[HIGH COURT OF AUSTRALIA.]

CURRIE . . . . . APPELLANT;
DEFENDANT,

AND

GLEN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS AND PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1935-1936.

MELBOURNE, 1935, *Nov.* 15, 18, 19.

1936, *Feb.* 13.

Rich, Starke, Dixon and McTiernan JJ.

Will—Construction—Gift to two nephews "during their joint lives as tenants in common"—"On death of either of them" then over—Gifts over effective on death of each nephew—Intention of testator.

By his will the testator directed his trustees to hold certain real property in Melbourne in trust for his nephews W. and J. "during their joint lives as tenants in common and on the death of either of them in trust as to the undivided moiety held in trust for him for his sons (if more than one) or for his son (if only one) who shall attain the age of twenty-one years but failing such sons attaining that age the said undivided moiety shall be held for the survivor of them" the said W. and J. "during his life and after the death of such survivor for his sons or son who shall attain the age of twenty-one years" and if there should be no son of either of the nephews who should attain the age of twenty-one years, then over as if the testator had died intestate. The testator further directed his trustees to hold the residue of his estate in trust for the statutory next of kin.

Held that the intention of the testator sufficiently appeared to make provision for each of his nephews during his life and after his death a further provision in remainder for such of his nephews' sons as should attain the age of twenty-one years, and that, W. and J. having died, the trustees held the property in question in trust as to one undivided moiety for the children of W., and as to the other moiety for the children of J.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

H. C. OF A. 1935-1936.

CURRIE v. GLEN.

APPEAL from the Supreme Court of Victoria.

By his will the testator, William Henderson Glen, who died on 6th February 1892, after making certain devises and bequests, provided: "I direct my trustees hereinafter named to hold my property in Collins Street and Little Collins Street . . . Melbourne from and after the twenty-fifth day of August One thousand eight hundred and ninety-five in trust for my nephews William Glen and John Glen during their joint lives as tenants in common and on the death of either of them in trust as to the undivided moiety held in trust for him for his sons (if more than one) or for his son (if only one) who shall attain the age of twenty-one years but failing such sons attaining that age the said undivided moiety shall be held for the survivor of them the said William Glen and John Glen during his life and after the death of such survivor for his sons or son who shall attain the age of twenty-one years and if there shall be no son of either of my said nephews who shall attain the age of twenty-one years the said property shall be held in trust for such persons as under the statutes for the distribution of the personal estate of intestates would have taken if I had died intestate but I declare that the annuities hereinafter bequeathed to my said wife and my adopted daughter Rose shall be a first charge on the said property in Collins Street and Little Collins Street." After giving these annuities and certain other bequests the will continued: "I declare that my trustees shall hold the residue of my estate in trust for such persons as under the statutes for the distribution of the personal estates of intestates would have taken the same if I had died intestate."

The testator left him surviving the nephews, William Glen and John Glen. John Glen died on 2nd February 1928, leaving three sons, the defendants John Malcolm Glen, David Watson Glen and Alan McDougall Glen all of whom attained the age of twenty-one years. William Glen died on 19th August 1929 leaving two sons, the defendants John Glen and William Henderson Glen, both of whom attained the age of twenty-one years. Subject to the payment of the annuities to the testator's widow and his adopted daughter the income derived from the properties in Collins Street and Little Collins Street was divided equally between the testator's nephews,

William Glen and John Glen, until the death of the latter on 2nd February 1928 and thereafter until the death of William Glen the income from the properties after payment thereout of the annuity to the testator's adopted daughter was divided between William Glen on the one hand and the defendants John Malcolm Glen, David Watson Glen and Alan McDougall Glen, on the other. Since the death of William Glen the plaintiff trustee had divided the income from the properties, after payment of the annuity, equally between the defendants John Malcolm Glen, David Watson Glen, and Alan McDougall Glen on the one hand and the defendants John Glen and William Henderson Glen or their assignees on the other. William Henderson Glen and John Glen assigned their interests in the properties by way of mortgage. The Australian Mutual Provident Society, Rolfe & Co. Ltd. and the People's Investment Co. Pty. Ltd. were the assignees of the interest of William Henderson Glen, and the Australian Mutual Provident Society and the Union Bank of Australia Ltd. were the assignees of the interest of John Glen.

In these circumstances the trustee of the estate, the Union Trustee Co. of Australia Ltd. took out an originating summons to determine whether the plaintiff now held the properties as to one undivided moiety therein for the children of the testator's nephew William Glen, and as to the other undivided moiety for the children of his nephew John Glen.

The summons was heard by *Irvine* C.J., who held that the children of the testator's nephew John Glen were entitled to an undivided moiety in the property subject to the annuity charged thereon, but that the children of the testator's nephew William Glen were not entitled to any interest in the property. Against this decision John Glen and William Henderson Glen, the children of the testator's nephew William Glen, and the assignees of the shares of John Glen and William Henderson Glen appealed to the Full Court of the Supreme Court of Victoria. The Full Court reversed the decision of *Irvine* C.J. and held that, subject to the annuity charged thereon by the testator, the trustee held the property in trust as to one moiety for the children of the testator's nephew John Glen, and as to the other moiety for the children of the testator's nephew William Glen.

H. C. OF A. 1935-1936.

CURRIE v. GLEN.

From this decision John Glen Currie, one of the defendants, sued as representing himself and all other persons being unsatisfied annuitants and legatees under the testator's will, now appealed to the High Court.

Walker, for the appellant. The trustee is to hold the property in trust for the two nephews during their joint lives. This is not the same as for their respective lives (*Grant* v. *Winbolt* (1)). The words " during their joint lives " are words referring to the quantity and not to the quality of the estate. This is a gift to these two persons limited to their joint lives (*Scalé* v. *Rawlins* (2)). This is not a case in which " survivor " can be read to mean " other " (*Harrison* v. *Harrison* (3)). *Kinsella* v. *Caffrey* (4) turned on very different facts from the present case.

Fullagar K.C. (with him *Moore*), for W. H. Glen, J. Glen and the Union Bank of Australasia. The expression " the death of either of them " means " on the death of each of them " (*In re Baron Wavertree of Delamere*; *Rutherford* v. *Hall-Walker* (5)). The primary meaning of " either " is " each." The ultimate gift over shows that the testator thought that he had disposed of the whole of the property. If the estate is to come to an end at the death of one of the donees the words " as tenants in common " are not given any meaning. The expression " during their joint lives " is not always construed strictly (*Townley* v. *Bolton* (6)); *Jarman* on *Wills*, 7th ed. (1930), vol. II., p. 618). The words " on the death of either " should not be controlled by the words " joint lives " which occur earlier. The expression " after the death of such survivor " means after the death of " the other " (*In re Bowman*; *In re Lay*; *Whytehead* v. *Boulton* (7); *Harrison* v. *Harrison* (8); *Inderwick* v. *Tatchell* (9); *In re Palmer's Settlement Trusts* (10)). The whole will can be construed as giving effect to the wishes of the testator.

(1) (1854) 23 L.J. Ch. 282.
(2) (1892) A.C. 342.
(3) (1901) 2 Ch. 136, at p. 142.
(4) (1860) 11 Ir. Ch. 154.
(5) (1933) Ch. 837.
(6) (1832) 1 My. & K. 148; 39 E.R. 637.
(7) (1889) 41 Ch. D. 525, at pp. 531, 532.
(8) (1901) 2 Ch. 136.
(9) (1901) 2 Ch. 738; (1903) A.C. 310.
(10) (1875) L.R. 19 Eq. 320.

Wilbur Ham K.C. (with him *T. W. Smith*), for the Australian Mutual Provident Society, adopted the argument of *Fullagar* K.C. "Either" means "each" (*Cave* v. *Horsell* (1)). This property was intended by the testator to be held for each of the nephews and to go in undivided moieties to themselves. Either the expression "during their joint lives" or "as tenants in common" must go, and it is more reasonable to discard the expression "as tenants in common" than the expression "during their joint lives."

Coppel, for Rolfe & Co. Ltd. In this case there is sufficient evidence to enable the Court to supply a clause by implication (*Towns* v. *Wentworth* (2)). The will provides for a gift of the whole property, which will operate in the event of either nephew having a son who attains twenty-one. The provision is complete as to one moiety, and if words are implied as to the other moiety the whole gift would be complete. The presumption against intestacy applies in the case of this will because the will shows that the testator contemplates that he is disposing of the whole of his property. Apart from this clause the will is carefully drawn, and a clause should be implied giving effect to the obvious intention of the testator. It is clear that the testator has, by implication, dealt with this interest (*In the Will of Barnett*; *Bradbury* v. *Barnett* (3); *Langston* v. *Langston* (4); *In re Redfern*; *Redfern* v. *Bryning* (5); *Doe d. Leach* v. *Micklem* (6)). [He also referred to *In re Stanley's Settlement*; *Maddocks* v. *Andrews* (7); *Tunstall* v. *Trappes* (8).]

Bourke, for The Peoples Investment Co. Pty. Ltd., adopted the arguments submitted on behalf of the preceding respondents and referred to *Mellor* v. *Daintree* (9).

Herring, for the Union Trustee Co. of Australia Ltd. The testator intended to create a tenancy in common which would subsist after

(1) (1912) 3 K.B. 533, at p. 543.
(2) (1858) 11 Moo. P.C.C. 526, at p. 543; 14 E.R. 794, at p. 800.
(3) (1919) V.L.R. 524; 41 A.L.T. 38.
(4) (1834) 2 Cl. & F. 194; 6 E.R. 1128.
(5) (1877) 6 Ch. D. 133.
(6) (1805) 6 East 486, at p. 491; 102 E.R. 1374, at p. 1376.
(7) (1916) 2 Ch. 50.
(8) (1830) 3 Sim. 286, at p. 312; 57 E.R. 1005, at p. 1015.
(9) (1886) 33 Ch. D. 198, at p. 205.

H. C. OF A. 1935-1936.

CURRIE v. GLEN.

the death of the first nephew. There are no words in the will which create a new tenancy in common.

Walker, in reply. The Court should not supply dispositions which are not contained in the will unless it is plain that there has been an omission (*Theobald* on *Wills*, 8th ed. (1927), p. 580; *Crawford's Trustees* v. *Fleck* (1)). This is not an irresistable conclusion which must be given effect to in order to carry out the obvious intention of the testator.

Cur. adv. vult.

1936, Feb. 13. The following written judgments were delivered :—

RICH J. This appeal is concerned with the interpretation of the following clause in the will of the testator : "I direct my trustees hereinafter named to hold my property in Collins Street and Little Collins Street part of Crown Allotment three of Section twelve City of Melbourne from and after the twenty-fifth day of August One thousand eight hundred and ninety-five in trust for my nephews William Glen and John Glen during their joint lives as tenants in common and on the death of either of them in trust as to the undivided moiety held in trust for him for his sons (if more than one) or for his son (if only one) who shall attain the age of twenty-one years but failing such sons attaining that age the said undivided moiety shall be held for the survivor of them the said William Glen and John Glen during his life and after the death of such survivor for his sons or son who shall attain the age of twenty-one years and if there shall be no son of either of my said nephews who shall attain the age of twenty-one years the said property shall be held in trust for such persons as under the statutes for the distribution of the personal estate of intestates would have taken if I had died intestate." Much of the difficulty in its interpretation has been caused by taking it piecemeal. It is essential to read the disposition as a whole. When this is done it is seen that the testator treats the disposition as one which causes an undivided moiety of the property to be held in trust for each of his nephews. The clause directs that on the death of either (and there is no reason

(1) (1910) S.C. 998.

here why "either" should not be read as "each") the undivided moiety held for him shall go over to his sons contingently, and, failing the contingency, to the survivor of the two nephews for life on the like contingency, and after the death of the survivor to his sons contingently upon the like contingency. It provides also that if there shall be no son of either who fulfils the contingency the property shall go over. The testator clearly assumes that he has provided for every contingency except that of there being no son of either nephew who fulfils the contingency. This might supply sufficient reason for construing "survivor" as "other" if the nephew who died last had had no son who fulfilled the contingency, but, in the events which have happened, it is unnecessary to express any opinion on the point. A consideration of the disposition as a whole makes it necessary, in order to give effect to the testator's language, to treat the original trust as being a trust which is in the first instance in favour beneficially of the two nephews absolutely, the words "during their joint lives as tenants in common" being intended not to describe the quantity of their interest, but to describe its quality as being tenancy in common, and not joint tenancy.

The appeal should be dismissed.

The ordinary rule as to the costs of an unsuccessful appeal by a beneficiary against an order made on an originating summons construing a will against the interest of the beneficiary is that the appellant should pay the costs. But the rule is departed from if the Court considers that such a cause for bringing the appeal existed as to warrant a relaxation of the salutary rule. In the present case, members of this Court in their individual judgments had differed in varying degrees from the reasons of the Full Court. In these circumstances, although my own judgment does not depart fundamentally from that of the Full Court, I am prepared to concur in relieving the appellant from the obligation to pay costs and ordering that the respondents should receive their costs from the estate, leaving the appellant to pay his own.

STARKE J. This appeal depends upon the interpretation placed upon the following provision of the will of William Henderson Glen: "I direct my trustees hereinafter named to hold my property in

H. C. OF A. 1935-1936.

CURRIE v. GLEN.

Starke J.

Collins Street and Little Collins Street part of Crown Allotment three of Section twelve City of Melbourne from and after the twenty-fifth day of August One thousand eight hundred and ninety-five in trust for my nephews William Glen and John Glen during their joint lives as tenants in common and on the death of either of them in trust as to the undivided moiety held in trust for him for his sons (if more than one) or for his son (if only one) who shall attain the age of twenty-one years but failing such sons attaining that age the said undivided moiety shall be held for the survivor of them the said William Glen and John Glen during his life and after the death of such survivor for his sons or son who shall attain the age of twenty-one years and if there shall be no son of either of my said nephews who shall attain the age of twenty-one years the said property shall be held in trust for such persons as under the statutes for the distribution of the personal estate of intestates would have taken if I had died intestate but I declare that the annuities hereinafter bequeathed to my said wife and my adopted daughter Rose shall be a first charge on the said property in Collins Street and Little Collins Street." The testator died in February of 1892, and his nephews William and John were then living. John died in February 1928, leaving three sons, John Malcolm Glen, David Watson Glen, and Alan McDougall Glen, each of whom has attained the age of twenty-one years. William died in August 1929, leaving two sons, John Glen and William Glen, both of whom have attained the age of twenty-one years. The question is whether the sons of William are entitled to an undivided moiety in the properties in respect of which the testator had directed the foregoing trusts. It was resolved in the negative by *Irvine* C.J., but his decision was reversed on appeal to the Full Court of the Supreme Court of Victoria. A further appeal is now brought to this Court.

The foundation of the decision the subject of appeal to this Court is to be found in the interpretation placed upon the phrase "during their joint lives as tenants in common." It was held that they were not words of limitation at all, but words governing the nephews' enjoyment of the properties during their joint lives. The conclusion was thus reached that the nephews took an estate for their respective lives, which, during their joint lives, would be enjoyed in common.

It was then said to be apparent from this gift and the succeeding gifts that the nephews took life interests, and their sons took "respectively in remainder." But this interpretation, with deference, does violence to the meaning of words which are by no means unknown in the limitation of estates. "A limitation to two or more persons for their joint lives creates a tenancy in common, confined to the life of him who dies first; unless it be accompanied by other words evincing an intention that the survivor, also, shall take" (*Edwards, Law of Property in Land and Conveyancing*, 5th ed. (1922), p. 314; *Leake* on *The Law of Property in Land*, 2nd ed. (1909), p. 144). The solution of the question in issue here cannot therefore be found in the interpretation adopted by the Full Court.

Nevertheless, the order reversing the decision of *Irvine* C.J. was in my opinion right. The termination of the estate limited for the joint lives of the nephews upon the death of John throws no light upon the meaning of the succeeding clause, "and on the death of either of them in trust as to the undivided moiety held in trust for him for his sons . . . who shall attain the age of twenty-one years." "Either" is not a technical word, it is a distributive word, and may mean one of two, or each of two—depending upon the subject matter and the context. A common grammatical illustration will suffice: "You can take either side," that is one side or the other; "The river overflowed on either side," that is, on each side. Everyone seems to agree with *Irvine* C.J. that, reading the will as a whole, apart from certain merely technical words contained in it, the real intention of the testator was to make provision for each of his nephews during his life, and after his death a further provision in remainder for such of his sons as should attain the age of twenty-one years. "That such was his intention is . . . not a matter of conjecture but of conviction." Any other construction results in a disposition that "may be described not only as capricious but almost as fantastic." But, if so, why cannot the non-technical word "either" be construed so as to accord with the intention of the testator gathered from the language of his will? It is not so intractable a word that the intention of the testator must be defeated. In my opinion, the words "on the death of either of them," in the context in which they are found, mean on the death of each of them.

H. C. OF A. 1935-1936.

CURRIE v. GLEN.

Starke J.

And it may be noticed that the words " either of my said nephews," where they occur a little later in the will, mean each of his nephews. It was pointed out, however, that this construction does not exhaust the difficulties of the will. The estate limited for the joint lives of the nephews is terminated upon the death of John, and there is no other disposition in favour of William. But the general provisions of the will may evince a contrary intention, upon which I express no opinion, or the residuary gift may take effect during his life. The matter is of little importance in the present case, for John died in 1928 and William in 1929. But even if the estate of William terminated with the death of John, still the succeeding gift operates and takes effect upon his death. All that can be said is that the testator has not sufficiently expressed his intention in the case of William but has done so as to his sons. Again, the gift, " but failing such sons attaining that age the said undivided moiety shall be held for the survivor " of the nephews " during his life ", etc., throws light, it is said, upon the preceding gift, and indeed controls its interpretation. But, on the interpretation of the preceding clause which I adopt, the difficulty under this clause only arises from the use of the word " survivor," and in the case of one nephew dying leaving sons and the other nephew then dying leaving no sons. The sons of the nephew first so dying are not sons of a survivor. It was suggested that the whole difficulty was met if the word " survivor " were read " other." But if the testator's intention in the preceding clause is clear, as I think it is, then there is no reason why effect should not be given to it because the testator's subsequent dispositions are difficult in application or fail to provide for all cases that may arise. The difficulty suggested has not in fact arisen and never will arise : each nephew died leaving sons.

The decision of the Full Court was also supported on other grounds. But they involve much conjecture, and in the view I take it is unnecessary to consider them.

The appeal, as before indicated, should be dismissed.

DIXON J. The testator was survived by his two nephews, William and John. Each of them died leaving sons who attained twenty-one. John predeceased William.

By his will the testator devised a valuable piece of real property to his trustees and directed them to hold it in trust for his two nephews, William and John, during their joint lives as tenants in common. The provision continued: "And on the death of either of them in trust as to the undivided moiety held in trust for him for" his sons or son attaining twenty-one "but failing such sons attaining that age the said undivided moiety shall be held for the survivor of them the said William . . . and John . . . during his life and after the death of such survivor for his sons or son who shall attain the age of twenty-one years and if there shall be no son of either of my said nephews who shall attain the age of twenty-one years the said property shall be held in trust for" the statutory next of kin. The question for decision is whether under this trust the sons of William, the second nephew to die, take the undivided moiety which had been held in trust for their father.

It appears to me to be reasonably clear upon the face of the disposition that the testator intended, after providing as he has done for the devolution of the undivided moiety of the first of the two nephews to die, then to go on to make another express provision for the devolution of the undivided moiety of the second of the two nephews to die, but that, for some reason, the will as it was executed, did not contain the second intended express provision. Its text, on the contrary, proceeds from the disposition of the first moiety immediately to the final gift over of the entirety in favour of next of kin.

To my mind the true question is whether enough appears upon the face of the will to supply the omission, enough, that is to say, to give rise to an implication governing the destination of the other moiety in the events which have happened.

I am unable to adopt the view contended for by the respondents that the express provision actually written in the will applies indifferently to both moieties so that there is no omission. According to that view, the expression "on the death of either" means "on the death of each in turn." Thus, on the death of the nephew first dying, his undivided moiety would pass to his sons, and, on the death of the second nephew, his moiety would pass to his sons. There is, of course, no difficulty in understanding the word "either"

H. C. OF A. 1935-1936.

CURRIE v. GLEN.

Dixon J.

to mean each in turn. But I think the context shows quite clearly that it is not used in this sense but in the sense of "one or other." The precedent estate is to the two nephews during their joint lives. The death of one or other of them would bring it to an end. It is a tenancy in common in the whole. The very event which brings it to an end is made the occasion of a gift of the undivided moiety of the nephew dying. "On the death of either of them in trust as to the undivided moiety held in trust for him." If he has no sons attaining twenty-one, the undivided share is to be held for the survivor of them, William and John. Only one of the two can survive the other. Thus it is a limitation of one undivided moiety of two tenants in common to the other upon the death of the first and the consequent cesser of a prior estate for their joint lives.

With a view to overcome the effect of this context, a contention was advanced that the duration of the prior estate was not for their joint lives but for their several lives and that "survivor" should be construed as "other." To get at a limitation for their respective lives, it was proposed that the expression "during their joint lives as tenants in common" should be read as meaning "so that during their joint lives they should be tenants in common." By means of this unnatural reading of a clear technical expression the limitation would be made to create an estate for their respective lives which, during the life of them jointly, would be a tenancy in common. In order to get over the difficulty lying in the word "survivor" it is said that it should be read as "other," and the rule of construction is invoked which permits the reading of "other" where "survivor" is written in a limitation to the survivor of a number of legatees contingently on the death of any of them under age or without leaving children or on death coupled with some other event, if the limitation is followed by a gift over which is conditional upon all the legatees so dying. This rule would apply to such a limitation as the following, e.g., to three persons as tenants in common in equal shares for their respective lives and, after the death of any of them his share to go to his children who attain twenty-one and if no child of his attain twenty-one, to the survivors for life with remainder to their children on attaining twenty-one, and if no child of any of them attain twenty-one, then over.

The purpose and effect of its application would be to enable the children of the first of the three persons to die to take on the death of one of the remaining two without children attaining twenty-one. This they might do as children of one of the " other " but not as children of a " survivor " ; for *ex hypothesi* their parent died first (see *In re Bowman* ; *In re Lay* ; *Whytehead* v. *Boulton* (1) ; *Harrison* v. *Harrison* (2) ; *Powell* v. *Hellicar* (3)). But, in the present case the rule could only apply when the word " either " is read as meaning each in succession.

" The word ' survivor,' like every other term, when unexplained by other parts of the will, is to be interpreted according to its strict and literal meaning " (*Jarman* on *Wills*, 7th ed. (1930), vol. III., pp. 2034, 2035). " *Inderwick* v. *Tatchell* (4) in the House of Lords is a strong authority in favour of this proposition " (*ibid.*).

The word " either " prima facie means one or the other. The expression " joint lives " is unambiguous and the words " during their joint lives as tenants in common " are terms of art for marking out the duration of the estate and the quality of its enjoyment, an estate for joint lives enjoyed as tenants in common. Considered apart from the absence of any corresponding limitation of the moiety of the surviving nephew, the language employed consists in the accurate use of words of art for the purpose of limiting the undivided moiety of the nephew first dying after the cesser of an estate for joint lives. Yet the contention advanced would give to almost every term a secondary meaning. The sole reason for adopting such a course is the ultimate gift over of the entirety and the other indications of an intention with respect to the disposition of the second moiety. In my opinion the difficulty cannot thus be met. To attempt to meet it in this manner distorts the construction of the text and runs counter to its evident meaning. It is inconsistent with the truth, which sufficiently appears from the face of the document, namely, that for some reason the limitation of the second moiety has not been written out in the instrument. Unless the omission, so far as it is material in the events which have happened,

(1) (1889) 41 Ch. D., at pp. 531, 532.
(2) (1901) 2 Ch. 136.
(3) (1919) 1 Ch. 138, at pp. 143 et seq.
(4) (1903) A.C. 120.

H. C. OF A. 1935-1936.

CURRIE v. GLEN.

Dixon J.

can be supplied with certainty from a consideration of the terms of the will, I think the testator's intention must fail.

But I have come to the conclusion that it may be so supplied. The general rule of law governing such a question was expressed by Lord *Wensleydale* in his dissenting opinion in *Abbott* v. *Middleton* (1) in a manner which has been uniformly accepted :—" The will must be expressed in writing, and that writing only is to be considered. It is now, I believe, universally admitted, that in construing that writing the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended or abridged, so as to avoid those consequences, but no further. . . . Quite consistently with this rule, words and limitations may be supplied or rejected when warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument."

But if indications of the intention which the testator sought to express appear in the will and they are convincing, effect must be given to them, notwithstanding that a gift or even a series of limitations must be implied.

" I am not to be deterred by any accidental omission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in this will, and treat that blunder as if it was the intention of the testator " (per *Bacon* V.C., *In re Redfern* ; *Redfern* v. *Bryning* (2)).

" If the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared (per Lord *Kingsdown*, *Towns* v. *Wentworth* (3)).

(1) (1858) 7 H.L.C. 68, at pp. 114, 115 ; 11 E.R. 28, at pp. 46, 47.
(2) (1877) 6 Ch. D., at p. 138.
(3) (1858) 11 Moo. P.C.C., at p. 543 ; 14 E.R., at p. 800.

"In construing a will conjecture must not be taken for implication: but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed" (per Lord *Eldon*, *Wilkinson* v. *Adam* (1)).

In considering whether the intention of the testator with respect to the undivided moiety of the nephew dying second can be ascertained from the tenor of the instrument, it must steadily be kept in mind that we are concerned with the intention in one event only and that the simplest and antecedently most probable, namely, the death of the surviving nephew leaving children who attain twenty-one. A paramount consideration is found in the gift over. It is a gift over of the entirety. The purpose is to dispose of the property on the hypothesis that the testator's real desires have failed of fulfilment. For, like the residuary devise and bequest, it is a trust in favour of the statutory next of kin. But the condition upon which its operation depends is that there shall be no son of either of his nephews who shall attain the age of twenty-one years. Such a condition obviously raises a high degree of probability that the entirety was thought by the testator to be disposed of among sons of nephews attaining twenty-one. In fact, one moiety, that of the nephew dying first, is expressly disposed of by a limitation in favour of the sons of that nephew, if any attain twenty-one, and, if none, in favour of the nephew dying second and his sons attaining twenty-one. The terms of the gift over establish, therefore, a strong presumption, to say the least, that the testator considered that he had disposed of the other moiety in favour of the sons of nephews. But the application of the limitation actually expressed depends altogether on the accident of the order of deaths. Whether the expressed limitation operated on the moiety of John or on that of William depended simply on the order in which they died. We find that, during their joint lives, they are given one estate in undivided shares without any discrimination. The gift, which is actually expressed to take effect on the determination of that estate, applies indifferently to them without regard to which of them predeceases the other. Its introductory words are thrown in a

(1) (1813) 1 V. & B. 422, at p. 466; 35 E.R. 163, at p. 180.

H. C. OF A. 1935-1936.

CURRIE v. GLEN.

Dixon J.

form suggesting that the entirety is to be disposed of by separate devises of two moieties, viz., "on the death of either of them *in trust, as to the undivided* moiety" &c. This is not actually balanced by a corresponding provision—"as to the other undivided moiety," but the gift over shows that it was thought that a corresponding provision was in the will and that the clause supposed to be there contained dispositions in favour of the sons of both nephews.

In my opinion, these considerations raise an inference which goes beyond conjecture that the intention of the testator was to give the remaining moiety to the children of his nephews. The probability of intention deduced from what he has expressed is so strong that the contrary cannot be supposed.

But there remains a more dubious step. So far I have said nothing of the order in which the sons of the testator's nephews are to take. Is there enough in the will itself to establish that the testator must have intended that the sons of the nephew last dying are to take his moiety if they attain twenty-one and that the sons of the nephew first dying take only in default of sons of the nephew last dying who attain twenty-one ?

On the whole, I think it appears that it must have been so. The character of the gift expressed, its evident relation to a missing counterpart, the dependence for its application on the accident of the order of death, the technical precision with which, apart from the omission of a passage, it is drawn, the adherence of the testator to limitations of interests for life and remainders to sons attaining twenty-one and in default over, all point to the one conclusion. These considerations all arise from the contents of the will and they amount, in my opinion, to an implication sufficiently clear to take effect.

I think the appeal should be dismissed.

McTIERNAN J. The will has no context to which the terms of art contained in the express devise to the nephews should yield. The land was devised to them as tenants in common (that being the quality of their estate) during their joint lives (that being the period of its duration). As this period would terminate on the death of either of them, it follows that the words "as to the undivided moiety

held in trust for him " must have been intended by the testator to refer exclusively to that undivided moiety of the land enjoyed by the nephew whose death marked the termination of the tenancy in common, and that the word " survivor " was intended to refer exclusively to that nephew who survived and not to be applicable as well to the one who died. The share of the nephew who died is directed to be held in trust for " his sons " who attain twenty-one years, but, failing such sons, for the " survivor " of the nephews during his life, and after the death to " such survivor " for his sons or son who then attain twenty-one years.

There is no express gift of the share of the nephew who survived. But the provisions conclude with a devise of the whole property to the persons entitled to personalty under the Statute of Distributions " if there shall be no son of either of my said nephews who shall attain the age of twenty-one years." There is only one express gift of one undivided moiety to which the contingency is applicable. But this clause is clearly based on the assumption that there have been gifts of the nephews' undivided moieties respectively to their sons. I agree that the considerations stated in the judgment of my brother *Dixon* must lead to the conclusion that there was a gift by implication of the other undivided moiety corresponding in terms to the express gift. At any rate this is sufficiently clear in relation to the devolution of the undivided moiety to the sons of the nephew in trust for whom as a tenant in common it was held (see *Sweeting* v. *Prideaux* (1) ; *Mellor* v. *Daintree* (2)). These cases supply instances of implication no stronger than that which I think should be made in this case.

The appeal should be dismissed.

In the result the reasons of the Supreme Court for its judgment have not been sustained by the judgments of the members of this Court. The appellant was justified in appealing, but as he has failed there should, in my opinion, be no order as to his costs ; but the respondents should have their costs out of the estate.

Appeal dismissed without costs. Let costs of all parties to this appeal (other than appellant's) be taxed (those of

(1) (1876) 2 Ch. D. 413, at p. 416.

(2) (1886) 33 Ch. D. 198, at p. 206.

H. C. OF A. 1935-1936.

CURRIE v. GLEN.

the trustee as between solicitor and client) and paid out of the properties referred to in the originating summons, but in taxing such costs only one set of costs is to be allowed in respect of the interests of the defendants John Glen and William Henderson Glen. Let the costs allowed in respect of such interests be applied in the first place in or towards payment of the costs of the assignees or mortgagees of such interests according to their priorities, and if there be any excess then towards payment of the costs of the said defendants John Glen and William Henderson Glen respectively. And let such costs when taxed be paid to the Australian Mutual Provident Society or its solicitor the first encumbrancer of the said interests. And let such assignees and mortgagees and such defendants be at liberty to apply to this Court or a Judge thereof for the purpose of determining their priorities, or any other question which may arise in relation to such costs. And let the assignees and mortgagees be at liberty to tax any costs, charges and expenses beyond those already provided for and let the taxing officer certify if so required out of which interest such additional costs are payable and let the assignees and mortgagees add such costs to their securities accordingly.

Solicitors for the appellant, *William S. Cook & McCallum.*

Solicitors for the respondents, *W. E. C. Treyvaud*; *Nunn, Smith, Crocker & Purves*; *O'Donohue & Brew*; *H. U. Best*; *Gair & Brahe.*

H. D. W.