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GORDON & GOTCH (AUSTRALASIA) LTD. v. COX.

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have induced the Court, in the first instance, to refuse leave to appeal.

I allow the summons to review taxation, and direct the Principal Registrar that the items nos. 1 to 7 mentioned in the bill of costs ought, in point of principle, to be allowed, and remit to him for the purpose of considering the amount that should be allowed in respect of each item. Appellant Gordon & Gotch Ltd. to pay £1 1s. costs of this summons.

Order accordingly.

Solicitors for the respondent, *Home & Wilkinson.*
Solicitors for the appellant, *Williams & Matthews.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FLANAGAN AND ANOTHER . . . APPELLANTS;
DEFENDANTS,

AND

THE NATIONAL TRUSTEES, EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED AND OTHERS } RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

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ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *May* 15-16.

SYDNEY, *Aug.* 9.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Will—Interpretation—"Die without leaving issue"—Death at any time—Gift to children for life with remainder to their children—Survivorship—Death without issue—No disposition of accrued shares—Residue—Intestacy—Wills Act 1915 (*Vict.*) (*No.* 2749), *sec.* 23.

By his will a testator, after disposing of his household effects, gave all the residue of his personal estate and all his real estate to trustees upon trust to apply the income to the support and maintenance of his wife and children

until the youngest surviving child should attain the age of twenty-one years or being a daughter marry under that age, and upon the happening of either of those events he devised specific premises to each of his five children (who all survived him) for life with remainder in each case to such children of the tenant for life as should be living at the death of the parent. The will then proceeded :—" I declare and direct that in case any of my said children shall die without leaving issue then the property hereinbefore given and devised to the child who may so die without leaving issue shall be divided in such shares and portions amongst my surviving children for life and after their respective deaths amongst their issue respectively as shall make the shares of such of my children as have received a less valuable portion equal as nearly as may be to the shares of those who have received portions of greater value I also declare that all property whatsoever real or personal not hereinbefore disposed of and of which I may die seised or possessed shall be divided amongst my said children or the survivors of them and their issue for the same estates and interest and in the same shares and proportions as lastly hereinbefore directed my desire and intention being that each of my said children and their issue shall receive as nearly as possible an equal share of my property after my death."

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ., that the words "shall die without leaving issue" referred to death at any time, whether before or after the youngest surviving child should attain the age of twenty-one years or being a daughter should marry under that age.

At the date of his death the testator had, besides the property specifically devised, other real and personal property. Two of the children, A and B, died without issue, in that order.

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ., that on the death of A the property specifically devised to her and her share of the other real and personal property passed to the four children who survived her for their respective lives and after their deaths to their children who survived them respectively subject to the directions for equalizing portions ; and that on the death of B the property specifically devised to him and his original share of the other real and personal property passed to the three children who survived him and their children subject to similar limitations.

Held, also, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that on the death of B the share of the property specifically devised to A which passed to B upon A's death passed under the declaration as to "all property whatsoever real or personal not hereinbefore disposed of and of which I may die seised or possessed" to the three children who survived him and their children subject to similar limitations.

Per Higgins J.: The words in this latter declaration refer, not to shares or interests, but to any corporeal concrete properties real or personal other than those previously mentioned specifically.

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Held, further, by *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ., that upon B's death there was an intestacy of the original testator in respect of so much of A's share of the other real and personal property as upon A's death passed to B and his children.

Decision of the Supreme Court of Victoria, reversed.

APPEAL from the Supreme Court of Victoria.

The will of James Joseph Flanagan, who died on 19th August 1874, after setting out a gift to his wife of his furniture and household effects for the use and benefit of herself and his children, continued as follows:—"All the rest residue and remainder of my personal estate and effects of what nature or kind soever and all my real estate whatsoever and wheresoever I give devise and bequeath unto my . . . trustees . . . upon the trusts following that is to say upon trust that they my said trustees . . . do and shall pay and apply the rents issues profits and proceeds thereof respectively for and towards keeping my house property in good and tenantable repair for and towards the support and maintenance of my said wife and my children Provided my said wife shall continue my widow until the youngest of my said children or of the survivors of them being a son shall attain the age of twenty-one years or being a daughter shall attain that age or marry under that age with the consent in writing of my said wife (she being my widow at the time) and one of the trustees for the time being of this my will or if my said wife shall have died or married again then with the consent in writing of all the trustees for the time being of this my will and from and after the decease or second marriage of my said wife do and shall pay and apply the said rents issues profits and proceeds for and towards the support maintenance education and advancement in the world of my said children until the youngest of such children or of the survivors of them being a son shall attain the age of twenty-one years or being a daughter shall attain that age or marry under that age with such consent as aforesaid And upon the youngest of such children or of the survivors of them being a son attaining the age of twenty-one years or being a daughter attaining that age or marrying under that age with such consent as aforesaid then I give and devise my house and premises known as the Templemore Hotel . . . to my son Francis for the term of his life from and after his attaining the age of

twenty-one years or marrying under that age with the consent in writing of my said wife (she being my widow at the time) and one of the trustees for the time being of this my will or if my said wife shall have died or married again then with the consent in writing of all the trustees for the time being of this my will and from and after the death of my said son Francis then I give and devise the said land and premises to such child or children of my said son Francis as shall be living at his death absolutely and if more than one in equal shares I give and devise all my land . . . with the iron store and premises erected thereon and being number thirty Latrobe Street West aforesaid Also all my land situate in Guilford Street . . . with the cottage factory and stables erected thereon . . . to my son Edward Albert for the term of his life from and after his attaining the age of twenty-one years or marrying under that age with such consent as aforesaid and from and after the death of my said son Edward Albert then I give and devise the said lands and premises to such child or children (if any) of my said son Edward Albert as shall be living at his death absolutely and if more than one in equal shares I give and devise my houses situate in Little Latrobe Street . . . numbered respectively ten twelve fourteen sixteen eighteen and twenty with the land belonging thereto to my daughter Mary Josephine for the term of her life from and after her attaining the age of twenty-one years or marrying under that age with such consent as aforesaid and from and after the death of my said daughter Mary Josephine then I give and devise the said houses land and premises to such child or children if any of my said daughter Mary Josephine as shall be living at her death absolutely and if more than one in equal shares I give and devise my houses situate in Latrobe Street West . . . and numbered respectively twenty-six thirty-two and one hundred and thirty-three with the land belonging thereto respectively to my daughter Bridget for the term of her life from and after her attaining the age of twenty-one years or marrying under that age with such consent as aforesaid and from and after the death of my said daughter Bridget then I give and devise such houses lands and premises to such child or children (if any) of my said daughter Bridget as shall be living at her death absolutely and if more than one in equal shares I give and devise my houses situate in Francis Street

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. . . and numbered respectively three and five with the land belonging thereto to my daughter Catherine for the term of her life from and after her attaining the age of twenty-one years or marrying under that age with such consent as aforesaid and from and after the death of my said daughter Catherine then I give and devise the said houses land and premises to such child or children (if any) of my said daughter Catherine as shall be living at her death absolutely and if more than one in equal shares I declare and direct that in case any of my said children shall die without leaving issue then the property hereinbefore given and devised to the child who may so die without leaving issue shall be divided in such shares and portions amongst my surviving children for life and after their respective deaths amongst their issue respectively as shall make the shares of such of my children as have received a less valuable portion equal as nearly as may be to the shares of those who have received portions of greater value I also declare that all property whatsoever real or personal not hereinbefore disposed of and of which I may die seised or possessed shall be divided amongst my said children or the survivors of them and their issue for the same estates and interest and in the same shares and proportions as lastly hereinbefore directed my desire and intention being that each of my said children and their issue shall receive as nearly as possible an equal share of my property after my death Provided always that from and after the youngest of my said children or of the survivors of them being a son attaining the age of twenty-one years or being a daughter attaining that age or marrying under that age with such consent as aforesaid then I give and bequeath to my said wife so long as she shall continue my widow the sum of three pounds per week to be contributed equally by and out of the several properties hereinbefore given and devised to my said children and I thereby charge the portions so given and devised to my said children with the payment thereof and also with the payment of my said wife's funeral and last medical expenses in case she shall die my widow."

The testator left him surviving his widow, who died on 4th November 1885, and the five children mentioned in the will. Of these children Mary Josephine Farrell died on 31st August 1881 without issue; Francis Flanagan died on 10th December 1887 without

issue; Edward Albert Flanagan died on 28th August 1911 leaving him surviving three children, James Joseph Flanagan, Eleanor Mary Bicknell and Eva Elizabeth Flanagan; and Bridget Doyle died on 13th May 1916 leaving her surviving one child, Julia Mary Gibney Roche. The fifth and youngest child, Catherine Johnstone, attained the age of twenty-one years on 1st November 1884. Besides the properties specifically devised, the testator had at his death real and personal property of considerable value. On 1st November 1884 the four children then living executed an agreement under seal, whereby they agreed to a specified apportionment among themselves of the property specifically devised to their deceased sister and the property of the testator which was not specifically devised. On 24th March 1888 a deed was executed between Joseph Flanagan, the then surviving trustee of the testator, of the one part, and the then surviving three children of the testator, of the second part, whereby the trustee purported to convey to the three surviving children for their respective lives in equal shares as tenants in common, and after their respective deaths to their children respectively, the properties specifically devised to Francis Flanagan for life and also the properties which Francis took for life under the above-mentioned agreement under seal.

On 12th May 1922 the National Trustees, Executors and Agency Co. of Australasia Ltd. and Walter Madden, who were then the trustees of the will of the testator, by originating summons asked for the determination of the Supreme Court upon the following questions :—

Upon the true construction of the said will and having regard to the facts and matters set forth in the affidavit to be filed herein and in the events which have happened :—

1. (*a*) Did the testator die intestate as to any and what portion or portions of his estate ? (*b*) In particular, did the testator die intestate as to the estate in remainder expectant on the death of his daughter Mary Josephine Farrell in the properties originally devised to her for life by the said will ?—If nay, who now are entitled to the said properties and for what estate and interests ? (*c*) Did the testator die intestate as to the estate in remainder expectant on the death of his son Francis Flanagan in the properties originally devised

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to him for life by the said will ?—If nay, who now are entitled to the said properties and for what estates or interests ?

2. Was the agreement under seal dated 1st November 1884 a valid and effective deed ; and did it operate to carry out the purpose stated in it, namely, to make each of the shares of the testator's children equal one with the other as nearly as possible and carry out the intention of the testator of an equality ?—If nay, what was the effect of the said agreement under seal ?

3. What persons are now entitled and in what shares and for what estates or interests in the real properties of the testator other than those specifically devised to the testator's five children by his said will ?

4. On the death of the testator's son Francis Flanagan without issue, what persons became entitled and in what shares and for what estates or interests in the properties which accrued to him for life on the death of his sister Mary Josephine Farrell without issue ?

5. On the respective deaths of the testator's children Edward Albert Flanagan and Bridget Doyle, what persons became entitled and in what shares and for what estates or interests in the respective properties which accrued to them for life upon the death of the said Mary Josephine Farrell and Francis Flanagan without issue ?

6. Was the indenture of conveyance dated 24th March 1888 a valid and effective conveyance and in accordance with the true construction of the testator's said will ?—If nay, what was its effect if any in law or in equity ?

7. What estates and interests and in what respective properties of the testator have the following : (*a*) the defendant Catherine Johnstone ; (*b*) the estate of Edward Albert Flanagan deceased ; (*c*) the plaintiff Company as the executor and trustee of the will of Julia Mary Gibney Roche deceased ; (*d*) the defendants James Joseph Flanagan, Eleanor Mary Bicknell and Eva Elizabeth Flanagan ?

The summons having been referred to the Full Court, that Court by a majority (*Irvine* C.J. and *Schutt* J., *Mann* J. dissenting) made an order declaring (*inter alia*) that the words " my surviving children," in the clause of the will providing for the case of the death of any of the testator's children without leaving issue and the words " my said

children or the survivors of them," in the clause of the will dealing with all the property real or personal not thereinbefore disposed of, meant the children of the testator living at the date when the youngest child attained the age of twenty-one years, namely, 1st November 1884; that on 1st November 1884 the persons entitled to the real estate of the testator, whether specifically devised or not, were Francis Flanagan, Edward Albert Flanagan, Bridget Doyle and Catherine Johnstone, and their respective issue; that by the operation of the will and of the agreement under seal of 1st November 1884 each of those four children was on that date entitled for life, with remainder to their respective issue, to certain specified properties (being in each case the property specifically devised to him or her for life and the share of the property not specifically devised apportioned to him or her by the agreement of 1st November 1884); that no provision was made by the will for the disposition of any of his real estate by way of accruer or otherwise in the event of any of those four children dying after 1st November 1884 without leaving issue and therefore that the testator died intestate with regard to the corpus of the properties to which the child or children so dying without leaving issue was or were entitled for life in accordance with the foregoing declarations; that in the events which had happened the next-of-kin of the testator living at his death or the representatives of any of them who had since died were entitled to the corpus of the properties held by Francis Flanagan for life, the children of Edward Albert Flanagan were entitled to the corpus of the property held by him for life, and the child of Bridget Doyle was entitled to the corpus of the property held by her for life; that the children of Catherine Johnstone, if any, would on her death be entitled to the corpus of the property held by her for life; and that if Catherine Johnstone should die without issue the next-of-kin of the testator living at his death or their representatives would be entitled to the corpus of the property held by her for life.

From that decision James Joseph Flanagan and Eleanor Mary Bicknell, by special leave, appealed to the High Court.

A. H. Davis (with him *Shelton*), for the appellants. The words "die without leaving issue" refer to death at any time (*O'Mahoney*

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v. *Burdett* (1)). The principle of *Cripps* v. *Wolcott* (2) is not applicable. There is no reason for construing the words as referring to death before the period of distribution. There are no specific words including the accrued shares with the original shares, but the general intention to do so appears from the provision as to equalization of shares.

Hayes K.C. (with him *Reginald Hayes*), for the respondents the trustees.

Hassett and *Walker*, for the respondent Selwyn Lynch Gerity, representing the next-of-kin of the testator. Under the will there was to be only one division, and that was to take place when the youngest surviving child attained the age of twenty-one years. The specifically devised properties were then to be given to those entitled to them; the shares of any who had died before that time were to be divided, and the properties not specifically devised were to be allotted, amongst the children who were then living so as to produce equality, the children in each case taking an estate for life with remainder to their issue. The clause dealing with the property "not hereinbefore disposed of" is a residuary clause, and applies to the property specifically devised to a child who dies without leaving issue (see *King* v. *Frost* (3)). The accrued shares also fall into the residuary clause. The only intestacy that arises is in respect of gifts of residue to children who die without leaving issue. The object of the provision as to children dying without leaving issue is to make it clear that the property devised to them shall be used for the purpose of producing equality. If the view that survivorship is to be determined on 1st November 1884 is correct, the result would be that on the death of Francis the specific devise to his children failed and the property fell into the residuary clause. The share of the residue so augmented is given over again to Francis and his issue by the residuary clause. There would then be an intestacy as to that portion of the residue. [Counsel also referred to *Harrison* v. *Harrison* (4).]

(1) (1874) L.R. 7 H.L., 388.
(2) (1819) 4 Madd., 11.
(3) (1890) 15 App. Cas., 548.
(4) (1901) 2 Ch., 136.

A. H. Davis, in reply, referred to *Ingram* v. *Soutten* (1); *Gale* v. *Gale* (2).

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J. The questions which arise for decision on this appeal may be stated thus : (1) Does the gift over contained in the will of James Joseph Flanagan take effect on the death at any time without leaving issue of any child of the testator, or only upon the death of a child without leaving issue before 1st November 1884, the date upon which the youngest child of the testator attained twenty-one ; and (2) in the events which have happened, who are the persons entitled to the property given by the will to the two children of the testator who have died without leaving issue, namely, Mary Josephine Farrell and Francis Flanagan ?

On the first question I am of opinion that the gift over takes effect upon the death of a child of the testator at any time without leaving issue. I have had an opportunity of reading the reasons about to be given by my brother *Higgins* in support of this conclusion, and have nothing to add on this question.

The second question involves the consideration separately of property passing under distinct gifts.

(*a*) As to the real property (six houses in Little Latrobe Street) specifically given to Mary Josephine and her issue, and as to the share of Mary Josephine and her issue under the gift of all property real and personal " not hereinbefore disposed of," it is not disputed that on her death without leaving issue this property passed by force of the gift over to the four children of the testator who survived her with remainder to their respective issue who should survive them subject to the directions contained in the will for equalizing portions.

The real contest is as to the property passing on the death of Francis without leaving issue.

(*a*) The Templemore Hotel was by the will specifically given to Francis for life with remainder to his child or children living at his death. On his death without leaving issue, this property by

(1) (1874) L.R. 7 H.L., 408. (2) (1914) 18 C.L.R., 560.

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force of the gift over passed to the three surviving children of the testator with remainder to their respective issue who should survive them subject to the directions for equalizing portions.

(*b*) Francis and his children were also originally entitled to a share, which may for convenience be referred to as Francis' original share, under the gift of property "not hereinbefore disposed of." On Francis' death without leaving issue this share, like the Templemore Hotel, passed to the three surviving children of the testator and their issue subject to the directions for equalizing portions.

(*c*) On the death of Mary Josephine without leaving issue, a share in the Little Latrobe Street houses specifically devised to her and her children passed to Francis for life with remainder to his children by force of the gift over contained in the will. On the death of Francis without leaving issue, the gift of this share to his children who should survive him failed, and in my opinion this property was caught by the gift of all property "not hereinbefore disposed of" and passed to the three surviving children of the testator for life with remainder to their issue. The expression "all property whatsoever real or personal not hereinbefore disposed of" in this will is, in my opinion, sufficient to pass all property or interests in property not *effectively* disposed of by the preceding provisions of the will. "A gift of . . . 'all land not hereinbefore devised' is a mere gift of residue, and shows no intention, within the" Wills "Act, to exclude lapsed specific gifts": *Jarman on Wills*, 6th ed., p. 951. The decisions referred to by the learned editor—especially *Green* v. *Dunn* (1), *Johns* v. *Wilson* (2) and *In re Mason*; *Ogden* v. *Mason* (3)—amply warrant the statement quoted above; and I can find nothing in this will which requires that the gift now under discussion should be treated as anything other than a true residuary devise and bequest. On the other hand, the change of language from "hereinbefore devised" in the gift over to "hereinbefore disposed of" in the subsequent gift appears to me to support the conclusion at which I have arrived. On this point I am unable to agree with the declaration proposed by my brother *Higgins*.

(*d*) Mary Josephine having died without leaving issue, the original

(1) (1855) 20 Beav., 6.
(2) (1900) 1 I.R., 342.
(3) (1901) 1 Ch., 619; aff. (1903) A.C., 1.

share given to her for life with remainder to her issue by the gift of property "not hereinbefore disposed of" became divisible among the four surviving children of the testator for life with remainder to their respective issue who should survive them. The share which so passed to Francis for life with remainder to his issue is, in the events which have happened, undisposed of, and in my opinion passes as on an intestacy of the testator, the operation of the residuary gift having been exhausted by carrying this share to Francis and his issue.

I agree with my brother *Higgins*, for the reasons about to be given by him, that questions 2 and 6 in the summons should not be answered. I agree also that it is premature to decide what is to become of the property given by the will to Mrs. Johnstone and her children in the event of her death without leaving issue.

In my opinion the appeal should be allowed; the judgment of the Supreme Court, except so much thereof as relates to the costs of the proceedings in the Supreme Court and in Chambers and as reserves liberty to apply in Chambers, should be discharged, and the following declarations should be made: (*a*) That the provision in the will as to death without leaving issue applies to death at any time without leaving issue; (*b*) that (i.) the six houses in Little Latrobe Street and (ii.) the share in the real and personal property "not hereinbefore disposed of" given to Mary Josephine Farrell and her children passed as from 1st November 1884 to the four children of the testator who survived her for their respective lives with remainder to their children who should survive them respectively subject to the directions in the will contained for equalizing portions; (*c*) that on the death of Francis Flanagan without leaving issue the Templemore Hotel passed to the three children of the testator who survived the said Francis Flanagan for their respective lives with remainder to their children who should survive them respectively subject to the directions in the will contained for equalizing portions; (*d*) that the original share of Francis Flanagan and his children in the property real and personal not "hereinbefore disposed of" passed as from 10th December 1887 to the three children of the testator who survived the said Francis Flanagan for their respective lives with remainder to their respective children who should survive them

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subject however to the directions in the will contained for equalizing portions; (*e*) that the share in the houses in Little Latrobe Street specifically devised to Mary Josephine Farrell and her children which on her death without leaving issue passed under the gift over contained in the will to Francis Flanagan for life with remainder to his children passed on the death of the said Francis Flanagan without leaving issue under the gift of "all property whatsoever real or personal not hereinbefore disposed of" to the three surviving children of the testator for their respective lives with remainder to their children who should survive them respectively subject to the directions in the will contained for equalizing portions; (*f*) that the share in the real and personal property "not hereinbefore disposed of" which on the death of Mary Josephine Farrell without leaving issue passed to Francis Flanagan and his children in the events which have happened was not disposed of by the will and passed to the persons who would have been entitled to share in the estate of the testator if he had died intestate; (*g*) that on the death of Edward Albert Flanagan his three children became entitled in equal shares absolutely to all the property original and accrued which came to him for life under the will of the testator; (*h*) that on the death of Bridget Doyle her child Julia Mary Roche became entitled absolutely to all the property original and accrued which came to the said Bridget Doyle for life under the said will.

The costs of all parties of this appeal should be taxed and paid out of the estate, those of the trustees to be taxed and paid as between solicitor and client.

ISAACS AND RICH JJ. In December 1870 James Joseph Flanagan made his will, and in August 1874 he died leaving a widow and five children, all minors, the eldest being Mary Josephine, the second Francis, and the youngest Catherine, who in 1870 was just seven years of age.

By his will the testator appointed two trustees and executors, and he appointed his wife guardian of his children during their minorities. After a bequest of furniture to his wife for herself and his children, he gave all his property to his trustees upon trust, in a passage which is one of those strongly indicative of the testator's

intention not to die intestate as to *any* of his property. It is therefore quoted: "*All* the rest residue and remainder of my personal estate and effects of what nature or kind soever and *all* my real estate whatsoever and wheresoever I give devise and bequeath unto my said trustees their heirs executors administrators and assigns upon the trusts following that is to say" &c. Apart altogether from the Court's disinclination to intestacy, regarding that as a *dernier ressort* (per Lord *Shaw* in *Lightfoot* v. *Maybery* (1)), there can therefore be no doubt that the testator set out with the intention of declaring trusts as to every fragment of ownership he held in all the world, and therefore to die completely testate.

The first trust was to pay and apply the income for and towards keeping his house property in repair, "and for and towards the support and maintenance of my said wife and my children." Then, if the wife died or remarried before the youngest child attained twenty-one or, if a daughter, married with certain consent, the income was to be applied "for and towards the support maintenance education and advancement" of the children until the youngest attained twenty-one or, if a daughter, married with the said consent. Down to that point, the trusts are clear. The children who have attained their majority have no right to have actual enjoyment of anything, beyond such support, &c., as the trustees afford out of the income, until the youngest surviving child attains twenty-one or, if a daughter, marries with the prescribed consent. Immediately that event occurs, which in this case was the attainment of the age of twenty-one by Catherine (now Mrs. Johnstone) on 1st November 1884, a new trust came into operation. The will proceeds: "And upon the youngest of such children or of the survivors of them being a son attaining the age of twenty-one years or being a daughter attaining that age or marrying under that age with such consent as aforesaid then I give and devise" &c. Then follow devises of five specific properties to five children respectively for life, with remainder in fee to such child or children of the testator's respective children as should be living at the parent's death.

We do not think the life estates vested absolutely, even in interest, immediately on the testator's death, because, in addition to the

(1) (1914) A.C., 782, at p. 802.

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Isaacs J. Rich J.

provision as to the youngest child attaining twenty-one, &c.—which of itself would merely postpone possession—there is attached to the gift to each child a contingency, "from and after his" (or her) "attaining the age of twenty-one years or marrying under that age with the consent in writing" &c. That is attached to the eldest as well as to the youngest; and if, for instance, before 1st November 1884 Francis had died under twenty-one unmarried or having married without the necessary consent, we do not think he would have had any rights vested in him. And so with the others. But this, though it shows the somewhat minute care with which the testator was prescribing the rights of his children in relation to these specific properties, does not really, in the events that have happened, otherwise affect the question with which we are now concerned.

The principal thing to remember so far is that the devise of each specific property is to a child of the testator for life only, and then a distinct separate devise of the fee in remainder to such child or children of that child as survive the parent. If a life tenant dies without leaving a child surviving, no disposition has so far been made of the property after the life estate. Thereupon follows a clause on which centres the whole contest. It runs thus: "I declare and direct that in case any of my said children shall die without leaving issue then the property hereinbefore given and devised to the child who may so die without leaving issue shall be divided in such shares and portions amongst my surviving children for life and after their respective deaths amongst their issue respectively as shall make the shares of such of my children as have received a less valuable portion equal as nearly as may be to the shares of those who have received portions of greater value."

The respondents represented by Gerity contend, and the majority of their Honors in the Supreme Court have held, firstly, that that clause applies only to a child dying before the event of the youngest surviving child attaining twenty-one (we disregard the other possible event), the clause having no relation to a child dying after that event; and, secondly, that it involves an operation of "equalization" possibly by division or partitition, to take place once for all.

The appellants contend, and their view was supported by *Mann*

J., that the clause applies whenever a child of the testator died without leaving issue, and applies indiscriminately to what have been for convenience' sake called "accruer" shares (though that is not strictly accurate) as well as to so-called "original shares."

The argument for the respondent Gerity, crystallized, was that a strict line of demarcation was drawn by the testator on the happening of a certain event—the attainment by the youngest child of the age of twenty-one years—which in fact was 1st November 1884. In what we are about to say we must be understood as limiting our observations to the case where the life tenant leaves another child of the testator surviving. The case was very keenly argued, and in view of the difference of judicial opinion it is impossible to say it does not present some difficulty. But, after attentively reading the clause in question, and considering it in connection with the rest of the instrument and by the light of such of the circumstances as are known to us, it seems to us to admit of a construction unattended with any real doubt. We may state at once that the result of our consideration is that, while on the main contention—indeed the only one argued before us or pronounced upon by the Supreme Court—we are of opinion that the appellants are right, yet on portion of the case, of very considerable importance, we think the individual respondents succeed, for a reason not put forward in argument or pronounced upon but which has since suggested itself and is to us transparently clear. In December 1870 the testator, if we picture him sitting in his chair as the classical phrase runs, saw before him his wife and five young children, the youngest not more than seven. After making the provisions for their guardianship during minority, and for their support and advancement extending up to the majority of the youngest surviving child, he allocated the five separate properties to his five children respectively, and he went so far as to dispose of those properties fully by giving a life estate to each child, and the remainder in fee to the children of that child, but only if his child fulfilled certain conditions and died leaving children. But other cases were yet unprovided for. The testator's children were young, some might not attain twenty-one, and in any case might not leave issue. What then? He added the clause quoted unquestionably to provide for some cases otherwise unprovided for. What those

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cases were must be judged of by his own words. He leaves the life tenancy disposition undisturbed, that has to take effect or not according to events. But he begins by postulating the event the converse of that already stated on the death of the life tenant. That is, he supposes the life tenant dying "without leaving issue"; which was a case yet unprovided for. That is to say, he supposes the life tenant's estate at an end and that the child in question has died "without leaving issue," so that the property is wholly undisposed of—a case yet unprovided for. If that event happens, he says then the "property"—not the deceased child's "share," for that being for life has ended, but the landed estate which is the "property,"—"hereinbefore given and devised to the child who may so die without leaving issue"—not devised to the issue who did not survive, which would be impossible—shall be divided. We stop there for a moment to say that "divided" does not, and cannot in our opinion, mean an immediate physical division. It is to be "divided" amongst whom? Amongst "my surviving children for life and *after their respective deaths amongst their issue respectively.*" "Their issue respectively" may be then non-existent, and certainly are at the given moment unascertainable. Apparently then the testator has dealt with the case as to his children and their issue in a manner converse to that in his primary disposition. But is that converse case limited to what happens before the life estate provision begins to operate? There is nothing in the testator's words so to limit it. Nor is there anything in the reason of the thing so to limit it. By that we mean the reasonable inference from reading in sequence and applying naturally the primary clause and this additional clause, as two connected provisions of the testator in providing for his descendants. The ordinary and primary sense of the words "die without leaving issue" is "die at any time without leaving issue"; and this is supported by the modern rule of interpreting wills according to their ordinary and natural meaning unless some rule of law, or canon of construction, intervenes so as to compel the Court to place some special meaning upon them. In an appeal from Bombay in 1914—*Chunilal Parvatishankar* v. *Bai Samrath* (1)—Lord *Shaw* for the Judicial Committee stated the law on this

(1) (1914) 30 T.L.R., 407; 38 Bombay L.R., 399.

important subject in short and very distinct terms, which from their general application and supreme authority deserve quoting in their entirety. The learned Lord said (1) :—" There is nothing specifically either English or Indian in the idea that the will of a testator must be construed on that principle which would enable Courts of law most fully to give effect to the intention expressed by his words. It may be that if the words he employs are *voces signatae* they must be so accepted, whatever the suspicion may be as to the testator having had that particular view of his own language. But in ordinary circumstances ordinary words must bear their ordinary construction, and the whole will, that is, the whole of the words employed by the testator, must be looked at together so as to determine his whole intention. Furthermore, it is not on this principle legitimate to take words which have a general meaning and subject them to limitations which the words do not necessarily imply. It may be true that there is a body of older cases which would warrant a suggestion that the term employed in this will, namely, ' should either of these two sons die without having had (leaving) any male issue,' should be limited to such death occurring before the death of the testator himself, but the will does not say that, and it has for many years been a settled principle that words of this class, being in general terms, must receive their full, and not a restricted, meaning. The leading authority on the subject is, of course, *O'Mahoney* v. *Burdett* (2); and two sentences of Lord *Hatherley's* opinion may be here repeated. He refers to the duty of the Courts always to consider carefully the whole will, ' and, having regard to all the various clauses contained in it, to see what is the full and complete and perfect intention of the testator.' He corrects the case of *Edwards* v. *Edwards* (3), and makes the statement of the principle run thus : ' that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition.' If it did not appear presumptuous to say so, one might comment on the case of *O'Mahoney* v. *Burdett* as one which emerged through a thicket of technical

(1) 38 Bombay L.R., at pp. 412-413. (2) (1874) L.R. 7 H.L., at p. 404.
(3) (1852) 15 Beav., 357.

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decisions to a ground of plain and pre-eminent good sense. It was also, of course fortified by authority, and notably by the case of *Farthing* v. *Allen* (1), the fullest report of which was given by Mr. *Jarman* in his work on *Wills*, 6th ed., p. 2160."

The ordinary sense of the words "die without leaving issue" is also supported by the words of the contested clause itself, where the testator prescribes the mode of "division," as he calls it. It is to make the shares of such of his children as "have received" a less valuable portion equal, as nearly as may be, to the shares of those who "have received" portions of greater value. "Have received" must mean "have received" at the time of the death of the child who "shall die without leaving issue," and they look rather to a surviving child as the actual recipient of benefit than to the testator as the donor of benefit. The then actual present position of the child is regarded; and this leads to the view that the operation of the clause is not confined to the period before which the child to be further benefited under this clause has received anything whatever in fact under the primary clause. The dominant idea is equalization. That, if effective on the first possible occasion, may of course be maintained on every other occasion. But, if not effective on the first occasion, what is there to indicate that it is not to be pursued on the next possible occasion?

The respondent Gerity's contention ultimately included an argument that on the second possible occasion (that is, always after 1st November 1884)—the clause just considered ceasing to operate—the property given to a child dying without issue fell into residue, by reason of the succeeding clause. That clause is as follows: "I also declare that all property whatsoever real or personal not hereinbefore disposed of and of which I may die seised or possessed shall be divided amongst my said children or the survivors of them and their issue for *the same estates and interest* and in the same shares and proportions as lastly before directed my desire and intention being that each of my said *children and their issue* shall *receive* as nearly as possible an equal share of my property after my death." Again the testator refrains from giving the absolute ownership of the property to his children; their "issue" takes the ultimate

(1) (1816) 2 Madd., 310.

"estate" or "interest," and therefore again the word "divided" does not mean physical distribution of the *res*. Also, his intention is manifested that this is done with a view to maintaining and preserving throughout substantial equality of benefit "received." But the words governing the whole of this clause are "property . . . not hereinbefore disposed of." So that though the residuary clause—for it is so even under sec. 23 of the *Wills Act* (*Mason* v. *Ogden* (1)—helps us to understand his general intention and his use of language, it does not help us to discover what property has been already disposed of. It helps to confirm very strongly the intention to die completely testate apparent in the earlier part of the will as already pointed out, because the words "all property whatsoever real or personal not hereinbefore disposed of" are the most comprehensive that could be used. In *Jones* v. *Skinner* (2) Lord *Langdale* M.R. says: "It is well known, that the word 'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have." In that case the learned Master of the Rolls also approves of *Chester* v. *Chester* (3); thereby adding his authority, not only to that of the powerful Court that decided it, but also to that of Lord *Eldon* in *Attorney-General* v. *Vigor* (4) and Sir Edward *Sugden* in *Incorporated Society* v. *Richards* (5). (See also *Jarman on Wills*, 6th ed., at p. 956, and *Halsbury's Laws of England*, vol. XXVIII., par. 1313, at p. 694.) *Chester* v. *Chester* is practically decisive of several questions that have arisen in considering this case. It was there held, notwithstanding some very acute suggestions to the contrary, that the words "lands not formerly settled or otherwise disposed of" did not exclude an undisposed of remote reversionary estate in lands which had been specifically settled. The Lord Chancellor and the Judges held (6) that "the words *not otherwise by me settled* could have excepted only that estate in the lands which was otherwise before settled: whereas it is plain that the reversion in fee was not settled and therefore would pass by the will." And this was added: "*The land can*

(1) (1903) A.C., 1.
(2) (1835) 5 L.J. Ch., 87, at p. 90.
(3) (1730) 3 P. Wms., 56.
(4) (1803) 8 Ves., 256, at p. 272.
(5) (1841) 1 Dr. & War., 258, at p. 285.
(6) (1730) 3 P. Wms., at p. 62.

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no further be said to be settled, than the estates therein are exhausted"; and so they held that to the extent that the estates were not exhausted the land itself was not settled. If that is correct where the word "land" is used, *a fortiori* is it so where the word is "property." *A nomen generalissimum* is used. And, it may be observed, the testator's word is "property," not "properties," which might be given a concrete and particular meaning. The judgment in *Chester* v. *Chester* (1) then dealt with another word which occurs in the residuary clause of the will now under consideration, namely, the word "seised." It is said: "It was material, that this reversion in fee which remains unsettled, is part of the old estate; so that if the person making this settlement was *seised in fee* as heir on the part of the mother, he shall still be *seised of this reversion* as of his old estate, and as heir of the mother's side, as before" (2). "With regard to this reversion, the land is with strict propriety said to be unsettled, and the owner *seised* thereof as part of his old estate, his old property and dominion" (2). Much more must this be so, where the prior gift is in the same will. It is only necessary to quote some very modern opinions of great weight to the same effect. In *In re Mason*; *Ogden* v. *Mason* (3), *Rigby* L.J., referring to a will which, as he said, did not say as to a certain gift of chattels "not hereinbefore mentioned" but "not hereinbefore disposed of," observed: "which must of course mean, and has always been taken to mean in a similar context, 'not hereinbefore effectually disposed of.'" The decision was upheld by the House of Lords (4).

It is clear then that the testator meant by this residuary clause to make it universal so far as he had failed to dispose of his property or, to use his own phrase, as to "property . . . not otherwise disposed of." What had been otherwise disposed of must be sought, not in the residuary clause, but *aliunde*, and by first ascertaining it through proper construction of the prior clauses. We cannot therefore accept the invitation of learned counsel to ignore the preceding clause, treat the will as if that clause were non-existent, and so regard the property devised to Francis as property which on his death was "undisposed of."

(1) (1730) 3 P. Wms., 56.
(2) (1730) 3 P. Wms., at p. 63.
(3) (1901) 1 Ch., at p. 626.
(4) (1903) A.C., 1.

So far, we hold with the appellants, but only with respect to the so-called "original shares." As to the so-called "accrued" shares an entirely different position exists for a reason, as we have said, not presented during the argument. The actual contention as to this centred round the usual arguments as to the force and effect of accrual clauses on survivorship. With respect to those arguments we thought at the hearing, and still think, they should be resolved in favour of the appellants, if relevant at all. But they are quite irrelevant, the question indicating once more the necessity of closely observing the actual words of the document to be construed.

The clause, as we have said, deals, not with "shares" previously given to the testator's children, but with the "property" in which shares had been created. And, as we have also held, it applies to the case of the children to whom shares had been given dying without issue either before or after 1st November 1884. But still, though there is by the clause a fresh devise of "property," the question is of "what property"? It is rigidly described as "the property *hereinbefore* given and devised to *the child* who may so die without leaving issue." So that, on the death of any child without leaving issue, it is only the property which by some *prior* clause in the will is given to *that* child, which is to be the subject of division under *this* clause. That specific property is then to be "divided"—that is, in point of fractional rights, amongst the surviving children for life, and their issue in remainder. That is not to be undone: the division once made stands as long as the surviving children live, and as long as their issue exist. But the property so divided under this clause does not, when one of the new takers dies, answer the description of "property *hereinbefore* given and devised" to *that* child. To affect the divided property—that is, the so-called accrued share—the word "*hereinbefore*" must be read "hereinbefore or by this clause"; or else the words "the child who may so die" include any child who has previously died and the word "surviving" is constantly shifting in its application. Applying the principle of construction so forcibly stated by Lord *Shaw* in the case cited, the words "hereinbefore given and devised" cannot be given any meaning other than their natural meaning, which is "in this will previously given and devised," and

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"the child" means the child just dead, whose property has not yet been divided among survivors. The so-called "accrued shares," therefore, when a child entitled thereto dies without leaving issue, become "property not hereinbefore disposed of" and are dealt with by the residuary clause. The direction in the residuary clause, however, which in effect incorporates the direction in the accruer clause, leaves in the events that have happened a partial intestacy which cannot be avoided.

We agree to the answers in the form proposed by the learned Chief Justice.

HIGGINS J. It seems to me that the difficulties here are not as to the meaning of the words, which are plain enough if we eschew conjecture, but as to the application of the words to the complicated position of facts. It is our first duty to give the words their natural meaning, neither substituting nor inserting other words, unless clearly required for the meaning; and especially not to treat the words "die without leaving issue" as if they were "die *before the youngest child attains* twenty-one without leaving issue" unless the context shows beyond doubt that the latter words are necessarily implied. The cases of *O'Mahoney* v. *Burdett* (1) and *Ingram* v. *Soutten* (2) show this duty very clearly, in much more difficult circumstances.

It is plain on the face of the will that the testator desires all his property (after payment of debts, &c.) to go for the benefit of his wife, his children and grandchildren and to no others. It is plain also that until the widow remarries or dies and the youngest surviving child attains twenty-one, &c., all the property is to be held together for the family maintenance; that on the remarriage or death of the widow it is to be held together for the maintenance, &c., of the children; and that on the youngest surviving child attaining twenty-one, &c., there is to be a distribution. But as this scheme left no provision for the widow if she survived the day that the youngest child attains twenty-one, &c., there is a proviso near the end of the will charging the properties distributed, as from that day, with the payment to her of £3 per week. This provision does not interfere with, it is consistent with, the distribution. The date for distribution, in the facts which have occurred, was to be 1st November 1884,

(1) (1874) L.R. 7 H.L., 388. (2) (1874) L.R. 7 H.L., 408.

the date of the youngest child, Catherine, attaining twenty-one. From that date, Francis is given the Templemore Hotel; Edward Albert 30 Latrobe Street and Guildford Street; Mary Josephine the houses in Little Latrobe Street; Bridget Nos. 26, 32 and 133 Latrobe Street; Catherine the houses in Francis Street. But the Templemore Hotel is not given to Francis in fee simple, only for life; and after his death the Templemore Hotel is given to such child or children of Francis as should be living at his death. Similarly, as to the other four children of the testator; and the provisions of the will would be simple to carry out if each of the five children left a child or children—life estate to the parent, fee simple in remainder to his or her children. Such was the primary scheme adapted to the case of each child leaving children.

But the testator proceeds to provide for the contingency of any of his children not leaving issue: "I declare and direct that in case any of my said children shall *die without leaving issue* then the property hereinbefore given and devised to the child who may so die without leaving issue shall be divided in such shares and portions amongst my surviving children for life and after their respective deaths amongst their issue respectively as shall make the shares of such of my children as have received a less valuable portion equal as nearly as may be to the shares of those who have received portions of greater value." Applying this clause (which I shall call clause 1.) to the actual facts, we find that Mary Josephine died without issue on 31st August 1881. This was before the date for distribution: so she never enjoyed the life estate in her houses. As she died "without leaving issue," her houses are to be divided amongst the four surviving children, not equally, but so as to *produce* equality in values as far as possible; and each of the four surviving children is to have a life interest in that property which comes through Mary Josephine, with remainder in fee simple to each of the four surviving children's children. "Issue" in this will clearly means children of a child of the testator, not remote descendants. So Mary Josephine's houses are to be divided between the four *stirpes*—the *stirps* of Francis, the *stirps* of Edward Albert, the *stirps* of Bridget, the *stirps* of *Catherine*. But here it must be noted that there is no provision that the share in Mary Josephine's houses which has come by way of

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accretion (I shall call it the accretion property) to the *stirps* of Francis is to be redivided if Francis die without leaving issue. The words of the gift over in clause I. apply only to "the property *hereinbefore* given and devised to the child who may so die without leaving issue"; they do not apply to accretion property. Now, Francis did die without leaving issue, in 1887—after the date for distribution; and I can find nothing in the will directing that the accretion property which has come to the Francis *stirps* shall be redivided amongst his three brothers and sisters who survive him. Therefore, there is prima facie an intestacy under the will as to the accretion property given to the *stirps* of Francis.

The main contest, however, has been as to the original devise to the Francis *stirps*. The Francis *stirps* got the Templemore Hotel; but the devise to that *stirps* failed on the death of Francis in 1887 without leaving issue; and if the words of the will are to be taken literally, without insertion of words or other gloss, the Templemore Hotel has to be divided among the three surviving children. It is urged for the respondent that the gift over to the surviving *stirpes* does not apply, because Francis did not die *before the youngest child attained twenty-one*, the date for distribution. But why are we to treat such words as inserted in the will? "Die without leaving issue" have a plain meaning, and prima facie apply to death at any time without leaving issue; and we are not justified in inserting the suggested words because of any conjecture, however strong, as to the testator's real intentions. But the scheme of the will as a whole, to keep the property within the testator's family, to make the family a kind of close corporation as to the property, actually favours the treating of these words in their natural sense. In my opinion, the original gift to the Francis *stirps* of the Templemore Hotel has to be divided amongst the *stirpes* of the three survivors.

There follows, however, a clause as to property "not hereinbefore disposed of"—a clause which I shall call clause II.: "I also declare that all property whatsoever real or personal not hereinbefore disposed of and of which I may die seised or possessed shall be divided amongst my said children or the survivors of them and their issue for the same estates and interests and in the same shares and proportions as lastly hereinbefore directed my desire and intention being that each of my

said children and their issue " (that is, each *stirps*) " shall receive as nearly as possible an equal share of my property after my death." By the words " all property whatsoever real or personal not hereinbefore disposed of " I take it that the testator means all his property except that real property which had been specifically given either originally or by way of accretion—the specifically devised realty that had been " hereinbefore disposed of." Then the direction to divide this property " not hereinbefore disposed of . . . amongst my said children *or the survivors of them* and *their issue* for the *same estates and interests* and in the same shares and proportions as *lastly hereinbefore directed* " means, in my opinion, that the same provision for division among the several *stirpes* (including the provision for the case of a *stirps* that had failed) as had been made with regard to the real property specifically devised, was to apply to all the testator's property that had not been specifically mentioned. The words " or the survivors of them and their issue " refer to the words in the next preceding clause, " amongst my surviving children for life and after their respective deaths amongst my issue respectively." Whatever was the destination of the specific devises was to be the destination of the other property. But again there is nothing showing an intention that any accretion property was to be redivided among the several *stirpes* of the surviving children. We might conjecture that the testator, if his attention had been called to this matter, would have provided for such redivision ; but we are not entitled to interpret a will by conjecture : we must interpret it by the expressions used. The expressions used are satisfied by treating the gift of each accretion property as a gift to the *stirpes* of surviving children, and if these surviving children leave no issue, the accretion property is prima facie left undisposed of and goes as on intestacy. The division of this other property is not equal, but equalizing as far as possible, between the *stirpes* ; so that each *stirps* (" each of my said children and their issue ") " shall receive as nearly as possible an equal share of my property after my death." The keynote of this clause II. is equality of values, as between the several *stirpes*, as to the real property specifically given and the property not specifically given (combined). So long as the property is all held together—until the date of distribution (when the

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youngest child attained twenty-one, &c.)—all the children surviving get an equal benefit by joint maintenance; and at the date of distribution, each *stirps* is to have a portion (equal, so far as possible) of the whole property, specifically given, and not specifically given. For this equal distribution between the several *stirpes*, according to values, the values should be ascertained as at the date of distribution, not later at all events.

It has not been contended by any one that the gifts dependent on approximate equalization should be treated as void for uncertainty; and I shall treat them as valid.

But does not the accretion property given to Francis, as to which prima facie there is an intestacy, fall into clause II.? I do not know whether this point involves much or little to the parties concerned. It is not the principal point in this case; but, as I understand that some of my learned brethren are inclined to answer the question in the affirmative, it is desirable that I should say something in justification of the contrary opinion which I hold. There is no doubt that usually a void or lapsed gift falls into the residue, if there is a residue; and this principle applies to realty as well as to personalty by virtue of sec. 23 of the Victorian *Wills Act* 1915: "*Unless a contrary intention shall appear by the will*, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law *or otherwise incapable of taking effect*, shall be included in *the residuary devise* (*if any*) contained in such will." Now, there is a residuary devise in the will. It is contained in the early part of the will. It applies to the whole property after the payment of debts, &c., and the bequest of furniture, &c.: "All the rest residue and remainder of my personal estate and effects of what nature or kind soever and all my real estate whatsoever and wheresoever I give devise and bequeath unto my said trustees . . . upon the trusts following" &c. I do not rely on the point that is supported by *Skrymsher* v. *Northcote* (1) and by *Lloyd* v. *Lloyd* (2), that a gift of part of a residue *must*, if the gift fail, pass as on intestacy. I am emboldened to give

(1) (1818) 1 Swans., 566.

(2) (1841) 4 Beav., 231.

effect to my own opinion by the fact that other Judges have commented adversely on these cases (see *Jarman on Wills*, 6th ed., p. 1056). The rule was laid down too absolutely. After all, each will must be decided on its own expressions; but there is a presumption in favour of lapsed devises falling into "the residuary devise (if any)."

What I call clause II. (*supra*) does not contain the word "residue" or "residuary" or (in my opinion) equivalent words. Or, to apply the test as stated by Lord *Davey* in a recent case (*In re Mason*; *Ogden* v. *Mason* (1)), the words of the gift which are said to catch up all lapsed interest must "be capable of sweeping in every description of freehold estate which is not otherwise disposed of." The words in this will are not thus capable. In clause I. the testator confines his attention to "the property hereinbefore" specifically "given and devised"—the corporeal, concrete property hereinbefore specifically mentioned; and he provides therein for failure of the gifts for default of issue—for accretion in the case of a *stirps* which has failed to the *stirpes* which have not failed. Then in clause II. the testator confines his attention to whatever other corporeal, concrete properties he may own at his death—"all property whatsoever real or personal not *hereinbefore disposed of and of which I may die seised or possessed*" —that is to say, the corporeal concrete properties other than those specifically mentioned in clause I. He does not, in clause II., refer to the limited interests created by his will, which did not exist before his will. I do not deny that, in many contexts, the words "not hereinbefore disposed of" may be treated as involving a general residuary gift of all kinds of interests, whether concrete properties or not; but here the words are confined to properties "of which I may die *seised or possessed*." "Seised" is a technical word, and can only be applied to corporeal, concrete properties; and "possessed" is the appropriate word for personalty. It would be nonsense to talk of a testator as being, at his death, "seised" of some unascertained share in land which his will directs to be divided, in a certain event, for the purposes of equalization between his beneficiaries. "Seised" would include corporeal lands held in fee simple, but let for a term of years to tenants (*Williams on Real*

(1) (1901) 1 Ch., 619; (1903) A.C., 1.

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Property, 14th ed., p. 256), as well as lands of which the testator dies in actual possession; but a testator cannot be said to be "seised" of a mere interest contingent, uncertain, and remote, which does not exist until created by his will. In *Chester* v. *Chester* (1) the word "seised" does not occur in the will; and the expressions used by the Lord Chancellor are inapplicable to the present case. In that case, C., on his son W.'s marriage, settled lands X on W. for life, remainder in tail male; remainder to C. in fee. Then by will C. gave all his lands in Littleton, &c., "or elsewhere" not by him formerly settled or thereby (i.e., by the will) otherwise disposed of to trustees for one hundred years, remainder to his son J. in fee. It was held that the will applied to the remainder in X given to C. in fee. That is all. The Lord Chancellor puts a hypothetical case (2):—"If the devise had been of *all* the testator's lands and hereditaments (without saying more), and then had limited the premises to the trustees for one hundred years, remainder to" C. "in fee, this had been good; the words lands and hereditaments would have passed the reversion in fee in the lands; and the words *not otherwise by me settled* could have excepted only that estate in the lands which was otherwise before settled: whereas it is plain that the reversion in fee was not settled and therefore would pass by the will." That is to say, the words *lands and hereditaments* (all) would have passed the reversion in fee in the lands. That is a very different case from the present, in which clause II. is limited to "all property whatsoever real and personal not hereinbefore disposed of and *of which I may die seised or possessed.*" I repeat it, that in *Chester* v. *Chester* the gift was not limited by the word "seised" at all—the word was not even used. The words "not hereinbefore disposed of" in clause II. are used instead of the words "not hereinbefore given and devised," in clause I., because clause I. relates only to real property, and clause II. relates to personal property as well as real and "devised" is appropriate to realty only. By clause I. the testator had made provision for the case of failure of his specific gifts to the several *stirpes*; in clause II. he proceeds to give the property "not hereinbefore disposed of" among the several *stirpes* "for the same estates or interest and in the same shares and proportions as lastly hereinbefore directed," but with a

(1) (1730) 3 P. Wms., 56. (2) (1730) 3 P. Wms., at p. 62.

view of equality between the *stirpes* as to the combined properties. Clause I. was framed with a view to equality between the *stirpes* as to the specific devises of realty. Clause II. was framed with a view to equality between the *stirpes* as to *all* the testator's concrete properties, whether specifically mentioned or not. There are to be two equalizing pots—not one. The accretion property which passed to Francis from Mary Josephine passed to him on the basis of equalization as between the five specific devises; and to ask the trustees to use it for equalization as between all the properties of the testator combined would be to set the trustees a task fantastic, if not impossible. It would be absurd to treat a testator as providing for the events of failure of children to Francis, in the case of his accretion property, by a mere direction that the interest in remainder shall go to the several *stirpes* for the same estates and interests and in the same shares and proportions as in clause I.—involving a similar failure.

In my opinion, clause II. is not a residuary clause within the meaning of sec. 23; and if it ought to be treated as such residuary clause —or, rather, as "*the* residuary devise (if any)"—a "contrary intention" appears within that section, an intention not to treat the accretion interest as being included under this clause.

As to the possibility, by no means remote, of the last surviving child, Mrs. Johnstone, dying without leaving issue, it is not in accordance with the practice of Courts of Equity to decide beforehand what is to become of the property destined for the Johnstone *stirps*. We cannot foretell how facts will stand at the end of Mrs. Johnstone's life interest, or foresee who will then be interested in putting forth claims to that property. But I may point out that under the words of the clause as to children dying without leaving issue, it is the *stirpes* of the other children, not the other children only, that take; and it does not follow that, if the children Edward Albert and Bridget have failed by death to enjoy a life interest after Mrs. Johnstone, the issue cannot take.

In my opinion, the appeal should be allowed.

As to the formal order, I cannot think that it fairly expresses even the opinion of the majority of the Judges of the Supreme Court. I should suggest that the declarations and orders be set aside,

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except as to costs; and that the following declarations be made: Declare (*a*) that the provision in the will as to death without leaving issue applies to death at any time without leaving issue; (*b*) that the real property specifically given by name to Mary Josephine Farrell and her children passed as from 1st November 1884 to the four children of the testator who survived her with remainder to their issue who survived them respectively subject however to the directions in the will contained for equalizing portions as regards the real properties specifically given; (*c*) that the real property specifically given by name to Francis Flanagan and his children passed as from his death to the three children of the testator who survived him with remainder to their respective issue who survived them subject however to the directions hereinbefore mentioned; (*d*) that the property real and personal not specifically given by name passed as from 1st November 1884 to the four children of the testator then surviving with remainder to their respective issue subject however to the directions in the will contained for equalizing portions as regards all the property of the testator as between the respective stocks by means of the said property; (*e*) that the said last mentioned property so far as the share of Francis Flanagan is concerned passed as from 10th December 1887 to the three children of the testator who survived him with remainder to their respective issue who survived them subject however to the directions referred to in (*d*); (*f*) that any share in the said properties (both the property specifically given by name and that not so given) which accrued as aforesaid to Francis with remainder to his issue by the death of Mary Josephine without leaving issue is left undisposed of by the death of Francis without leaving issue and passed to the persons entitled to share in the estate of the testator on intestacy; (*g*) that on the death of Edward Albert Flanagan his three children became entitled in equal shares absolutely to all the property original and accrued which came to him under the will of the testator; (*h*) that on the death of Bridget Doyle her child Julia Mary Roche became entitled absolutely to all the property original and accrued which came to Bridget Doyle under the said will.

The questions 2 and 6 in the summons cannot be answered.

It appears that on 1st November 1884, the date for distribution, the four surviving children and the executors for the time being executed a deed which stated the will, and the death of Mary Josephine and the division of the property of the testator and Mary Josephine's portion into equal parts as far as possible. The four surviving children and the executors acknowledged that the division was as nearly as possible equal. This deed would not bind the issue of the children, or any one but the parties executing. The question asks did the deed make each of the shares equal, as nearly as possible; and is it valid and effectual. This is a matter of evidence, which a Judge cannot decide on originating summons. But as no complaint has been made, it is better for the present trustee to assume that what the four life tenants acknowledged to be equal was equal.

As for the sixth question, by a deed executed on 24th March 1888, after the death of Francis, between the surviving trustee for the time being and the three surviving children, the trustee conveyed to the three remaining *stirpes* (a) the properties specifically devised to Francis with remainder to his issue, (b) the accretion share which came to Francis and his issue. So far as the accretion share is concerned, this conveyance was wrong according to my view of the will, and it would not be binding on such next-of-kin of the testator as did not execute the deed. It is impossible to answer the question on the materials before us.

STARKE J. I am content with the order announced by the Chief Justice.

Order as stated in judgment of Knox C.J.

Solicitors for the appellants, *Loughrey & Douglas.*

Solicitors for the respondents, *Gavan Duffy, King & Co.*; *M. Mornane*; *Gillott, Moir & Ahern.*

B. L.