[HIGH COURT OF AUSTRALIA.]

NATIONAL TRUSTEES, EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED AND OTHERS . . . Appellants;

Plaintiffs and Defendants,

AND

O'CONNOR . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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Melbourne, *Oct.* 27, 28.

Sydney, *Nov.* 14.

Knox C.J., Barton, Isaacs, Gavan Duffy, and Rich JJ.

Will—Construction—Gift to several beneficiaries—Gift to remaining survivors in event of decease of any beneficiary—Contingency—Death before testator—Accrued shares.

A testator by his will, after providing for the payment of his debts and funeral and testamentary expenses, provided as follows: "I give devise and bequeath unto" his youngest son, his wife and his three daughters, "equal shares and I hereby appoint" A and B "or the survivor of them executors of this will In the event of the decease of any of the parties herein mentioned their portion to revert to the remaining survivors equally neither of the parties herein mentioned shall have power to dispose of their interest in the said property." It was admitted that the testator intended to dispose of all his real and personal property.

Held, that the event upon the happening of which the portions were to revert to the remaining survivors was the death of a beneficiary during the lifetime of the testator, and, therefore, all the beneficiaries having survived the testator, that each of them took on the death of the testator an indefeasible interest in one-fifth of the real and personal estate.

Held, also, that the gift of portions to the survivors did not include accrued portions, but only original portions.

Decision of the Supreme Court of Victoria (*Irvine* C.J.): *In the Will of O'Connor*; *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *O'Connor*, (1919) V.L.R., 324; 41 A.L.T., 15, reversed.

APPEAL from the Supreme Court of Victoria.

John O'Connor died on 20th May 1873 leaving a will dated 20th August 1869. After directing payment of all the testator's just debts, funeral and testamentary expenses, the will proceeded :— "I give devise and bequeath unto my youngest son John O'Connor and each of my three daughters and wife Mary O'Connor Suzen O'Connor Bridget O'Connor and my wife Mary O'Connor equal shares and I hereby appoint Patrick Collins and Daniel Hourigan or the survivor of them executors of this will In the event of the disease of any of the parties herein mentioned there portion to revert to the remaining survivors equally neither of the parties herein mentioned shall have power to dispose of there interest in the said property." (The spelling in the original will is reproduced.) The testator left him surviving his widow Mary O'Connor, who died in 1898; his daughter Suzen, who died in 1916 unmarried and intestate; his daughter Mary, who died on 8th March 1918 unmarried and intestate; his daughter Bridget, who died on 13th March 1918 unmarried leaving a will; and his three sons, Michael, Patrick and John. The sons Michael and Patrick, who were not mentioned in the will, on 30th May 1889 released, discharged and absolved the executors appointed by the will, their mother, sisters and brother John, and also the estate of the testator from all right, title and interest, claim and demand (if any) of them in, to, under or in respect of the will or the estate of the testator. On 4th April 1919 the National Trustees, Executors and Agency Co. of Australasia Ltd. and James Patrick McParland were the trustees of the testator's estate, which then consisted of 50 acres of land. The Company was also the administrator of the estates of the testator's widow and of the estates of his daughters Suzen and Mary, and the Company and Richard Farley were executors of the will of the testator's daughter Bridget.

An action in the Supreme Court was brought by the Company against John O'Connor, James Patrick McParland and Richard Farley, by which it was sought to obtain the construction by the Court of the testator's will, with all necessary declarations, orders and directions, and also an order for the sale and distribution of the real estate between the parties interested.

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The action was heard by *Irvine* C.J., who gave a judgment by which it was declared and adjudged that the testator did not die intestate as to any part of his estate, that the persons mentioned in the will as devisees took as tenants in common with an express right of survivorship, that on the death of any of them his or her interest both original and accrued, if any, passed in equal shares to the others surviving, and that the defendant John O'Connor was, in the events that had happened, absolutely entitled to the property remaining in the estate of the testator: *In the Will of O'Connor*; *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *O'Connor* (1).

From that decision the Company, McParland and Farley appealed to the High Court.

R. E. Hayes and *Walker*, for the appellants. The parties have agreed that the testator intended to dispose of his whole estate real and personal to his widow and four children. The words "in the event of the decease" &c. should be interpreted as referring to death during the lifetime of the testator, and "survivors" as meaning those who survive the testator, so that each of the five beneficiaries, having survived the testator, took an absolute interest. The words of the will leave it in doubt as to whether the event is death at any time or death during the lifetime of the testator, and in such a case the rule is that they should be interpreted as referring to death during the lifetime of the testator (*Hawkins on Wills*, 2nd ed., p. 311; *Jarman on Wills*, 6th ed., vol. II., p. 2144; *Cripps v. Wolcott* (2); *Elliott v. Smith* (3)). The words "in the event of the decease" import a contingency, and, as death by itself is not a contingency, unless some other limitation is indicated the contingency will be taken to be death during the testator's lifetime. The gift to the five beneficiaries is absolute, and there are no clear words cutting down that gift (*Randfield* v. *Randfield* (4)).

[ISAACS J. referred to *In re Fisher*; *Robinson v. Eardley* (5); *In re Poultney*; *Poultney* v. *Poultney* (6).

(1) (1919) V.L.R., 324; 41 A.L.T., 15.
(2) 4 Madd., 11.
(3) 22 Ch. D., 236.
(4) 8 H.L.C., 225.
(5) (1915) 1 Ch., 302.
(6) (1912) 2 Ch., 541, at p. 545.

[RICH J. referred to *Penny* v. *Commissioner for Railways* (1).]

The word "revert" does not indicate any intention to cut down the absolute gift. It merely means "pass over" (*Jenkins* v. *Stewart* (2)). The will deals with personalty as well as realty, and it would be unlikely that the testator intended the personalty to be held on trusts which would not terminate until all the beneficiaries but one should die. It is also unlikely that he intended that if one of his daughters should die after him, leaving children, those children should get nothing. If the words "in the event of the decease" are to be interpreted as referring to death at any time, then the gift over is of the original share of a beneficiary who dies, and not of any accrued share to which he may have become entitled upon the prior death of another beneficiary (*Hawkins on Wills*, 2nd ed., p. 320; *Bright* v. *Rowe* (3); *Douglas* v. *Andrews* (4); *In re Henriques' Trusts* (5); *In re Chaston*; *Chaston* v. *Seago* (6)).

[ISAACS J. referred to *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikhareswar* (7).]

Pigott and *Owen Dixon*, for the respondent. The five beneficiaries took as tenants in common or joint tenants, the interest of each beneficiary being defeasible on his death. Where in a will there is, in the event of his death, a gift over of property given to a person absolutely, the event will be taken to be his death before that of the testator, unless an intention to the contrary appears in the will (*O'Mahoney* v. *Burdett* (8)). An intention to the contrary does appear here. The word "revert" indicates that the interest has been in some person originally. (See *In re Norman's Trusts* (9); *Coogan* v. *Hayden* (10).) The intention was to give each of the beneficiaries an interest in a common fund, and that interest it is which is dealt with by the clause beginning "In the event of." The restriction on alienation shows that the testator intended that the property should be kept together until it finally came to the last survivor. (See *Billings* v. *Sandom* (11).) The use of the words "in the event of"

(1) (1900) A.C., 628.
(2) 3 C.L.R., 799.
(3) 3 My. & K., 316.
(4) 14 Beav., 347.
(5) (1875) W.N., 187.
(6) 18 Ch. D., 218.
(7) L.R. 10 Ind. App., 51, at p. 60.
(8) L.R. 7 H.L., 388.
(9) (1879) W.N., 175.
(10) 4 L.R. Ir., 585, at p. 591.
(11) 1 Bro. C.C., 393.

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does not necessarily indicate a contingency. In order that the rule should apply, it must be found that the testator has used words of contingency coupled with death. Here the testator has expressed no idea of contingency. It is unusual for a testator in his will to provide for contingencies which are to happen in his lifetime. If a contingency is involved, the only reason for saying that it is death during the lifetime of the testator is that no other contingency is found in the will.

[KNOX C.J. My brother *Gavan Duffy* suggests that the contingency may be the death of one of the beneficiaries leaving more than one of the other beneficiaries surviving.]

If that is the contingency indicated, then when only two are left surviving they would be holding as joint tenants with all the rights of survivorship, and the son John O'Connor would now be entitled to the whole of the property.

[RICH J. referred to *Hearn* v. *Baker* (1).]

The gift of the "portion" of any beneficiary who should die to the survivors is sufficient to carry accrued shares as well as original shares (*Douglas* v. *Andrews* (2); *Goodman* v. *Goodman* (3); *Woodroofe* v. *Woodroofe* (4); *Barker* v. *Lea* (5); *Jarman on Wills*, 6th ed., vol. II., p. 2115)).

R. E. Hayes, in reply, referred to *Hughes* v. *Whitby* (6); *Bouverie* v. *Bouverie* (7).

Cur. adv. vult.

NOV. 14.

KNOX C.J. In this case my brothers *Barton* and *Gavan Duffy* and I agree with the conclusion at which my brothers *Isaacs* and *Rich* have arrived, and the judgments which they are about to read.

ISAACS J. read the following judgment:—The will is home-made and inartistic. Some of the dispositions are clear and unambiguous. The testator gives, in absolute terms, what is conceded to be the whole of his property to his wife and four children in "equal shares."

(1) 2 K. & J., 383.
(2) 14 Beav., 347.
(3) 1 DeG. & Sm., 695.
(4) (1894) 1 I.R., 299.
(5) Turn. & R., 413.
(6) I.R. 7 Eq., 98.
(7) 2 Phil., 349.

That means, apart from qualifications which do not appear here, that the beneficiaries take as tenants in common. It appears that the property included both realty and personalty, though the exact nature of the personalty and its amount are not disclosed. After making the apparently absolute gift to each person the testator made his appointment of executors. He did not appoint trustees. So far the gift is unambiguous. Then follow these words, of which the meaning is in dispute: "In the event of the decease of any of the parties herein mentioned their portion to revert to the remaining survivors equally." The question is whether "decease" means decease before the testator's death, or decease at any time thereafter, provided, alternatively, one or two of the others happen to survive. There is a subsidiary question, namely, whether, if "decease" is not limited to death in the lifetime of the testator, accrued shares follow the substitutionary provision. But, though subsidiary, the determination of that question is material on the general construction of the will.

The rule is laid down by the Privy Council in *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikhareswar* (1). There Sir *Robert Collier*, for the Judicial Committee, says:—"It is undoubtedly a rule of English law that, when a fund is given to a class of persons with a direction that, on the death of any of them, their shares are to go over, the original shares only, and not the accruing shares, will go over. This rule was stated by Lord *Hardwicke* in *Pain* v. *Benson* (2), and has been followed, not always without expressions of reluctance, by a long series of decisions. But an intention that the accruing shall go over with the original shares has been inferred where there is what has been called 'an aggregate fund' which the testator desires to keep unsevered (when the gift has been to several with benefit of survivorship) (*Worlidge* v. *Churchill* (3); *The Crawhall Trusts* (4)), when, in addition to the word 'share,' the word 'interest' is used (*Douglas* v. *Andrews* (5)), or where the words are his 'or her share or shares' (*Wilmot* v. *Flewitt* (6))." Applying that rule to the present will, it is clear that accrued shares do not

(1) L.R. 10 Ind. App., at p. 60.
(2) 3 Atk., 78, at p. 80.
(3) 3 Bro. C.C., 465.
(4) 8 D. M. & G., 480.
(5) 14 Beav., 347.
(6) 11 Jur. (N.S.), 820

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pass. If, therefore, "decease" means in the lifetime of any survivor or survivors, the result must be that when the widow died in 1898 her fifth share was equally divided among the remaining four, each of whom took one-twentieth of the whole estate as an accrued share. That left four-fifths of the estate held as original shares subject to the substitutionary provision. Then in 1916, when Suzen died, her original fifth was shared equally by the remaining three, that is, each took one-fifteenth of the whole estate as an accrued share, leaving three-fifths subject to the substitutionary provision. Next, on 8th March 1918, when Mary died, each of the remaining two took half her original one-fifth, that is one-tenth each as an accrued share, leaving two-fifths (or alternatively one-fifth) to be subject to the substitutionary provision. When, five days later, Bridget died, either her representatives had one indefeasible fifth original share and three indefeasible accrued shares, or they had three indefeasible accrued shares only, and Bridget's original one-fifth passed to John, who now holds his own original share, and also, in the latter alternative, holds as an accrued share Bridget's original one-fifth, plus one-twentieth, one-fifteenth and one-tenth, the four accrued shares totalling twenty-five sixtieths. On this latter basis, the shares would stand thus: John would have thirty-seven sixtieths, the administrators of the widow, nothing; the administrators of Suzen one-twentieth that is three-sixtieths; the administrators of Mary one-fifteenth plus one-twentieth equals seven-sixtieths; the administrators of Bridget one-fifteenth plus one-twentieth plus one-tenth equals thirteen-sixtieths. Thus twenty-three sixtieths of the estate would be held apart from John. That incontestably excludes any construction of the will which regards the property as an aggregate mass kept intact down to the last survivor or even the last two survivors. It is, of course, still more difficult to maintain such an idea if the clause of substitution stops at two survivors, for in that case to Bridget's estate would belong one-fifth original share plus thirteen-sixtieths accrued shares; in all twenty-five sixtieths, while John would have the same proportion, the remaining ten-sixtieths belonging to the estates of Suzen and Mary. When we remember that the will was made in 1869, the testator dying in 1873, and that the widow died in 1898, and the daughters died in 1916 and

1918, nearly fifty years after the date of the will, the inference is that the children were very young at the time the will was made.

As to the primary construction of the passage " In the event of the decease of any of the parties herein mentioned," the observations of Sir *William Grant* in *Cambridge* v. *Rous* (1) are of considerable importance. Applying those observations to the present case, it is clear that the expression " in the event of the decease " primarily indicates a contingency. As death at some time is a certainty, the contingency must be death at some particular time fixed in the testator's mind. The question then is: What time did he have in his mind? If nothing more appears, then, as Sir *William Grant* says, the phrase, as a matter of probability, imports dying before the testator. Sir *John Leach's* opinion accords with this. (See *Allen* v. *Farthing* (2) and *Child* v. *Giblett* (3), quoted in *Jarman*, p. 1598.)

In this case, as in *Cambridge* v. *Rous* (4), there is nothing in the will to prohibit each beneficiary consuming his or her share of the property. Alienation of the " interest," whatever that means, is forbidden, but enjoyment, even to the extent of exhausting the separate share of the fund, is apparently open. We are not told anything about the debts, nor how far it might have been open to the executors to convert the property and distribute it *pro ratâ* among the tenants in common. As to this, what Sir *William Grant* says in *Cambridge* v. *Rous* (5), and what Lord *Hatherley* says in *O'Mahoney* v. *Burdett* (6), are very much in point.

The context does not weaken the primary construction of the contingency. The word " portion " is equivalent to " share " (*Jarman*, 5th ed., p. 1522), and " share " is consistent with vested share and with share not vested. The word " revert " may be variously considered, as by Lord *Cairns* L.C. and by Lord *Hatherley* in the same case (*O'Mahoney* v. *Burdett* (7), at pp. 393 and 402-403 respectively). " Revert " rather conveys the notion of coming back to the testator, and thence, when followed by such words as " to A B," passing through the testator as a new gift to A B. That was apparently Lord *Hatherley's* view. The words " remaining sur-

(1) 8 Ves., 12, at pp. 23-24.
(2) 2 Jarm., 5th ed., 1597.
(3) 3 My. & K., 71.
(4) 8 Ves., 12.
(5) 8 Ves., at p. 23.
(6) L.R. 7 H.L., at p. 403, ll. 23-25.
(7) L.R. 7 H.L., 388.

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vivors " seem to mean simply the survivor or survivors. To restrict the word " survivors " to two does not help either of the rival constructions, because as a prospective share must at least be included, it would be an extreme interpretation which, in the event of the death of four of the beneficiaries in the testator's lifetime, would give one-half of the estate to the survivor and leave possibly an intestacy as to the other half. Nor does the provision against alienation do more than prohibit the alienation of whatever interest any of the parties may happen to have—including, of course, accrued shares.

But besides the primary construction, there are considerations which tell in favour of the view that the phrase " in the event of the decease " means in the lifetime of the testator. The children must have been very young, and if the testator contemplated their attaining age and marrying, he could hardly have intended depriving the children of one for the benefit of others who perhaps had not married.

Altogether, to ascribe to the testator the intention of fixing " decease " at any time during the lives of survivors would make a certainly complicated, a possibly defective, and probably an unnatural will.

Having regard to these considerations and to the preference the law has for indefeasible vesting in case of doubt, the better construction seems to be that on the death of the testator each beneficiary took an indefeasible vested interest in one-fifth of the estate.

RICH J. read the following judgment:—The question for our decision is whether, on the true construction of the will of John O'Connor, the gift over " in the event of the decease of any of the parties herein mentioned " takes effect on their death at any time or only on their death in the lifetime of the testator.

The will is in the following words: [His Honor read the will, and continued:] In the case of a will such as this, which is obviously the composition of an illiterate draftsman, I think it would be unsound to place too much reliance on the precise meaning of particular words or phrases contained in it. The adoption of such a method of interpretation would, in my opinion, be of

no real assistance in ascertaining the real intention of the testator. I agree with the Chief Justice of Victoria in his conclusion that the testator in this case cannot be supposed to have had any clear perception of the accurate significance of the words he used. It is, of course, necessary to gather the intention of the testator from the words of the will; but in examining these words it is, in my opinion, neither necessary nor desirable to draw the same inference from the use of a word having no settled primary meaning, such as "portion," as would be drawn from the use of such a word in a will prepared by a draftsman capable of appreciating the finer shades of meaning of particular words. On the other hand, it is not permissible to proceed on a mere conjecture as to the probable intention of the testator based on what he might be expected to do with his property, apart from the words used in the will. I proceed to consider the provisions of the will.

It is conceded by all parties that the will disposes of the whole of the property of the testator, but there is no evidence as to the relative values of the real and personal property belonging to him at his death. It seems, however, that, as it appears from the will that the testator was a farmer, his property must have included some personalty.

The dispositive clause of the will is clear and definite. It is an immediate gift, and provides for the complete and final distribution of the testator's real and personal property. The specific provision for the payment of the debts to be followed by distribution points strongly to the finality of the distribution. The clause gives certain named persons absolute interests in the property in equal shares. It is a well-known rule of construction that, if there be a clear gift, subsequent words in order to defeat such a gift must be reasonably clear or sufficiently certain (*Randfield* v. *Randfield* (1)), and it must not be forgotten that the Court is "naturally in favour of vesting" (*Re Litchfield*; *Horton* v. *Jones* (2)). The question, then, is whether the subsequent clause in this will indicates with reasonable certainty the intention of the testator to cut down the absolute gift already made. The opening words of the clause, "In the event of the disease," following an immediate gift, apply words of contingency

(1) 8 H.L.C., at pp. 235, 238.

(2) 104 L.T., 631, at p. 632.

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to an event which is certain, and some contingency must be supplied. Was, then, the testator referring to death in his lifetime, or to death at any time? The answer to this question depends upon the expressed intention of the testator to be gathered from the whole will read together (*Ward* v. *Brown* (1)).

In my opinion, the contingency the testator was providing for was the death of one or more beneficiaries in his lifetime (*Howard* v. *Howard* (2); *In re Fisher*; *Robinson* v. *Eardley* (3); *Elliott* v. *Smith* (4)). The words creating the survivorship are general, and not confined to real property. The effect, therefore, extends to personal property. It is difficult to suppose that such things as furniture and money were intended by the testator to be used only, without any absolute interest in them until the death of all but one of the beneficiaries named. It would be an unreasonable construction of this will to hold that "the money" bequeathed should be "paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course spend it without any farther trust, and on the other hand that a subsequent event, . . . after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise" (*Ward* v. *Brown* (5)).

A further objection to the construction which would restrict the absolute gift is to be found in the fact that the words of the gift over would not carry accrued shares, but only the original shares—a result altogether inconsistent with the idea of the survivor taking the entirety of the property. The words "portion," "share" and "revert," in the context of this will are, at most, ambiguous, and do not with any certainty lead to the reasonable inference that the testator was referring to death happening during the lives of the survivors. The cesser clause contains no determination or gift over of the interest, but purports to prevent its alienation, and is ineffectual, and has no weight in controlling the construction of the will.

(1) (1916) 2 A.C., 121, at p. 127.
(2) 21 Beav., 550.
(3) (1915) 1 Ch., 302.
(4) 22 Ch. D., 236.
(5) (1916) 2 A.C., at pp. 126-127.

For these reasons I have come to the conclusion that each of the named beneficiaries takes one-fifth of the estate.

Appeal allowed. Declaration that each of the five beneficiaries under the will took on the death of the testator an indefeasible interest in one-fifth of his real and personal estate. Order appealed from varied accordingly. Case remitted to the Supreme Court to be further dealt with consistently with this judgment.

Solicitors for the appellants, *Courtney & Dunn* for *Desmond Dunne*, Warrnambool.

Solicitors for the respondent, *Fitzgerald & Fitzgerald* for *E. W. Powling*, Warrnambool.

B. L.