The action coming on for hearing before *Hood* J., he answered the questions as follows:—

1. The defendant Brahe is entitled to an estate in fee simple free from encumbrance in the land in question.

2. To an estate in fee simple—that is, when he attained the age of 21.

3. Yes.

On appeal to the Full Court, this judgment was affirmed by *Madden* C.J. and *à Beckett* J., *Holroyd* J. dissenting: *The Trustees Executors and Agency Co. Ltd.* v. *Butler* (1).

The defendant George Butler now appealed to the High Court.

The only question argued on this appeal was as to what estate Thomas Butler took in the events that happened.

(1) (1905) V.L.R., 650; 27 A.L.T., 63.

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McInerney, for the appellant. The will is clear and unambiguous as to the interest given to Thomas Butler. The estate is to go over to George Butler on the happening of one of the three events, viz., the death of Thomas under 21, the death of Thomas unmarried, and the death of Thomas without leaving male issue. Canons of construction are only applicable where a will is unintelligible in itself. There is no authority for the statement in *Jarman on Wills*, 5th ed., p. 471, that it has been long settled that, where there is a devise of real estate, to A. and, in case of his death under 21, *or* without issue, then over, the word "or" is to read as "and." Nearly all the cases relied on in support of the existence of such a rule turn upon the construction of the language of the wills under consideration. The rule at most is one of construction applicable only in the absence of express or implied intention, and is not a rule of law which takes effect, although the testator has indicated a contrary intention: *Re Coward*; *Coward* v. *Larkman* (1).

[Counsel referred to the following authorities:—*In re Edwards* (2); *Hawkins on Wills*, p. 1; *Abbott* v. *Middleton* (3); *Walsh* v. *Peterson* (4); *Johnson* v. *Sincox* (5); *Morgan* v. *Thomas* (6); *Cooke* v. *Mirehouse* (7); *Mortimer* v. *Hartley* (8); *Grey* v. *Pearson* (9); *Soulle* v. *Gerrard* (10); *Fairfield* v. *Morgan* (11).]

Mitchell K.C. and *Hayes*, for the defendant Brahe, respondent, and

Guest, for the plaintiff company respondent, were not called upon.

The judgment of the Court was delivered by

GRIFFITH C.J. In this case, which is an appeal from the Full Court of Victoria dismissing, by majority, an appeal from a judgment of *Hood* J., this Court is called upon to construe the will of one Tobias Butler who died in 1871. The learned Judge

(1) 57 L.T., 285.
(2) (1894) 3 Ch., 644.
(3) 7 H.L.C., 68, at p. 89.
(4) 3 Atk., 193.
(5) 31 L.J., Ex., 38.
(6) 9 Q.B.D., 643.
(7) 34 Beav., 27.
(8) 6 Ex., 47.
(9) 6 H.L.C., 61.
(10) Cro. Eliz., 525.
(11) 2 Bos. & P., (N.R.), 38.

of first instance and the majority of the Full Court thought they were bound by the rule of construction stated in *Jarman on Wills*, 5th ed., at p. 471, in these words:—"It has been long settled that a devise of real estate to A. and his heirs, or, which would be the same in effect, to A. indefinitely, and in case of his death under twenty-one, *or* without issue, over, the word 'or' is construed 'and,' and, consequently, the estate does not go over to the ulterior devisee, unless both the specified events happen."

Holroyd J., the dissenting Judge, thought that any such rule, if it ever existed, is at any rate very much weakened by later decisions of Courts of the highest authority, and he thought that the paramount rule is to ascertain from the will itself the intention of the testator. I am not certain that the majority of the Court intended to express any dissent from that rule, and I feel almost sure they did not. For it is clear, as stated in the case of *Re Coward*; *Coward* v. *Larkman* (1), cited by Dr. McInerney, that every rule of construction may be excluded by the context—it is at best only to be applied where the context does not show a contrary intention. It is therefore necessary in every case to construe the whole will to see what the testator meant.

At the same time there are certain recognized rules of construction. Indeed, it cannot be denied that so long as it is the function of Courts of Justice, which are supposed to consist of competent lawyers, to interpret wills, they must apply some rules of construction in exercising those functions, and those rules are applied not only to wills but to all other solemn documents. I will mention three, each of which is applicable to the present case. One is the rule which I quoted in argument and which is stated in *Jarman on Wills*, 5th ed., at p. 443:—"Where there is a clear gift in a will it cannot afterwards be cut down except by something which with reasonable certainty indicates the intention of the testator to cut it down." Another rule is that in considering wills the Court always favours the vesting of an estate.

A third rule of construction is that relied on in this case, the existence of which can hardly be denied. It is stated in *Jarman on Wills*, 5th ed., p. 471, in the way I have read, and in reference to that rule *Willes* J. in *Johnson* v. *Simcox* (2), said:—"We

(1) 57 L.T., 285.
(2) 31 L.J. Ex., 38, at p. 40; 7 H. & M., 344.

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think that the reading 'or' as conjunctive, in such limitations as the present, is so firmly established, if not so founded in good sense, that the construction which we adopt could not be more imperative upon us if, in the will under consideration, the word 'and' had stood literally in the place of 'or.'"

As I have said, all these rules are to be applied in the absence of a context showing a contrary intention. I proceed then to refer to the words of the will. The testator gave all his real and personal estate to his trustees upon trust for the benefit and support of his wife and children, it being his will that the income should be paid to his wife during her widowhood for the maintenance of herself and his children, and after her death or remarriage should be applied by the trustees to the maintenance of of his children during their minority. Then the will proceeded:—"And upon my eldest son Thomas Butler becoming of age it is my will that the whole of my said estate should belong to and be vested in him, and I further charge my said eldest son Thomas Butler to properly maintain and support all my other children out of the proceeds of my said estate until each of them shall become of age respectively."

Stopping there, there is a clear gift of the whole estate to Thomas Butler on his becoming of age, and the fact that, having attained that age, he did not get the beneficial enjoyment of the property until the death of his mother, would not make any difference as to the vesting of the estate in him. If the will stopped there, there would be no difficulty, because Thomas Butler did attain the age of 21. But the will continued—and these are the words upon which the question arises—"And should my eldest son Thomas Butler die before becoming of the age of twenty-one years or unmarried or without male issue then it is my will that my said estate should belong to and be vested in my second son George Butler." Now, it is said that, if the words are taken literally, in the event of Thomas Butler dying at any time a bachelor, or, having married, dying at any time without male issue, the estate previously given would be divested, that is to say, that, although the estate was to vest in him on his attaining the age of 21, it was not to vest in him absolutely, but was liable to be divested on the happening of

either of those events. There is at once an apparent contradiction between two provisions of the will, and it is necessary so to construe the will as, if possible, to reconcile those two provisions. There are the words vesting the estate in Thomas Butler on his attaining the age of 21 years, and there is the rule that when an estate is once vested there must be clear words to divest it. Are the words which are said to divest the estate clear? In the first place we are confronted with a difficulty, viz., that in a great number of cases words almost identical have been construed in a particular way, that is to say the words "dying under the age of 21 or without issue" in such a collocation have been construed as meaning "dying before attaining the age of 21 and without issue." If words have for a long time received a particular construction, it may not unreasonably be assumed that the testator meant to use them in that sense. Assuming that grammatically the words include the event of death at any time unmarried or without issue, the question is, is that what the testator meant, or did he mean what those words have been held in many cases to mean? There is then at once an ambiguity. An estate has been given, and it is difficult to say that that estate has been cut down by clear words.

But the will does not stop there. We must consider what the subsequent gifts were. It says that on those events happening "it is my will that my said estate shall belong to and be vested in my second son George Butler." If Thomas Butler died under 21, George Butler would necessarily be an infant, because he is younger than Thomas Butler, so that it appears from the last words I have read that the intention of the testator was that the question whether George Butler should take or not was to be determined before he himself had attained 21. This view is strengthened because the will goes on to say that, although the estate vests in George Butler before he attained 21, "upon my said second son George Butler dying before becoming of the age of twenty-one years or unmarried or without male issue," then something else is to happen. So that the question whether George Butler was to have an estate which was to go over if he died under the age of 21 years was to be determined before he attained that age. The condition, therefore, that the testator is dealing with is a condition

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that must happen before George Butler attains 21. But the question whether the estate of Thomas Butler was to be taken away from him even if he lived to be 80 years old, but died without leaving male issue, could not be determined before George Butler attained 21, which would happen in a few years.

The subsequent gifts are gifts to the other two sons of the testator similar to that to George Butler, with a final gift over, if the fourth son should die "before becoming of the age of twenty-one years, or unmarried, or without male issue," to the testator's daughters in equal proportions. Then follow other words:—"I further charge any of my said children who under this my will shall inherit my said estate to properly maintain and support my other children out of the income of the said estate until each of them shall become of the age of twenty-one years respectively." So that the testator contemplated that one at any rate of his sons would probably inherit the estate, which would be liable in his hands to a charge in favour of his other children until the youngest attained 21, and the charge would then cease, and the directions of the will would thereupon come to an end. I think it is apparent that the testator contemplated that on any son attaining 21 and taking the estate, the trusts of the will would be completely determined, and that the question of the person entitled to the estate would be finally ascertained.

Therefore, upon the construction of these provisions it seems to us that so far from the rule laid down in *Jarman on Wills*, and by *Willis* J. in *Johnson* v. *Simcox* (1), being excluded, the Court would be compelled to come to the same conclusion without the application of that rule. It is no doubt true, as stated by *Jessel* M.R. in *Morgan* v. *Thomas* (2), that "or" never does mean "and," unless there is a context which shows it is used for "and" by mistake. What we have to do is to give effect to the intention of the testator. But by treating "or" as used as a mistake for "and," and used as synonymous with "and," you give a complete and homogeneous meaning to the whole will. The same result would be obtained in this case by omitting the word "or" where it first occurs in the sentence "dying before becoming of the age of 21 years, or unmarried, or without male issue," and reading it

(1) 31 L.J. Ex., 38.

(2) 9 Q.B.D., 643, at p. 646.

"dying before becoming of the age of 21 years, unmarried or without male issue." But the conclusion we arrive at is that we are compelled by the subsequent gifts to say that the provision under which George Butler was to inherit was to take effect before George Butler became twenty-one, and was then to be exhausted. That being so it is impossible to hold that it referred to the death of Thomas after attaining twenty-one. It is equally impossible to hold that the provision cuts down a vested estate given in plain words by the preceding clause.

For these reasons we are of opinion that the construction put upon the will by the Supreme Court was correct.

We desire to add that to our minds the arguments of the Judges in *Fairfield* v. *Morgan* (1) are conclusive, as a matter of reasoning, to induce us to come to the same conclusion apart from the special provisions of this will.

The appeal will therefore be dismissed.

Appeal dismissed with costs.

Solicitors, for appellant, *McInerney, McInerney & Wingrove.*

Solicitors, for respondents, *Dugdale & Creber*; *Brahe & Gair*, Melbourne.

B. L.

(1) 2 B. & P. N.R., 38.