[HIGH COURT OF AUSTRALIA.]

WILLIAM THOMAS GALE AND ANOTHER Appellants;
Plaintiffs,

AND

FREDERICK CHRISTOPHER GALE AND ANOTHER . . . . . } Respondents.
Defendants,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. of A. 1914.

Melbourne, *Sept.* 24, 25, 29.

Griffith C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Will—Construction—Gift to sons followed by gift over in event of sons dying unmarried, &c.—Gift subject to being divested.

By his will a testator gave his estate to his executor upon trust to pay his funeral expenses and two legacies. The will then continued: "I bequeath and devise all the residue of my estate both real and personal to my three sons," naming them, all to share alike. The testator then directed that a specified part of his estate should not be sold for seven years, and that the executor should have power to carry on the whole or any part of his estate as he might deem advisable, and should be entitled to commission at a certain rate for collecting rents, dividends, interest or any other revenue, and that the balance of income be paid to the sons in equal parts quarterly. The will then proceeded: "I give power to my executor to advance a sum of money to any of my sons to buy good land for his use such advance to be debited to his share in my estate. I direct that if any of my sons die unmarried his share in my estate will go to the survivors. Should any of my sons die and leave a widow and issue of his own his share in my estate will go to his widow and children. Should any of my sons die and leave a widow and no issue of his own she will be entitled to one half of her deceased husband's share in my estate. I direct that if all my sons die unmarried leaving no widow nor children and if any of my estate not appropriated that will go to my brother H. G.'s sons and daughters."

Held, by *Griffith* C.J. and *Gavan Duffy*, *Powers* and *Rich* JJ. (*Isaacs* J. dissenting), that the word "die" in the will referred to death at any time, and was not limited to death within the lifetime of the testator, and, therefore, that the sons were entitled to the residuary estate in equal shares, but so that their respective interests were defeasible upon the happening of any of the events mentioned in the will except so far as any such share might in the meantime have been lawfully appropriated by way of advance under the power contained in the will.

Decision of the Supreme Court of Victoria (*Hodges* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

By his last will William Gale, deceased, bequeathed and devised all his real and personal estate to his executor "upon the following trusts": first to pay his funeral expenses and secondly to pay certain specified legacies. The will then proceeded: "I bequeath and devise all the residue of my estate both real and personal to my three sons, namely, William Thomas Gale, Henry John Gale and Frederick Christopher Gale, all to share and share alike. I direct that my property situate on the corner of Victoria and Humphrey Streets and my bank shares be not sold within seven years after my death. I give power to my executor to sell and convert into money any other property and shares I may have at the time of my death. I also give power to my executor to carry on the whole of my estate or any part of it he may deem advisable. I direct that my executor will pay all rates taxes insurance and execute needful repairs and that my executor will be allowed 2½ per cent. for collecting rents dividends interest or any other revenue. I direct that the balance of income be paid to my three sons in equal parts quarterly. I direct my executor to carry out any trusts that may be reposed in me at the time of death. I give power to my executor to advance a sum of money to any of my sons to buy good land for his use such advance to be debited to his share in my estate. I direct that if any of my sons die unmarried his share in my estate will go to the survivors. Should any of my sons die and leave a widow and issue of his own his share in my estate will go to his widow and children. Should any of my sons die and leave a widow and no issue of his own she will be entitled to one half of her deceased husband's share in my estate. I direct that if all my sons die unmarried

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leaving no widow nor children and if any of my estate not appropriated that will go to my brother Henry Gale's sons and daughters of St. John's Isle of Man."

The testator left him surviving the three sons mentioned in the will, all of whom were married, and one, F. C. Gale, had one child.

An originating summons was taken out by the two sons, W. T. Gale and H. J. Gale, asking the following question:—Are the plaintiffs and the defendant F. C. Gale entitled absolutely to the residue of the estate under the bequest and devise in that behalf contained in the said will or only to a life interest therein?

F. C. Gale, who was the executor appointed by the will, and his wife Louisa Maud Gale, as representing all other persons interested under the will, were made defendants to the summons.

The summons was heard by *Hodges* J., who held that the three sons were entitled to the residuary estate in equal shares but defeasible as to each such share respectively upon the happening of the events mentioned in the will.

From that decision the plaintiffs now appealed to the High Court.

Starke and *Owen Dixon*, for the appellants.

Schutt (with him *Ham*), for the respondent F. C. Gale.

Pigott, for the respondent L. M. Gale.

During argument reference was made to *Edwards* v. *Edwards* (1); *O'Mahoney* v. *Burdett* (2); *Ingram* v. *Soutten* (3); *Duffill* v. *Duffill* (4); *Clarke* v. *Lubbock* (5); *Apsey* v. *Apsey* (6); *Randfield* v. *Randfield* (7); *Jenkins* v. *Stewart* (8); *In re Chant*; *Chant* v. *Lemon* (9); *Skrymsher* v. *Northcote* (10); *Lloyd* v. *Davies* (11); *Clark* v. *Henry* (12).

Cur. adv. vult.

(1) 15 Beav., 357.
(2) L.R. 7 H.L., 388.
(3) L.R. 7 H.L., 408.
(4) (1903) A.C., 491.
(5) 1 Y. & C.C.C., 492.
(6) 36 L.T., 941.
(7) 8 H.L.C., 225.
(8) 3 C.L.R., 799.
(9) (1900) 2 Ch., 345.
(10) 1 Swans., 566.
(11) 15 C.B., 76.
(12) L.R. 6 Ch., 588.

GRIFFITH C.J. read the following judgment:—I confess my inability to discover any real difficulty in the construction of this will so far as regards the question now submitted for decision. It is, indeed, one of the cases in which the application of settled rules of construction affords a ready answer. The duty of the Court is to ascertain the intention of the testator as expressed by the language he has used, and for that purpose to have regard to the whole will.

The testator began by saying that he gave his estate to his executor "upon the following trusts." After giving two legacies of £100 each he proceeded: "I bequeath and devise all the residue of my estate both real and personal to my three sons," naming them, "all to share and share alike." If the will had stopped there the three sons would have taken an absolute estate. This *primâ facie* meaning will, however, be cut down if the subsequent provisions of the will indicate with sufficient certainty the intention of the testator to do so: *Randfield* v. *Randfield* (1). But the will did not stop there. The testator went on to direct that part of his estate, which he specified, should not be sold for seven years, and that his executor should have power to "carry on" the whole or any part of his estate as he might deem advisable, and should be entitled to commission at $2\frac{1}{2}$ per cent. on income collected by him. He then directed that the balance of income should be paid to his sons in equal parts quarterly. Then followed this clause: "I give power to my executor to advance a sum of money to any of my sons to buy good land for his use such advance to be debited to his share in my estate." The will then proceeded: "I direct that if any of my sons die unmarried his share of my estate will go to the survivors. Should any of my sons die and leave a widow and issue of his own his share in my estate will go to his widow and children. Should any of my sons die and leave a widow and no issue of his own she will be entitled to one half of her deceased husband's share in my estate. I direct that if all my sons die unmarried leaving no widow nor children and if any of my estate not appropriated that will go to my brother Henry Gale's sons and daughters of St. John's Isle of Man." The word "is" must be supplied before "not."

(1) 8 H.L.C., 225.

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Griffith C.J.

Whatever question may be raised with regard to the application of these words to some possible contingencies, as for instance a son dying without a widow living but leaving issue, there is no ambiguity in the words "if any of my sons die unmarried" or the corresponding words in the other three conditions. The case of *O'Mahoney* v. *Burdett* (1) establishes the rule that a gift over in such terms means "upon death at any time," whether before or after the testator's death, unless the context renders a different construction necessary or proper. By "necessary" I understand to be implied the existence of clear provisions inconsistent with that construction, and by "proper" I understand "upon the proper construction of the whole will."

Is there, then, anything in the other provisions of the will to displace the ordinary construction of the word "die" as meaning "die at any time"?

The circumstance that other provisions which can only operate after his death are interposed is certainly not sufficient to do so. It follows that the word "die" does not mean "die in the lifetime of the testator." If the will directed the estate to be distributed at a fixed period, which might happen in the lifetime of the sons, the necessary meaning would, as pointed out by Lord *Hatherley* and Lord *Selborne* in *O'Mahoney* v. *Burdett* (1), be "die before distribution." It is suggested that such a direction is to be found in the authority to advance money to any of the sons "to buy land for his use." This cannot be construed as a direction to distribute the whole estate at a fixed period, for the power is discretionary and may be exercised from time to time, and at any time, during the lifetime of the sons, or not at all. The meaning of this provision seems clear enough. The general scheme of the testator was, as is shown by the tenor of the final gift over, to keep his estate in his own family as far as possible. But he qualified this general intention by a provision by which his sons, although not absolutely entitled to their shares, might obtain, if the executor thought fit, what he called "advances" for the specific purpose of buying "good land," which the testator might reasonably hope would remain in the family. His executor was one of the sons, and his interest under the cross gifts, as well

(1) L.R. 7 H.L., 388.

as his duty, might be trusted to prevent him from exercising his discretion so as to defeat the testator's general intention. In my opinion the term "advance" was used by the testator in the ordinary sense of an advance by trustees to a person entitled presumptively to a share in a fund distributable upon a contingency, and the words "to be debited to his share" mean that in that event what would otherwise be a full one-third share should be diminished by the amount so advanced. In this view the words "not appropriated" in the final gift over are apt words to denote the shares so far as they have not been diminished by such advances, and in my opinion they certainly include that case. Whether upon a possible construction of the gifts over they might include anything else is a point which does not now arise. To adopt the words of *Cozens-Hardy* L.J. in *In re Schnadhorst* (1)—I am unable to discover in the will any context which requires any other meaning to be put upon the gifts over than that which the House of Lords held, in *O'Mahoney* v. *Burdett* (2), to be the meaning of clauses of this kind.

The decision of *Hodges* J. was therefore right, but the formal order should be varied by making the declaration read as a declaration that the plaintiffs and the defendant F. C. Gale are entitled to the residuary estate in equal shares, but so that their respective interests are defeasible upon the happening of any of the events mentioned in the will except so far as any such share may in the meantime have been lawfully appropriated by way of advance under the power contained in the will in that behalf.

This will leave open for future determination, if necessity should arise, any question as to the construction of the gifts over in certain possible events suggested in argument.

ISAACS J. read the following judgment:—Having to form an independent opinion, I am bound to express it, however much I regret to find it at variance with that held by the majority of my learned brethren.

The problem ultimately resolves itself into this proposition, of which the respondents maintained the affirmative: Has the testator intended that notwithstanding the express gift of the

(1) (1902) 2 Ch., 234, at p. 242. (2) L.R. 7 H.L., 388.

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whole residue to his three sons, who are on the face of the will the primary objects of his solicitude, they shall never at any time during their life, and under any circumstances, have the right to receive or touch a single penny of the corpus of his estate; that even as to income their right is to be confined to a limited period, and to a certain extent dependent on the will of the executor, and beyond that, however great their needs may be, they are to be entirely subject to the goodwill of the executor for pecuniary assistance and that for a specific purpose only? I must confess that much more compelling words than those relied on here are necessary to bring my mind to a conclusion that appears to me unnatural and self-contradictory.

There is no rule of law, strictly so called, applicable to the case except this: that the meaning of a will is to be gathered from what the testator has actually said, reading his words by the light of surrounding circumstances and in relation to the subject matter. There is no technical expression requiring a rigid interpretation, unless it be the word "advance."

There is scarcely even a canon of construction to be applied. There is this, to begin with, that the Court—as Lord (then Mr. Justice) *Parker* said in *Re Litchfield* (1)—is naturally in favour of vesting rather than of divesting. The case of *O'Mahoney* v. *Burdett* (2) really declines to establish any special canon of construction for the words "die unmarried," but decides that they, like all other words not judicially interpreted in a special manner, must *primâ facie* be read in their primary and natural sense, and that to alter that meaning a proper context showing a contrary intention is required. That principle is applicable to all documents.

If, however, there is, as Lord *Cairns* says in *O'Mahoney* v. *Burdett* (3), "a context which renders a different meaning necessary or proper"; or, to use Lord *Hatherley's* words in the same case (4), there is found something "to favour a contrary construction"; or, again, as Lord *Selborne* (5) says, "indicative of a contrary opinion"; the Court may and ought to give effect to what

(1) 104 L.T., 631, at p. 632.
(2) L.R. 7 H.L., 388.
(3) L.R. 7 H.L., 388, at p. 399.
(4) L.R. 7 H.L., 388, at pp. 404, 405.
(5) L.R. 7 H.L. 388, at p. 406.

it finds to be the true intention of the testator. Again that is a general principle of construction. I take it to be the duty of the Court to look at this document as a whole (see *Crumpe* v. *Crumpe* (1)), and find the real intention of the testator from a reasonable consideration and construction of what he has actually said, from all he has said and how he said it. Having so ascertained his main purpose and intention to its satisfaction, the Court must give effect to it and carry it out, even at the cost of particular expressions which in themselves may be inconsistent with it, but not sufficient to control it. For this no other authority need be cited than *Towns* v. *Wentworth* (2).

In seeking the true intention it is patent that the same words differently arranged, either in speaking or in writing, may convey a very different signification; and, after all, what we have to regard is what is the meaning the testator intended to convey to those who came to read his testament after his death as a document representing his last will with regard to his property. It is obvious, therefore, that the manner in which he expressed his directions, or the form of the document, as well as its mere words, is important, and in the case of a will, just as in the case of a Statute or a contract, re-arrangement and transposition may seriously alter the substance. A man's intention may be found indicated in many ways. Where you have an inartificially drawn will as this is, that is a circumstance to be considered; the fact that it is not drawn by a lawyer may be one indication of intention, as in *Hall* v. *Hall* (3), or, on the other hand, that it is drawn by skilled persons: *Ingram* v. *Soutten* (4). This will was obviously not the work of a lawyer, or of a person perfect in orthography. But it was clearly the expression of a practical man's will, and it exhibits a certain dominant intention, which I think should govern the matter. I mean that the testator intended to give his sons a certain and a substantial benefit, and he took special precautions to see they got it to the full. He first makes small bequests to his nieces; then gives all the residue of his estate both real and personal to his three sons, naming them, and says, "all to share and share alike." There he stops

(1) (1900) A.C., 127.
(2) 11 Moo. P.C., 526, at p. 543.
(3) (1892) 1 Ch., 361, at p. 367.
(4) L.R. 7 H.L., 408, at pp. 416, 419.

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for the moment in the disposition of his property. So far the gift is absolute. On the principle of *Randfield* v. *Randfield* (1) any subsequent words cutting down the interest so given must do so " with reasonable certainty " (*per Campbell* L.C.); they must be " reasonably clear " (*per* Lord *Wensleydale*), or " sufficiently certain " (*per* Lord *Kingsdown*). I have previously expressed this view in *Peter* v. *Shipway* (2), and on this as on other points of law in that case *Higgins* J. agreed (3). The principle of that House of Lords case must be applied as well as the decision of *O'Mahoney* v. *Burdett* (4). One does not exclude the other. And it seems to me that when the word " die " is read together with the whole context, including the portion *primâ facie* conferring an absolute gift—for that, in view of *Randfield's Case* (1) and *Ingram* v. *Soutten* (5), it cannot be denied is part of the relevant context, or, as Lord *Cairns* said in *Ingram* v. *Soutten* (5), within " the scope of its provisions "—it is not " reasonably certain " to be used in the sense of " die at any time." On the contrary, the will read as a whole convinces me the reasonable certainty is the other way, and is intended to refer to the testator's lifetime. At the least, there is a sufficient element of uncertainty remaining to make it " proper," as Lord *Cairns* says, to adhere to the clear and unmistakable terms of the original gift. In *Peter* v. *Shipway* (6) the view expressed by the Chief Justice went even further in holding that if there is " some ambiguity " that is sufficient to prevent the cutting down of a clear gift.

After that primary distinct gift in the terms already mentioned, the testator at once proceeds, not to qualify it, but to treat it as complete in itself. He gives certain subordinate directions with respect to its administration by means of a prohibition, and the creation of certain powers. He attempts to tie up specified land and his bank shares for seven years. But as to the rest of his property, it is left quite free in the executor's hands to deal with. He empowers, but does not direct, the executor to " carry on the whole of my estate or any part of it

(1) 8 H.L.C., 225.
(2) 7 C.L.R., 232, at p. 256.
(3) 7 C.L.R., 232, at p. 262.
(4) L.R. 7 H.L., 388.
(5) L.R. 7 H.L., 408, at p. 416.
(6) 7 C.L.R., 232.

he may deem advisable." The alternative of "carrying on," which means retaining it in its present form, is of course realization into money, and the natural object of that is distribution. So that possible though not compulsory distribution is *primâ facie* contemplated as to part immediately, and as to the balance in seven years. And if the property be converted and distributed, it may be spent without any further trust: See *O'Mahoney* v. *Burdett* (1). If "carried on," the estate or the part carried on is assumed to produce net income, which the sons are to have quarterly. But the income so directed to be paid is clearly intended only for the case of carrying on, and not after realization. After realization nothing is said as to income—further investment not being contemplated by the will.

What, then, is to be available for the sons themselves? An advance is possible. But as to that, the executor might or might not choose to make one at all; if he were willing it must be for a specific purpose, and the amount would then be "debited to his" (the son's) "share," a share which by the hypothesis he was never to be entitled to receive, whether anyone was dependent on him or not. This is itself a central inconsistency. But the son might not require money for such a purpose, and in that event he could never get anything of the capital, however great his necessities might be.

This "advance" power, it is noticeable, comes in after a direction to carry out trusts to which the testator is subject. I take that as an indication that at that point in the will the testator had concluded the gift to his sons and dealt with matters outside his own property. Then, in order, consistently with the seven years' tying up of some of the property, to provide for the interim necessities of his children, the power to advance was inserted. Lord Justice *Cotton's* definition of advancement in *Re Aldridge*; *Abram* v. *Aldridge* (2) was referred to. Now that case, and especially that definition, appears to me to be in principle a very strong authority against the respondents' view here. The will in that case said:—"And I give a power of advancement to my trustees." The question was whether under those words there was power to advance out of corpus. First of all, the learned

(1) 1 L.R. 7 H.L., 388, at p. 403. (2) 55 L.T., 554, at p. 556.

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Lord Justice said that, no limit having been fixed, the natural limit to the amount of advancement was the share given to each child. Then he proceeded to inquire whether corpus was available, in view of the fact that income only was given to the children, the corpus being given to grandchildren. Then comes the definition in these words:—"What is advancement? It is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their *obtaining the absolute interest* in a portion or the whole of that to which they would be entitled." The learned Lord Justice proceeds to answer this question:—"Because the testator has merely made use of the word 'advancement' in this clause, can we say that he has authorized the payment of that which, independently of the clause, the person to whom it was advanced could never have any right whatever? If the clause did authorize in terms the payment to a person not absolutely entitled to the corpus there would be an end of the question; that would be a gift of the corpus to him. But can a mere direction to advance be properly read as directing a payment to a person of that which, under the will, independently of the clause, he never could get." *Fry* L.J. said (1):—"It seems plain to me that a power of advancement does not, *per se*, enable the trustees to take the property of one person and give it to another."

As, therefore, it is the inevitable result of the respondents' construction of the will, that the testator intended to place the corpus of each original share entirely beyond the reach of his sons themselves, so that it should only be available for some other person after the son's death, either his successor or his substitute, it would be a transparent inconsistency to allow under the advancement clause, and at the mere will of the executor, himself one of the beneficiaries, the corpus to be handed over, up to the limit as *Cotton* L.J. says of the amount of the share, and still more as it seems to me to permit the whole of the estate to be so advanced.

If advances are contemplated out of capital, it cannot then, as I conceive, be denied consistently with the case just cited that the

(1) 55 L.T., 554, at p. 557.

capital itself of each original share is contemplated in some way, or in some event, to reach the hands of the son, and if so, to be consumable by him. But then it is said that is all swept away by executory limitations. In the first place, the position in which we find them, is not what one would expect primarily at all events if they were intended to cut down the provision made for the sons.

The clauses referred to comprise the following possible conditions of a son at the time of his death: (1) never having married; (2) having married; (3) leaving a widow; (4) not leaving a widow; (5) leaving a widow and children; (6) leaving neither widow nor children; (7) leaving a widow and no children; but not the case of leaving children and no widow. Then there is the alternative of all the sons dying unmarried leaving no widow or children, and some of them not answering to that condition. I enumerate the possibilities in this way because, as pointed out by Lord *Cairns* in *O'Mahoney* v. *Burdett* (1), where a person must of necessity die either in one or other of two alternative conditions, the case is the same as if death *simpliciter* were the condition, in which case the doctrine of repugnancy would lead to construing the period intended as that of the testator's death. For it is of the essence of an executory limitation that the event on which the absolute gift is to be defeated must be one which may possibly never happen.

The only omission is that of leaving children and no widow, which is hardly a strong reason for outweighing the approximation to simple "death" in the other cases. If that event were provided for, there would be a clear repugnance. So that on that fine and rather unnatural thread hangs the argument as to defeasibility. Rather it seems to me the testator inserted these latter directory clauses to guard against possible failures of his primary arrangement in favour of his own children. This is strongly borne out by the frame of the last of the so-called executory limitations, as I read it. It is in these terms: "I direct that if all my sons die unmarried leaving no widow nor children, and if any of my estate not appropriated, that will go to my brother Henry Gale's sons and daughters." Mr. *Pigott* admitted

(1) L.R. 7 H.L., 388.

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very frankly, and in my opinion with absolute accuracy, that the non-appropriation referred to was in the event of the death of all the sons in the testator's lifetime. I read that last clause as raising two distinct lines of gift to the nephews and nieces of the testator. The first line has reference to the original shares given to the sons, and the second to any part of the estate not disposed of effectually by the will in the events which may have happened. For instance, the half-share remaining where the son dies leaving a widow and issue. It is not that only such part of the estate as is "unappropriated" that passes in the event of all the sons dying unmarried, leaving no widow or children; that reading gives rise to insuperable difficulties of interpretation of the word "appropriation." A double meaning has in that case to be found for it, and still partial intestacy supervenes. But construed as mentioned, all difficulties are avoided, and full meaning is given to the condition.

Read in the manner indicated, the final conditions considered together with the rest of the will, do not in my opinion operate to cut down the absolute gift we find in the early part. This is confirmed by the marginal direction that should Frederick C. Gale die during his administration of the will another is nominated. This, as Mr. *Starke* justly said, is very strong evidence that some distribution in the lifetime of Frederick is authorized, and complete distribution after seven years should he so long live. The word "administration" as used by the testator appears to cover all the contingencies he has provided for.

Lastly a difficulty as to accrued shares stands in the respondents' way. Mr. *Pigott* did not, and for very proper reasons, argue this point. But the Court cannot escape observing its importance, though I do not in the circumstances decide it. If the intention of the testator is to be arrived at, it is an inseparable part of the inquiry whether accrued shares are included in the final clauses. If they are, it is an almost impossible task to say there is a defeasance, for it would be imputing contrariety of intention in the same words of even the first direction. If they are not included in the first directions, the manifest desire of the testator to provide for all possible events is not fulfilled.

In my opinion this appeal should be allowed.

GAVAN DUFFY J. read the following judgment:—In this case the will is so ill drawn that I am unable to discover from its terms what the real intention of the testator was. Indeed, it is probable that he himself had no clear conception of the meaning and effect of his words. I agree in the result at which the Chief Justice has arrived, not because I am satisfied that the construction he adopts is correct, but because I think there is nothing in the will which indicates with any certainty that the words "die unmarried" should not have their normal meaning, namely, "die unmarried at any time."

POWERS J. I concur in the judgment delivered by the Chief Justice.

RICH J. read the following judgment:—I see no difficulty in answering the questions asked by this originating summons. Some other questions raised during the course of a rather subtle argument are not at present ripe for decision and throw no light on the construction of the will. The scheme of the will is not complicated. The general intention of the testator indicated by the words used by him in his will is to make provision not only for his sons but also for their wives and children if they leave any. He provides in the first instance for the case of his sons dying without having been married. He then provides for some of the cases where they have married and died leaving widows and/or children. At the conclusion of his will he provides for the contingency of all his sons dying after marriage and without leaving widows or children. In that event so much of his estate as has not been "appropriated" is to go over to his brother's children. The will also gives special directions with regard to administration—payment of debts, rates, taxes, insurance, repairs, commission, and income, and a special power of advancement.

In my opinion the words "not appropriated" include whatever part of the estate is left after payment of such sums as the executor in his discretion advances under the power of advancement; the result being that an exercise by the executor of his

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power of advancement operates as a *pro tanto* absolute vesting of the prior gift to the sons so far as the ultimate divesting clause is concerned.

It was argued on behalf of the appellants that the words of the gifts over are referable either to death before the period of distribution or to death before the testator. For the first contention reliance was placed on the provision for advancement. But this clause is not equivalent to a direction to distribute the estate during the lifetime of the sons. It confers on the executor a power of advancement which he may in his discretion never exercise. As regards the latter contention, in no case is death *simpliciter* treated as a contingency, and I can find no support for it in the will.

It was also argued that the words "not appropriated" were intended to cover property not included in the will and property included in the will but not affected by the provisions of the will. It is, in my opinion, sufficient to say that these words do not refer to any acts or omissions on the part of the testator, but to acts of administration by the executor.

I can find nothing in the context of this will to render it necessary or proper to construe the words relating to death coupled with the contingencies mentioned in the will as meaning anything but death at any time.

I agree with the order proposed by the Chief Justice except as to costs.

With regard to costs I consider that the salutary rule should be adhered to, that where a beneficiary is not satisfied with the construction of the will by the primary Judge and appeals, he must, apart from special circumstances, pay the costs.

GRIFFITH C.J. The majority of the Court think that under the circumstances, as the variation of the order is substantial, costs of all parties should come out of the estate.

Appeal dismissed. Order appealed from varied by substituting for the declaration made a declaration that the plaintiffs and the defendant F. C. Gale

are entitled to the residuary estate in equal shares but so that their respective interests are defeasible upon the happening of any of the events mentioned in the will except so far as any such share may in the meantime have been lawfully appropriated by way of advance under the power contained in the will in that behalf. Costs of all parties of the appeal to be paid out of the estate.

Solicitor, for the appellants, *Septimus A. Ralph.*

Solicitors, for the respondents, *Ford, Aspinwall & De Gruchy,* for *Cuthbert, Morrow & Must,* Ballarat; *George Shaw.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HANNON . . . . . APPELLANT;
PLAINTIFF,

AND

McLARTY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *Sept.* 8.

Griffith C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Nuisance—Negligence—Highway—Wheat left on highway—Horses injured by eating wheat.

The defendant left a waggon loaded with bags of wheat, unattended and unprotected except by a dog, on the side of a country road three chains wide. The plaintiff's horses were by his direction turned out of his yard on to the road to find their way unattended, as they were accustomed to do, to a paddock seven miles away. The horses tore open some of the bags and ate