[HIGH COURT OF AUSTRALIA.]

MAURICE GIBBONS EAGLE KNIGHT AND ANOTHER . . . . . APPELLANTS;

AND

JOSIAH CHARLES EAGLE KNIGHT AND OTHERS . . . . . RESPONDENTS.

CYRIL HENRY EAGLE KNIGHT AND ANOTHER . . . . . APPELLANTS;

AND

JOSIAH CHARLES EAGLE KNIGHT AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1912.

HOBART, *Feb.* 19, 20, 21.

MELBOURNE, *May* 31.

Griffith C.J., Barton and Isaacs JJ.

Will—Interpretation—Gift to persons "surviving" the testator—Meaning of "survive."

A testator, by his will, left the residue of his property to trustees upon trust to divide it equally between such of the children of A. and of B., "as shall survive me and live to attain the age of 21 years on their attaining such age."

Held by *Barton* and *Isaacs* JJ. (*Griffith* C.J. dissenting) that the primary meaning of "survive" is "outlive," that there was nothing in the context of the will to control that meaning and, therefore, that the children born during the lifetime of the testator and who were living at his death were alone entitled to share in the residue.

Per Griffith C.J. and *Isaacs* J.—The "rule of convenience" laid down in *Andrews* v. *Partington*, 3 Bro. C.C., 401, is to be applied only when it is necessary, that is, when the fund in question becomes actually divisible.

Decision of the Supreme Court of Tasmania (*McIntyre* J.) affirmed.

CONSOLIDATED APPEALS from the Supreme Court of Tasmania.

An originating summons was taken out in the Supreme Court of Tasmania by Marie Louise Steinbach and Charles Horace Steinbach for the determination of the question (*inter alia*) what person or persons were entitled to the residuary estate of Charles Eagle Knight, deceased, bequeathed by his will and codicil.

The material portions of the will and the material facts are stated in the judgments hereunder.

The summons was heard before *McIntyre* J., who held that the children of Josiah Charles Eagle Knight and of Elizabeth Mary Steinbach, who were appointed residuary legatees under the will, took as a class and that that class became fixed upon the death of the testator and included any child who at that date was *en ventre sa mère*. He also held that each of the children forming the class was entitled on attaining the age of 21 years to call for payment of his or her share of the residuary estate (other than such portion of it as was or ought to have been set aside to meet certain legacies directed to be set apart for the benefit of Edith Knight, Elizabeth Hose and Eagle Leonard Knight during their respective lifetimes), and to call for payment of his or her share of the sums so set apart or which ought to have been so set apart as and when such sums fell into the residuary estate by the death of the life tenants respectively.

From this decision two appeals to the High Court were brought which by order of *Barton* J. were consolidated.

Nicholas, for the appellants in the first appeal and for two of the respondents in the second appeal, being children born after the death of the testator and before C. H. Steinbach, the eldest son of Elizabeth Mary Steinbach, attained the age of 21 years. The word "survive" means simply "live after." That, at any rate, is one of its meanings and, even if not its primary meaning, the context shows that to be the meaning intended by the testator: *In re Clark's Estate* (1); *Gee* v. *Liddell* (2); *In re Delany*; *Delany* v. *Delany* (3); *Inderwick* v. *Tatchell* (4). He intended to benefit all the children of J. C. E. Knight and E. M. Steinbach

(1) 3 D.J. & S., 111.
(2) L.R. 2 Eq., 341.
(3) 39 Sol. J., 468.
(4) (1901) 2 Ch., 738; (1903) A.C., 120.

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who should attain 21 years of age. The class of those entitled to the residue was closed as soon as C. H. Steinbach attained the age of 21 years: *In re Emmet's Estate*; *Emmet* v. *Emmet* (1); *In re Knapp's Settlement*; *Knapp* v. *Vassal* (2); *Underhill and Strahan's Interpretation of Wills*, 2nd ed., pp. 105, 110; *Vaughan-Hawkins on the Construction of Wills*, p. 5.

[ISAACS J. referred to *In re Stephens*; *Kilby* v *Betts* (3).]

Lodge, for the appellants in the second appeal, being children born after C. H. Steinbach had attained the age of 21 years. The stricter meaning of "survive" is "live after," although the more usual meaning is "outlive."

[ISAACS J. referred to *In re Dunster*; *Brown* v. *Heywood* (4)].

It is inconsistent with the context that the testator should have intended to limit his bounty by the use of the word "survive." The rule of convenience which closes the class of beneficiaries as soon as one member is entitled to payment, will not be applied unless necessary: *Hill* v. *Chapman* (5); *In re Stephens*; *Kilby* v. *Betts* (3).

[ISAACS J. referred to *In re Canney's Trusts*; *Mayers* v. *Strover* (6).

Here the residue in fact consists of several funds which fall in at different times, and at most the class will be closed when each fund falls in and is available for distribution.

L. L. Dobson, for the respondents in the first appeal, and for some of the respondents in the second appeal. The class was closed when C. H. Steinbach attained 21 if it was not closed at the testator's death: *Hagger* v. *Payne* (7); *Picken* v. *Matthews* (8); *Hill* v. *Chapman* (9); *Underhill and Strahan's Interpretation of Wills*, 2nd ed., p. 105.

[ISAACS J. referred to *Gillmann* v. *Daunt* (10); *Pilkington* v. *Pilkington* (11).]

The word "survive" means "outlive." That is its strict literal meaning and there is nothing in the context to control it: *Jarman*

(1) 13 Ch. D., 484, at p. 490.
(2) (1895) 1 Ch., 91.
(3) (1904) 1 Ch., 322.
(4) (1909) 1 Ch., 103, at p. 106.
(5) 3 Bro. C. C., 390.
(6) 101 L.T., 905.
(7) 23 Beav., 474.
(8) 10 Ch. D., 264, at p. 267.
(9) 1 Ves. Jr., 405, at p. 407.
(10) 3 K. & J., 48.
(11) 29 L.R. Ir., 370, at p. 376.

on Wills, 2nd ed., p. 689; *In re Keep's Will* (1); *Davidson* v. *Dallas* (2); *Mann* v. *Thompson* (3); *Wake* v. *Varah* (4).

[ISAACS J. referred to *In re Benn*; *Benn* v. *Benn* (5)].

Nicholas, in reply, referred to *Trickey* v. *Trickey* (6).

Lodge, in reply, referred to *Defflis* v. *Goldschmidt* (7).

Cur. adv. vult.

The following judgments were read :—

May 31.

GRIFFITH C.J. I will preface what I have to say in this case by reading a passage from the judgment of *Romer* L.J. in *In re Gorringe*; *Gorringe* v. *Gorringe* (8):—"In construing a will what I like to do is, before going to the authorities, to read the will itself carefully, and to see whether, apart from authorities, I cannot gather what the meaning of the testator was. Of course, in construing the will I must bring in aid all those rules of law and construction which the authorities have laid down; but if in doing so, and construing the will for myself, I come to one conclusion, I do not think it is a wise or right thing to attempt to construe one will—a will like this—by the determination put by a Judge on another will, merely because that other will is something like the present. No doubt it is tempting, if you find a will something like the will you have to construe already construed by a Judge, to start with the assumption that the first decision was right (which is a right assumption), and then proceed to see how the will differs, and then to consider each difference in detail and to see whether that difference ought to lead you to a different conclusion from that arrived at by the Judge in the prior case. To my mind such a method of procedure often leads to a very erroneous conclusion as to a will taken as a whole."

I will also read a passage from the judgment of *Lindley* L.J. in *In re Morgan*; *Morgan* v. *Morgan* (9):—"I do not see why, if

(1) 32 Beav., 122.
(2) 14 Ves., 576.
(3) Kay, 638.
(4) 2 Ch. D., 348, at p. 354.
(5) 29 Ch. D., 839.
(6) 3 My. & K., 360.
(7) 1 Mer., 417.
(8) (1906) 2 Ch., 341, at p. 347.
(9) (1893) 3 Ch., 222, at p. 228.

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we can tell what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases or decisions in other cases. I always protest against anything of the sort. Many years ago the Courts slid into the bad habit of deciding one will by the previous decisions upon other wills. Of course there are principles of law which are to be applied to all wills; but if you once get at a man's intention, and there is no law to prevent you from giving it effect, effect ought to be given to it."

The testator, who died on 5th September 1893, by his will dated 7th May of the same year, gave all his estate to trustees upon trust, after payment of his debts and funeral and testamentary expenses and two small legacies, to pay the income to his wife for life, and after her death and payment of a further legacy of £50, to set apart seven sums of £5,000, £3,000, £1,000, £5,000, £1,000, £2,000, and £2,000, respectively, to be held by them upon certain trusts, and as to his residuary trust fund upon certain other trusts.

The testator had, apparently, no children, but had a niece named Elizabeth Steinbach, the wife of Henry John Mealin Steinbach (one of the trustees of the will), who had three children, the eldest of whom, C. H. Steinbach, was then of the age of eleven years, and a nephew named Josiah Charles Eagle Knight, who was married and had one child. A second child was born to him on 21st April 1894, 7½ months after the death of the testator, and nearly twelve months after the date of the will.

The trusts of the first sum of £5,000 were for Mrs. Steinbach for life, and after her death "Upon trust to pay and divide the same equally between and among such of the children of the said Elizabeth Mary Steinbach as shall survive me and live to attain the age of twenty-one years on their respectively attaining the age of twenty-one years But I declare that if any of such children shall predecease me or die under the age of twenty-one years leaving issue him or her surviving such issue shall take and if more than one equally between them the share original or accruing which his or her parent would have taken had he or she survived me and lived to attain the age of twenty-one years."

The trusts of the sum of £3,000 were to apply the whole or part of the income "for the maintenance education and advancement of C. H. M. Steinbach, Marie Louise Steinbach and Rupert Henry Steinbach, the present children of the said Elizabeth Mary Steinbach" in such proportions as the trustees might think fit, or at their option to pay the income to Mrs. Steinbach to be so applied by her, and to accumulate the surplus, if any. Upon any of the children attaining 21, one-third share of the fund and of any accumulation was to be paid over to him or her. If any child died under 21 without issue, his or her share was to be paid "equally among the others or to the one other of such children" who should attain 21, but if any child should die under 21 leaving issue the issue were to take the parent's share.

The trusts of the first sum of £1,000 were to pay the income to H. J. M. Steinbach for his life. After his death it was to fall into and form part of the residuary trust fund, and to be paid and divided to and between the same persons and in the same manner as thereinafter directed with reference to that fund.

The trusts of the second sum of £5,000 were for Josiah Knight for life and after his death for his children. The terms of the disposition were, except as to the name of the first beneficiary, identical with those of the first sum of £5,000.

The trusts of the second sum of £1,000 and of the two sums of £2,000 were for Edith Knight, wife of Josiah Knight, Elizabeth Hose, a niece, and Eagle Leonard Knight, a nephew, of the testator, respectively, for life, and after their respective deaths upon trusts declared in terms identical with those with respect to the first sum of £1,000.

The trusts of the residuary trust fund were declared as follow: "I declare that my said trustees shall stand possessed of my residuary trust fund Upon trust to pay and divide the same equally between and amongst such of the children of the said Elizabeth Mary Steinbach and of the said Josiah Charles Eagle Knight as shall survive me and live to attain the age of 21 years on their respectively attaining such age And if there shall be only one such child then the whole shall be paid to such one child provided always that if any of the children of the said Elizabeth Mary Steinbach or of the said Josiah Charles Eagle

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Knight shall die under the age of 21 years leaving issue such issue shall take and if more than one equally between them the share or shares whether original or accruing to which their his or her parent would have been entitled had he or she survived me and attained the age of twenty-one years."

The appellants in the first appeal are two children of Josiah Knight who were born after the testator's death and before Charles Steinbach attained the age of 21. The appellants in the second appeal are three children of Josiah Knight who were born after Charles Steinbach had attained that age.

The first question for determination is whether any of these children are within the residuary gift to "such of the children of the said Elizabeth Mary Steinbach and of the said Josiah Charles Eagle Knight as shall survive me and live to attain the age of 21 years on their respectively attaining such age." The appellants contend that the words "shall survive me" should be read, "shall not die in my lifetime," or "shall be living after me." The respondents contend that they must be read as "having been born in my lifetime be living after my death." This, to adopt the words of *Jessel* M.R. in *Wells* v. *Wells* (1), is a question "not of law but of the English dictionary;" to which I would add the language of *Knight-Bruce* L.J. in *Pride* v. *Fooks* (2):—"It may be repetition or the mere utterance of a truism to say, as I venture nevertheless to do, that if a will taken as a whole shows that the testator has used in it any word in a sense and with a meaning different from the ordinary or correct interpretation of the word, and shows also what are the sense and meaning attributed to the word by the testator, it must be construed according to that sense, to that meaning." *A fortiori*, if a word is of ambiguous meaning, or has more than one meaning.

I proceed to apply the rule which I have quoted from *Romer* L.J. (3), and inquire what I can gather from the will itself as to the meaning of the testator. The impression left upon my mind from reading it is that the testator intended to make provision for all the children of his niece Mrs. Steinbach and of his nephew Josiah Knight, whenever born, provided that they did not die in

(1) L.R. 18 Eq., 504, at p. 506. (2) 3 De G. & J., 252, at p. 266.
(3) (1906) 2 Ch., 341, at p. 347.

his lifetime, and attained 21 years, or, dying under that age, left issue. I will refer later to particular provisions of the will, which, to my mind, confirm this general impression.

Then I am met with the objection that the word "survive" used in a transitive sense necessarily implies that the person spoken of is alive in the lifetime of the person of whom it is said that he survives him. Is this so? I find that in 1864 in the case of *In re Clark's Estate* (1), *Knight-Bruce* and *Turner* L.JJ. thought that in a will in which a testator left property to a reputed niece for life and after her death to all her children who should survive him they "might without impropriety hold the words 'who shall survive me' to mean 'who shall be living after me.'" *Knight-Bruce* L.J. added: "I am not sure that this is not their strictly correct meaning." I take leave respectfully to express my concurrence. Indeed, I should be disposed to go further, and to say that I am strongly disposed to think that this is the strictly correct meaning, when used of a class to be ascertained, not at the testator's death, but at the determination of a prior life interest which, indeed, is probably what the learned Lord Justice meant.

In *In re Delany* (2) *Chitty* J. expressed the opinion that that case was rightly decided.

Unless, therefore, we can say that these three very learned and eminent Judges imperfectly understood the English language, it is clear that the sense which they attributed to the word "survive" is at least one of its meanings. I am contented to share their ignorance, if it be ignorance. It may be conceded that the word used as a transitive verb is more often used in the sense contended for by the respondents, but I cannot agree that it is the "primary," as distinguished from the "more usual" sense. Nor can I agree that there is any rule of construction which gives preference to what has been called a "primary" meaning in any case in which there is a context.

Particular cases in which the "more usual" sense has been attributed to the word "survive" throw no light on the present case.

I will refer now to some specific provisions of the will which

(1) 3 D.J. & S., 111, at p. 115. (2) 39 Sol. J., 468.

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to my mind support and strengthen my first impression. And first I note that the gift in question is not to children of the testator, but to grand-nephews or grand-nieces who may survive him. He says in effect: "I desire to benefit all the children of my niece and nephew with the exception of any who die before me." Putting myself in his place it seems to me that what he had in his mind was the state of the families of his niece and nephew at their respective deaths, which he anticipated would be after his own, and not the state of the families at his own death.

I refer next to the words of the gift of £5,000 to Mrs. Steinbach and her children, and compare them with those of the gift of £3,000 which immediately follows. I find that in the former the testator speaks of "such of the children of Mrs. Steinbach as shall survive me," &c., and in the latter he speaks of her "present children." This seems, to my mind, to indicate that he distinguished between her present and her future children, and had in his mind in the first gift all the children that might be born to her.

Again, in the words contained in the first gift "if any of such children shall predecease me," &c., the word "such" cannot, of course, be limited to the class previously mentioned of "such of the children . . . as shall survive me." It must, therefore, be read as "if any such children (*i.e.*, any of her children) shall predecease me or die under the age of 21 years," &c.

The gift in remainder to the children of Josiah Knight is in identical language and must bear the same meaning.

As to the other sums, the testator directs that, after the death of the respective holders of the life interests, they shall fall into his residuary trust fund, and be paid and divided "to and between the same persons and in the same manner as hereinafter described" with reference to it.

I have already read that disposition, which contains a proviso that "if any of the children of the said E. M. Steinbach or of the said J. C. E. Knight shall die under the age of 21 years leaving issue," such issue shall take the share to which their, his or her parent would have been entitled if he or she had survived the testator and attained the age of 21. I regard these last words as

merely a description of the quantity of the share to be taken by the issue. The words "if any of the children" are free from ambiguity, and in their natural sense bear the same meaning as that which, as I have pointed out, is shown by the context to be the meaning of "any of such children" in the gifts in remainder after the death of his niece and nephew.

The construction, therefore, which I favour is consistent with all the language of the will, while the contrary construction cuts down the word "any" in three places to mean something less than it means literally.

For these reasons I am unable to agree with the opinion of the learned Judge from whom this appeal is brought, and think that all the children of Mrs. Steinbach and Josiah Knight, who attain 21, take interests under the will as a class, whether born in the testator's lifetime or not. Indeed, I am unable to bring myself to doubt that this was his meaning.

In this view it is necessary to inquire further when the class became closed.

Mrs. Steinbach's eldest child Charles attained the age of 21 on 2nd February 1903. It is contended that the class then became closed irrevocably, and that all children born after that date are excluded from any share in the residuary fund.

I agree that under what is called the "rule of convenience," laid down in *Andrews* v. *Partington* (1), the class was closed as to any moneys which were then in the hands of the trustees and subject only to the residuary trusts. H. J. M. Steinbach had died before that date, so that the £1,000, to the income of which he was entitled, was then subject to those trusts only. There was also, I understand, some other residue not specifically dealt with by the will. The decision of the learned Judge is therefore right as to these funds.

But as to the three other sums, amounting to £5,000, which will fall into the residuary fund after the death of the persons respectively entitled to the income other considerations arise.

The rule admittedly defeats the testator's actual intention. It is never applied unless it is necessary. See *In re Stephens*; *Kilby* v. *Betts* (2) and the cases cited by *Buckley* J., in particular,

(1) 3 Bro. C.C., 401.

(2) (1904) 1 Ch., 322.

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In re Wenmoth's Estate; *Wenmoth* v. *Wenmoth* (1). It seems to me that in principle the rule, which is not applied unless it is necessary, is to be applied when and as often as it is necessary, *i.e.*, whenever a fund becomes divisible. If (as here) several funds are given by the same will, to become divisible at different times, I think that full effect is given to the rule by holding that the class amongst whom each fund is to be divided is to be ascertained at the time when that fund becomes divisible.

The case of *Pilkington* v. *Pilkington* (2), in which it was pointed out that the period of distribution and not the period of vesting is the time at which the rule is to be applied, confirms this view. If under a will several periods of distribution are appointed in respect of several funds the rule must, in my judgment, be applied as to each fund when the period of distribution of that fund arrives and not sooner.

In my opinion, therefore, both appeals must be allowed.

BARTON J. I regret that I am unable to agree with my learned brother the Chief Justice in his conclusion as to the construction of this will.

The class is designated as those who "*survive me* and live to attain the age of 21 years." The verb here has an object—the person who speaks. It is used in an active or transitive, and not in a neuter or intransitive, sense. In the active sense to survive a person is, according to the dictionaries, to live longer than or beyond, to outlive or overlive, to outlast, that person; to exceed the person in the duration or continuance of existence. There the person is the object of the verb. Instances of this meaning are quoted, such as:

> "I'll assure her of
> "Her widowhood, be it that she survive me,
> "In all my lands and leases whatsover."—*Shakespeare.*
>
> "No wonder then if that he were depriv'd
> "Of native strength, now that he them surviv'd."—*Spenser.*

When the verb is used in its intransitive or neuter sense, that is, not acting upon any specific object, the wider meaning of remaining alive or living on, or retaining force or operation, as

(1) 37 Ch. D., 266. (2) 29 L.R. Ir., 370.

the sense may require, will properly belong to it, and the following instances, among others, are given by the dictionaries:

> "Those that survive let Rome reward with love."—*Shakespeare.*
> "Now that he is dead his immortal fame surviveth."—*Spenser.*

Another instance, given by the Standard Dictionary, occurs when we say of a custom that it survives, *i.e.*, remains in force.

Where the verb is active, that is, where it acts upon an object, I have not been able to find in the dictionaries an instance of any normal meaning but that of the first set; nor do I remember an instance of any other meaning.

Still, if there is in this will a context plainer, or at least as plain, the word may acquire from it a different and, as is here contended, a wider meaning. And the same result might follow if in applying the will to its subject matter relevant facts were found which rendered the ordinary meaning improbable, and another and an unusual meaning the most probable one. In the present case I cannot find any such facts, and the whole question, in my opinion, is whether there is such a context as I have described.

The material provisions of the will have been set out by my learned brother the Chief Justice.

Of the children of Elizabeth Mary Steinbach, all were born in the lifetime of the testator. They are Charles Horace, Marie Louise and Rupert Henry, and they are all named in the will. The youngest of these was a baby at the times of the making of the will and of the death. Of the children of Josiah Charles Eagle Knight, one, Charles Eagle Leonard, was born during the testator's life, and another, Lilith Estelle, was *en ventre sa mere* at his death, so that she is now eighteen years of age. The testator died on 5th September 1894, four months after the execution of the will. (The codicil does not affect this case). There were born after his death and are now living five other children of Josiah Charles Eagle Knight, three of them born before and two born after 2nd February 1903, when Charles Horace Steinbach, the eldest member of the class, however it may be defined, came of age. These five children are all appellants.

Josiah Charles Eagle Knight was not the only nephew of the testator nor was Mrs. Steinbach his only niece. The will gives

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£200 to Thomas Charles Eagle Hose, a son of his sister Phoebe Hose; and the testator had a niece named Elizabeth Hose, the daughter of the same sister, to whom, subject to the life estate of his widow, he gave for her life the income of £2,000, which sum he directed should on her death fall into the ultimate residue. There was also a nephew named Leonard Eagle Knight, to whom, after the death of the testator's widow, the trustees were to pay during his life the income of a further sum of £2,000, which sum also the will directed should on the death of that nephew fall into the ultimate residue. But Elizabeth Mary Steinbach and her children, and Josiah Charles Eagle Knight and his children, are by far the largest participants in his bounty, whether because they needed it most, or for any other reason, we cannot inquire, for the will does not tell us.

I take the residuary gift first by itself, for the purpose of ascertaining the meaning it would bear if it were found unaffected by the true construction of the rest of the will. I am disposed to agree that this, to adopt the words of *Jessel* M.R., already quoted from the report of *Wells* v. *Wells* (1), "is a question not of law but of the English dictionary." As will have been seen, a search of the English dictionaries has convinced me that the ordinary and usual meaning of the words "survive me," as here used is, "outlast or outlive me." That expression is not ambiguous. It clearly implies the existence, at the testator's death, of the persons who may "survive" the testator. If they come into existence after that time they cannot be said to survive *him*. They may survive somebody or something else, but not the testator. Or they may "survive" in some general sense unconnected with the testator. But neither of these is the use of the words as they occur in the text, for it is the testator, and not another person, or an event, that is to be survived.

The proviso does not diminish the force of the expression or make another meaning more probable. It makes an addition to the already defined class, the children who survive the testator and attain 21, in favour of the children of those who die without having reached that age, but leaving issue. It seems to me to provide *per stirpes* for the children of survivors who themselves

(1) L.R. 18 Eq., 504, at p. 506.

fail to come into the class by reason only of their failure to attain the prescribed age. For the concluding direction, "such issue shall take" &c., demonstrates that the issue who are to take must be the issue of a child of Elizabeth Mary Steinbach or of Josiah Charles Eagle Knight who "would have been entitled had he or she survived me and attained the age of 21 years." And this is equally demonstrated although in the proviso the phrase "any of the children of the said Elizabeth Steinbach or of the said Josiah Charles Eagle Knight" is large enough to include, if taken by itself, the whole of the children of either of them, since even in that case the requisite is that the issue, in order to take, must be issue of a parent who would have been entitled if he or she had survived the testator and lived to attain 21. Looking at the occurrence of the expression "survived me" in this connection, I am quite unable to say that it is used in any other than the usual sense—unless indeed that expression is required by the rest of the will to be used in a different sense.

Let us look, then, at the other parts of the will relied on as giving an unusual meaning to the words in question; a meaning not attached to them in the dictionaries when they are used as we find them in this gift. One must not forget that, in the task of construing a passage in a will by the context, that is to say, by the will itself, one has still before him the duty of construing the context, and that he must apply to this work the ordinary rules of construction. Consequently, in construing the passages which are called in aid for the appellants, we must take the word "survive," in its relation to an object, to mean "outlive" that object, unless there is some context which so controls the expression as to give it a different meaning.

Thus cautioning myself I proceed to consider the parts of the will invoked by the appellants.

First, as to the two sums of £5,000 each, the trusts of which are to come into operation upon the termination of the widow's life interest. Those sums were then to be set apart from the general estate, and the trusts keep them out of the ultimate residue, the subject of this appeal. These two bequests are in practically identical terms, and what I may say as to either of them applies equally to the other. Let us then consider the

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second, which I need not repeat in full. I choose it, and not the first, only because there are children of Josiah Charles Eagle Knight born after the testator's death, who, if the appellants are right, are brought into the class as a result of the construction of this bequest, while all of Mrs. Steinbach's children were born during the life of the testator.

It does not seem to be denied that in this gift the description "such of the children of the said Josiah Charles Eagle Knight as shall survive me and live to attain the age of 21 years" would in the absence of evidence of a different intention constitute a class of persons who were to take only if they outlived the testator, and reached the prescribed age. But it is urged that the declaration which follows, "if any of such children shall predecease me or die under the age of 21 years leaving issue him or her surviving," such issue shall take the share which the parent would have taken had he or she "survived me and lived to attain" that age, affords evidence of an intention incompatible with the idea that the grandnephews and grandnieces to be benefited personally are those only who outlive the testator and attain 21. It is pointed out that "any of such children" must mean any of the children of Josiah Knight, whenever born, since if the expression "survive me" were read in its usual sense, the issue of those who might predecease the testator could not take, as their parent could not be included in a class none of whom could take without having survived him, while on the other hand, if we give "survive me" the wider sense of "live after me," the word "such" may properly refer to its last antecedent. But if it be conceded that this context requires that the expression "any of such children" should, taken apart from the rest of the declaration, be given the meaning contended for, that is not enough for the need of the appellants. The issue can only take the share which the parent would have taken had the parent survived the testator and lived to the age of 21, and the words "survived me" must there again be given their ordinary meaning unless that meaning is controlled by context. By force of this part of the declaration the words "predecease me or die under the age of 21 years" are made clear beyond doubt. The antithesis is between a child predeceasing—*i.e.*, dying before or failing to outlive the testator—

and a child outliving him so as to attain the age of 21 years. A child's issue may take if *that child* shall either die before the testator or live to attain the age of 21 years; the same child cannot be the subject of that alternative unless he were born during the testator's life; and this applies to any of the children of Elizabeth Mary Steinbach, no doubt, but only as viewed at the death of the testator. Unless they are so viewed the concluding words of the declaration are robbed of their effect. It was urged that the intention being to provide for events which could not happen before the falling in of the life estate of Josiah Knight, the words "survive me," wherever used in the will, must be read in relation to that event. The reason given is not sufficient to justify the suggested alteration in sense, there being no ambiguity. If the testator meant to fix the death of Josiah Knight, and not his own death, as the test of survivorship, it is rather surprising not to find, in a will evidently carefully drawn by a solicitor, some such expression as "survive the said Josiah Knight," instead of that actually used. I am of opinion that in this bequest of £5,000 it is essential that a child of Josiah Knight should, in order personally to take, fulfil both conditions of outliving the testator and attaining the prescribed age, with the proviso that the issue of any of Josiah Knight's children may take the share to which their parent would have been entitled had the parent, having been born in the testator's lifetime, fulfilled the double condition of outliving him and attaining that age. That is the result of construing the whole provision together, and giving its words their ordinary sense, and I find no reason for any other sense unless I yield to the temptation of making a will for the testator.

The next provision on which the appellants relied was that for setting apart after the death of the widow, £3,000, and applying the income or such part of it as the trustees should deem expedient for the maintenance, education and advancement of Charles, Marie and Rupert, "the present children" of Mrs. Steinbach, the surplus if any, and its resulting income, to be invested at compound interest for the same purpose, each child attaining the age of 21 years to be paid a one-third share and "any accrued share" of the £3,000 and of the accumulated

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interest thereon, with the powers to the trustees already fully described by the Chief Justice.

As to this gift the appellants argue that because it is limited to the then "present" children of Mrs. Steinbach, the testator intended the gift of the ultimate residue and of the income of the £5,000 to apply to all her children who might live after him, including those born at any time after his death. I cannot accept this inference. If any inference as to future children of hers is necessary there is no reason to extend it beyond the cases of other children born in his lifetime. As *McIntyre* J. has pointed out, it is a reasonable inference that the testator thought the birth of such children probable; but it is not a necessary inference that he contemplated benefit to children born after his decease. To extend the inference thus is to act on mere conjecture and to give the expression "survive me" a meaning which is not demanded by the context. And here I may point out that it is not unreasonable that the testator should have desired to confine his bounty, in respect both of the £5,000 gifts and of the residue, to children of Mrs. Steinbach and of Mr. Josiah Knight who might be born in his lifetime, and whom he would expect to have the opportunity of seeing and knowing as objects of his generosity. And if one thought it unreasonable, that would be no warrant for modifying the will.

I do not find therefore that the other provisions of the will afford convincing reasons—indeed, I cannot see that they afford any—for the reading of the residuary gift in a sense different from that which the terms used would ordinarily convey.

Of the numerous cases cited, I do not think it necessary to refer to more than four, all of which were cited in the Court below and were reviewed by *McIntyre* J., who has sufficiently set out in his careful judgment the various testamentary provisions which were the subject of decision.

In *Re Clark's Estate* (1), *Knight Bruce* L.J., with whom *Turner* L.J. agreed, thought that they might "without impropriety" hold that in the will in question the words "survive me" meant "live after me." He said, indeed, "I am not sure that this is not their strictly correct meaning," which is certainly not a strong

(1) 3 D.J. & S., 111.

indication of opinion. He did not go so far as to say that it was ordinarily the meaning. If the dictionaries are to be the test, it is not. There is much reason to believe that the decision was dictated by peculiar circumstances in the case, rendering it unlikely that the words were used in their ordinary sense. The devisee for life, a niece, was only twelve years old at the date of the will, which was made shortly before the testator's death, and in the ordinary course she would not marry until at least five or six years afterwards, so that if her marriage resulted in the birth of children the testator could not expect them to be born within six or seven years. She married nine years later. Practically the whole argument for the children as reported was that it was "most unlikely that in making a disposition in favour of the children of a girl twelve years old he should intend none to take, except those who were born in his lifetime." This argument appears to have prevailed in inducing the Lords Justices to reverse the decision of *Kindersley*, V.-C., who had held that the words must be taken to have been used in their ordinary sense. The circumstances of the present case are very different.

The report of *Gee* v. *Liddell* (1) makes no mention of any cases cited, though there was a very strong bar. In holding that the gift over to the children or remoter issue of the testator's nephew who should survive the testator and his nephew, and live to the age of 21, was not void for remoteness, Lord *Romilly* M.R. said (2) that it was clearly too remote unless the effect of the word "survive" were to confine the happening of the event on which the gift over was to take effect, to the day of the death of the survivor of the testator and his nephew. He adopted the argument at the bar that "the word 'survive' imports that the person to survive must be living at the death of the person who is to be survived; that it cannot, according to the ordinary import of the words, be said that George III. survived William III.; though it may be said that he survived his father and grandfather."

In re Delany (3) turned on the meaning of the expression "benefit of survivorship," and on the authority of *In re Clark's Estate* (4) it was contended that "survive" merely meant "live

(1) L.R. 2 Eq., 341.
(2) L.R. 2 Eq., 341, at p. 344.
(3) 39 Sol. J., 468.
(4) 3 D. J. & S., 111.

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after." *Chitty* J. rejected this contention. He said that the common meaning of " survivor " implied two lives running together, and that it would be a very forced use of the expression to say that Queen Victoria survived William the Conqueror. He held that " there was no sufficient context to say that an unusual meaning should be adopted." Of *In re Clark's Estate* (1) he said that " with great respect " he " would say that that decision was right on the particular will." Evidently he thought that that decision arose out of the peculiar circumstances of the case, and he was not prepared to construe one will by another.

In *In re Heath*; *Jackson* v. *Norman* (2) *Buckley* J. had to interpret a bequest of a sum " for such of the children of A. B. as shall survive me and attain the age of 21 years." The question was whether children born after the testator's death could be said to survive him—the very question for decision here. *Buckley* J. held that such after-born children were not included in the class. He had been pressed in argument with the case of *In re Clark's Estate* (1), and he quoted with approval the comments made by *Chitty* J. on that case in *In re Delany* (3). He went on to say (2):—" I think the decision of *In re Clark's Estate* (1) must have been arrived at on the particular facts of that case. The Court was struggling to get away from the ordinary meaning of the expression, and did not intend to lay down any general rule that 'survive' means 'live after.'" The learned Judge found no context in the will before him to take the words out of their ordinary meaning, in fact he thought the indications were contrary to those in the will in *In re Clark's Estate* (1).

It is plain from the three cases last cited that the learned Judges who decided them did not think that to survive a person merely means to live after him, unless there is a context requiring such a meaning. To one of these Judges *In re Clark's Estate* (1) was not cited. It was pressed without avail on the other two, and it is plain that they were of opinion that the decision should not be followed except in a case of closely similar circumstances.

I make no further reference to the cases. It is clear, first, that so far as judicial opinion on the meaning of an ordinary English

(1) 3 D. J. & S., 111. (2) 48 Sol. J., 416. (3) 39 Sol. J., 468.

expression is relevant, the Courts attribute to this one the sense which the dictionaries also give it; and, secondly, that the cases proceed upon the trite but cardinal principle that words are to be understood in their ordinary and usual sense unless, by reason of the context, or by the force of relevant facts which become apparent in applying the will to its subject matter, a different meaning is clearly indicated.

In the present case I cannot discover either fact or context having that effect. It is therefore my opinion that no child of Mrs. Steinbach or of Mr. Josiah Knight, born after the death of the testator, is entitled to take; that the order of *McIntyre* J. is right; and that the appeal should be dismissed. In all the circumstances of the case I think the costs of all parties as between solicitor and client should be paid out of the estate.

ISAACS J. The principal contest in this case is whether, in the gift of residue these words "such of the children of the said Elizabeth Mary Steinbach and of the said Josiah Charles Eagle Knight as shall survive me" must be read to mean all the children of the persons named who might exist after the testator's death though born subsequently to that event. Mr. Justice *McIntyre* thought not, and I am of opinion that learned Judge was right, and that this appeal should be dismissed.

Usually the construction of any will is of comparatively slight concern outside the parties interested. In the present instance, however, there are involved matters of considerable general importance, namely the primary and natural meaning, or, in other words, the true and real meaning of the phrase, "survive me," an expression which is conspicuous in very many wills; and also a consideration of the circumstances which should induce the Court to attach a secondary meaning, that is an artificial meaning, to a word in place of its primary signification.

The appellants' contention can be sustained only in one of two ways. The first is that the words "survive me" inherently and in the absence of any overriding context, carry with them the meaning of merely "living at some date after my decease," with reference to any contemporaneous existence.

For myself, I must confess that is foreign to the impression I

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have always had. And I find it opposed to every distinct opinion I have been able to find. I take first, Webster (1890), who thus defines the word—"Survive" transitive verb—"To live beyond the life or existence of; to live longer than; to outlive; to outlast; as to *survive* a person or event." The intransitive verb—"To remain alive, to continue to live."

"Surviving" is defined as "remaining alive, yet living," and "survivor" as "one who outlives any person or any time, event or thing."

The Imperial Dictionary (1882) defines the word "survive" as a transitive verb thus: "(1) To outlive, to live beyond the life of, as the wife *survives* the husband, or a husband *survives* his wife.

> "I'll assure her of
> "Her widowhood, be it that she *survive* me,
> "In all my lands and leases whatsoever."—*Shakespeare.*

"(2) To outlive anything else, to live beyond any event, as many men *survive* their usefulness or the regular exercise of their reason." Survive—as an intransitive verb—is defined, 'To remain alive, to live after anything else that has happened.' For example—

> 'Yea, though I die, the scandal will survive.'—*Shakespeare.*
> 'This pleasure which when no other enemy survives,
> 'Still conquers all her conquerors.'—*Denham.*"

Then Professor Skeat in his Etymological Dictionary (1882) defines "survive" as "to overlive, to outlive."

These works are all prior to the date of the will—though, of course, the meaning has not changed since. So much for lexicographers.

Then the appellant placed reliance on the case of *In re Clark's Estate* (1), showing that "survive me" means "live after me." I think the question serious enough to say that in my opinion *In re Clark's Estate* (1) ought not to be regarded as any authority for that proposition. It is an instance of context displacing natural meaning, and, when the main ground upon which it was determined is remembered, it is rather against the view of a primary signification favourable to the appellants. *Kindersley* V.-C., as appears in *In re Clark's Estate* (2), was most positive

(1) 3 D.J. & S., 111. (2) 12 W.R., 898.

in his opinion that such was not the true sense of the words, and found nothing in the context to alter their natural meaning. The Appellate Court, however, reversed him in very few and guarded words, apparently on the general provisions of the will, and *Knight-Bruce* L.J. added (1) "and I am not sure that this is not their strictly correct meaning." The appellants read this added observation as a certain definite judicial pronouncement. I do not so regard it. Nor do I see any reason for attributing to *Turner* L.J. concurrence in anything beyond the judgment. In the two cases of *In re Delany* (2) and *In re Heath* (3), *Chitty* J. and *Buckley* J. differed from the suggestion of *Knight-Bruce* L.J., and both held that the usual meaning of survive was to outlive, and that *In re Clark's Estate* (4) must have been decided on its particular facts. I respectfully agree with the observations of *Buckley* J. that the Court was struggling to get away from the ordinary meaning of the expression. The circumstances were indeed unusual.

In *Gee* v. *Liddell* (5) the Master of the Rolls, in the main event in which he considered the ordinary meaning of the word, said :— "My opinion is that the meaning of the word 'survive' or 'survivor' imports, that the person who is to survive must be living at the time of the event which he is to survive."

That brings me to the second possible reason for adopting the appellants' meaning of "survive me," namely, the effect of the context upon the words themselves. Undoubtedly, a testator has the right to choose his own vocabulary, and the right to use words in any sense he pleases, however arbitrary. But, as he is announcing his desires to persons who he knows are accustomed to understand language in its ordinary sense, unless some special meaning is intimated, it is obvious he expects them not to depart, either by enlargement or restriction, from the ordinary signification of his words without a distinct indication to do so. If there be such indication it must, of course, be followed. As Lord *Macnaghten*, speaking for the Privy Council in *King* v. *Frost* (6), said :—"Unquestionably there are cases in which the Court in con-

(1) 3 D.J. & S., 111, at p. 115.
(2) 39 Sol. J., 468.
(3) 48 Sol. J., 416.
(4) 3 D.J. & S., 111.
(5) L.R. 2 Eq., 341, at p. 344.
(6) 15 App. Cas., 548, at p. 553.

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struing the words 'survivors or survivor' has departed from the ordinary and natural meaning of those words in order to carry out an intention apparent on the face of the will which would otherwise remain unfulfilled."

But to say simply it is necessary to find a clear intention affords no guiding principle to assist the search for that intention. The same learned Lord said in *Edyvean* v. *Archer* (1):—"What is a clear intention? That which is clear to one man is not always clear to another," and a little later on (2), quotes Lord *Eldon's* words:—"The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like" declaration "plain to the contrary." I have corrected the word "demonstration" in that report to "declaration" as in the original, *Church* v. *Mundy* (3).

There are several clauses pointed to as furnishing the contrary intention.

First, I examine the clause under consideration, and if I can infer anything reasonable from that I ought to do so, and then compare that reasonable inference with what seems to be *manifestly* apparent in other parts of the instrument: *See per* Lord *Halsbury* L.C. in *Law Union and Crown Insurance Co.* v. *Hill* (4). There the words down to and including the direction to pay to one child are untouched by any contrary direction. So far no child not both surviving and attaining 21 years can participate personally or by issue. Then follows a direction introduced by the words "provided always," which naturally suggest a qualification of the preceding gift. This qualification is that any of the children of Elizabeth Steinbach or Josiah Knight "shall die" under 21, which here means "shall be dead," and, under the principle of *Loring* v. *Thomas* (5), and *Barraclough* v. *Cooper* (6), would certainly include children who died in the testator's lifetime. Whether notwithstanding the word "any" the proviso is to be limited to the same children as are the recipients of the main gift depends on a consideration of the whole clause. If even the gift in the proviso is, on a fair interpretation, equally

(1) (1903) A.C., 379, at p. 384.
(2) (1903) A.C., 379, at p. 385.
(3) 15 Ves., 396, at p. 406.
(4) (1902) A.C., 263, at p. 265.
(5) 1 Dr. & Sm., 497, at p. 510.
(6) (1908) 2 Ch., 121*n*.

applicable to afterborn children as to those whose gift is qualified by the proviso, there would still be a difficulty in the appellants' way.

It is a gift to "issue" and, so far as they are the issue of prior born children, the gift is substitutionary, but, so far as they are the issue of afterborn children, the gift is original to them, and does not amount to a gift to their parent. But, in my opinion, the proviso is not equally applicable because the gift to issue is clearly, by force of the words "original or accruing" to the parent, intended to be substitutionary to the issue, and is to consist of such share as the parent would have been entitled to had that parent survived the testator and also attained 21.

There is an instructive instance of an accruer clause very wide to begin with being cut down by the concluding words in *King* v. *Frost* (1) already cited. The present is of the two the stronger case. Consequently, so far as the residuary clause itself is concerned, there is no "declaration plain to the contrary." On the other hand, it works quite rationally and harmoniously if the true original meaning of "survive" be adhered to.

If the altered meaning suggested be given to the word "survive" in order to effectuate the supposed intention of the testator to benefit impartially and without exception all his grandnephews and grandnieces and their issue, it fails to satisfy the supposed intention.

A grandnephew predeceasing the testator and over 21, his issue would still be wholly unprovided for. This introduces inconsistency, and, so far from weakening the primary meaning, it adds to the improbability of the altered meaning being intended, because it would be a strange intention indeed which ignored grandnephews and their issue all of whom the testator personally knew, and favoured grandnephews and their issue he never could know, and whose very existence was problematical.

Then, say the appellants, preceding clauses, if looked at, clear up the matter in their favour. I again agree with the learned primary Judge that those clauses tell the other way.

There is the £5,000 Steinbach clause where the word "survive" is first used. The first part of that clause is in the ordinary

(1) 15 App. Cas., 548.

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form and taken by itself could not, without overthrowing many wills from their acknowledged basis, be construed otherwise than in the ordinary and true sense. After that comes a paragraph commencing with the words "but I declare that if any of such children shall predecease me or die under the age of 21 years" &c. What children is the testator speaking of there? Of course, as has been urged by Mr. *Nicholas*, the children who predecease cannot be children who survive, and equally the children who die under 21 cannot be those who reach that age. But they can still be the same children indicated in the prior paragraph because they can be children as to whom it was possible for the double condition to be fulfilled. So there is no inconsistency in adhering to the ordinary sense of the word "survive." Then we may look a little further and see whether the latter words are not in themselves opposed to the appellants' view. As to "predecease" used in apposition to "survive," it indicates to me that the testator was using the two words in respect of the same persons, all or any of whom might either survive or predecease him—the word "but" having contrasting force in relation to the same object. If in regard to "predecease" the same persons are indicated, it is almost hopeless, when the close alliance of "predecease" and "die under the age of 21 years" is considered, to expect a new addition to the class to be added by the latter word. The natural sense is satisfied by reading the provision as a gift to persons who may fulfil two conditions, provided both are in fact fulfilled, but, if either condition is wanting, then to their issue. This is immensely strengthened by the nature of the gift to the issue, namely, the share, original or accruing, which the parent would have taken if the parent had survived and lived to attain 21; which by the hypothesis of the appellants would in some cases have been impossible to the knowledge, and consistently with the intention, of the testator.

Then comes the £3,000 Steinbach gift which is contrasted with the previous one. That is bounty to three children living at the date of the will, and to no others, and the provisions conclude with this declaration:—"Provided always that if any of the said children above mentioned of the said Elizabeth Mary Steinbach shall die under the age of twenty-one years leaving issue such

issue shall take . . . the share or shares original or accruing to which his or her parent would have been entitled had he or she attained the age of twenty-one years."

Now here we find a distinct contradiction of the supposed intention to benefit all grandnephews and grandnieces alike. Why should not subsequently born Steinbach children be maintained as well as those living at the date of the will? Simply the determination of the testator—which cannot be questioned. It is beside the question to point to the word "said" before children, because the quest is to discover a paramount intention (a term rather discounted by Lord *Halsbury* L.C. in *Law Union and Crown Insurance Co.* v. *Hill* (1)) to spread bounty over all grandnephews and grandnieces so pronounced as to overcome the natural and true meaning of words that in themselves indicate the contrary. And in this £3,000 Steinbach clause the testator has emphatically declared he had no such intention.

Another instance of differentiation is found in the fact that no corresponding maintenance provision is made with regard to the Knight infant who was living at his death.

Then the £3,000 Knight clause stands on the same footing as the £5,000 Steinbach clause, and, like that clause, looks forward to the state of affairs as they will exist at the death of the life tenant.

Moreover, if by any benevolent construction those £5,000 clauses might be stretched to cover the issue of after born children, that would be by means of the words "die under the age of 21 years," and not by means of, but in spite of, the word "survive," which would still remain unaltered.

It is not immaterial to observe that, besides doing violence to the ordinary meaning of words, the appellants' contention practically strikes out several words repeatedly used. The phrase "such of the children . . . as shall survive me," would read "the children," and in the £5,000 clauses, the further word "predecease" would be omitted, as well as "survive," and the subsequent description of the gift to issue would omit the condition of survival. It is indisputable that a testator may choose his own language, but the language he has actually and preferentially chosen is important

(1) (1902) A.C., 263.

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when the contest is what was his real intention. Where it is sought to displace a *primâ facie* intention by another, the failure to use simpler language, natural and appropriate to express that other, is a weighty argument.

For these reasons I cannot perceive that there is any clear intention to use the words "survive me" in any but the ordinary sense of "outlive me." There is sometimes a great temptation to find in the words of testators an underlying intention to be symmetrically bountiful, and not to exclude persons when we see no reason for exclusion. But no observation is more worthy of recollection than that in *Abbott* v. *Middleton* (1), where Lord *Cranworth*, in speaking of tracing the workings of the testator's mind, says:—"That is, as I conceive, scarcely within the province of a Court of justice, whose duty it is not to search for the testator's meaning, otherwise than by fairly interpreting the words he had used." This passage has been quoted by Lord *Macnaghten* in *Foxwell* v. *Van Grutten* (2). But that intention must be found, if at all, upon a fair and faithful interpretation of the words of the testator, on the principle stated by Lord *Thurlow* in *Jones* v. *Morgan* (3) that "where persons have expressed themselves right, they knew what they meant."

Upon the question of when the class was closed, Mr. *Nicholas* and Mr. *Dobson* both urged that the moment the elder Steinbach came of age, namely, 2nd February 1903, the class was closed for all purposes of the residuary trust fund. Reliance was placed on *Hill* v. *Chapman* (4) and *Hagger* v. *Payne* (5). Those cases will, however, be found to be distinguishable from this case. The rule of convenience, as it is called, has, for more than two centuries, been adopted where it has been found impossible to comply with the whole of the testator's intention in the distribution of a proposed gift, and the Court has been compelled to choose the direction in which effect will be best given to that intention. One child is immediately entitled to his share; others yet unborn might come within the class if the door were left open. Then the question is, shall the child presently entitled be paid at once, with

(1) 7 H.L.C., 68, at p. 91.
(2) 82 L.T., 272, at p. 273.
(3) 1 Bro. C.C., 206, at p. 221.
(4) 3 Bro. C.C., 391.
(5) 23 Beav., 474.

the necessary consequence that the door be finally closed, or shall he wait until all possible members of the class are qualified. If the child presently entitled is to be paid at once, the necessary consequence follows that the class is considered as closed, because unless that is so, the amount payable to him cannot be determined, and "if you have once paid it to him, you cannot get it back" (*Gillman* v. *Daunt* (1)). But, as pointed out by *Sir George Jessel* in *In re Emmet's Estate*; *Emmet* v. *Emmet* (2), "that rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable." I understand that to mean, that, where the Court is not driven to make a choice of convenience, it will not do so, but leave the testator's real intention to operate. *Pearson* J. expressed it in *Watson* v. *Young* (3) in these words:—"The exclusion is simply, as it is said, in order to arrive at a result which is less inconvenient than extending the period during which the class is to be formed."

It appears to me that when and howsoever that compulsory choice is avoided, it is sufficient to let in the real rights of the beneficiaries. If the testator has directed an accumulation: *Watson* v. *Young* (4); and *In re Stephens*; *Kilby* v. *Betts* (5), or where income has to be paid at various dates: *In re Wenmoth's Estate*; *Wenmoth* v. *Wenmoth* (6), he has manifested an intention that can and therefore ought to be carried out, to benefit all members of the class, without interfering with the right of any member to present payment. In *In re Stephens* (5), *Buckley* J. rejected the reported distinction of *Chitty* J. on the true basis. This was followed in *In re Canney's Trusts*; *Mayers* v. *Strover* (7). And on the same principle where a residuary trust fund is one fund in name, but where that designation is really the common name of several distinct funds, or distinct branches of the fund, I see no reason for dragging in the so-called rule of convenience where no possible inconvenience could arise. Wherever any one member of a class is entitled to payment of his share of

(1) 3 K. & J., 48, at p. 49.
(2) 13 Ch. D., 484.
(3) 28 Ch. D., 436, at p. 445.
(4) 28 Ch. D., 436.
(5) (1904) 1 Ch., 322.
(6) 37 Ch. D., 266.
(7) 101 L.T., 905.

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any one of those funds or branches, the class must be closed as to that fund or branch, but it would be stretching the artificial rule to an unwarranted extent to close altogether the class in his favour though he had no present right to payment of another fund or branch of the fund.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors, for the appellants, *Simmons, Crisp & Simmons*; *Roberts & Allport.*

Solicitors, for the respondents, *Dobson, Mitchell & Allport*; *Simmons, Crisp & Simmons.*

B. L.

Foll *Dallhold Investments (in liq) v Gold Resources Aust Ltd* (1991) 31 FCR 587

[HIGH COURT OF AUSTRALIA.]

YOUNG AND OTHERS . . . . . APPELLANTS; DEFENDANTS,

AND

TIBBITS AND OTHERS . . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1912.

SYDNEY, *April* 17, 18, 19; *May* 16.

Griffith C.J., Barton and Isaacs JJ.

Principal and agent—Employment of agent—Claim for commission—Evidence—Effect of silence.

In an action by the plaintiffs claiming commission on a sale of the defendants' property effected by the plaintiffs and in respect of which sale they alleged they had been employed as agents by the defendants,

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting) that there was no evidence fit to be submitted to a jury of such employment, the evidence