[HIGH COURT OF AUSTRALIA.]

KENNA AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

CONOLLY AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction—Residue—Gift over—Transmissible interests—Issue—Vesting—Contingency.

By his will a testator, who died in 1879, declared that "in the case of the death and failure of issue of my said children . . . all the residue and remainder of my real and personal estate . . . shall be equally divided amongst the children of my brother" K. "and of my sister" C. "and the issue (if any) of such children of my said . . . brother and sister who shall be dead provided nevertheless that the issue of any deceased child of my said . . . brother and sister shall have no more than the share to which the deceased child or respective deceased children would have been entitled to if living *per stirpes* and not *per capita*." The children of the testator who survived him died without leaving issue.

H. C. OF A. 1938.

SYDNEY, *Aug.* 29, 30.

MELBOURNE, *Sept.* 16.

Rich, Starke, Dixon and McTiernan JJ.

Held that the children of the testator's brother and sister, K. and C., who survived the testator took a share unless they died leaving issue before the testator's last surviving child, in which case the issue of such child or children took the parent's share.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

Richard Kenna, late of Bathurst in the State of New South Wales, died in 1879 leaving him surviving two sons, Richard and Patrick, and two daughters, Mary and Eleanor.

H. C. OF A. 1938. KENNA v. CONOLLY.

By his will and the first codicil thereto he devised his real estate to trustees upon trusts primarily in favour of his sons and their issue, with gifts over in favour of his daughters and their issue. By a second codicil he provided that "in case of the death of all my children without leaving issue entitled under the trusts of my said will and codicils my property at the corner of William and Russell Streets in Bathurst shall be in trust for Patrick Kenna the eldest son of my brother Patrick Kenna of Orange if living or of his lawful issue if dead . . . and in case of the death and failure of issue of my said children as aforesaid all the residue and remainder of my real and personal estate whatsoever and wheresoever . . . shall be equally divided amongst the children of my brother Michael Kenna of the County Clare in Ireland and of my sister Margaret Cox the wife of Michael Cox of the same place and the issue (if any) of such children of my said last-mentioned brother and sister who shall be dead provided nevertheless that the issue of any deceased child of my said last-mentioned brother and sister shall have no more than the share to which the deceased child or respective deceased children would have been entitled to if living *per stirpes* and not *per capita*."

The four children of the testator who survived him died without leaving issue; the last of them, Patrick, died in 1934. The eldest son of the testator's brother Patrick died without issue before the death of the testator's son Patrick. Four children of the testator's brother Michael Kenna survived the testator, one of whom died, a bachelor, before the death of the testator's son Patrick. The testator's sister Margaret Cox had five children who survived the testator, but four of them died without issue before the death of the testator's son Patrick. The fifth also died before 1934, but left issue four children, who are still living.

A suit was brought in the Supreme Court of New South Wales in its equitable jurisdiction by Richard Kenna, Patrick Kenna and Johanna Larkin, the children of the testator's brother Michael Kenna, against William Arnold Conolly and John Joseph O'Connor, the trustees of the will and codicils of the testator; Margaret Cox, Mary or Minnie Cox, Timothy Cox and Michael Cox, the issue of the son of the testator's sister Margaret Cox; and Lottie Kenna and

Alwyn Leslie Kinna, the personal representatives of the testator's sons. There were no personal representatives of the testator's daughters. The plaintiffs claimed that in the events that had happened they and the defendants Margaret Cox, Mary or Minnie Cox, Timothy Cox and Michael Cox were entitled to the residue and remainder of the testator's real and personal estate and a declaration as to the interests taken by them in that estate.

Nicholas J. held that the testator did not die intestate with respect to the property situated at the corner of William Street and Russell Street, Bathurst, and that all the testator's real estate passed under the residuary gift contained in the second codicil, and, later, by a supplemental decree, his Honour held: (*a*) that upon the true construction of the will and codicils the testator's residuary real estate was not divisible on a *per capita* basis among such of the children of the testator's brother Michael Kenna and sister Margaret Cox as were alive at the date of the death of the testator's last surviving child and the issue then living of any child or children of Michael Kenna and Margaret Cox who died prior to the death of the testator's last surviving child, such issue taking the share to which the deceased child or respective deceased children would have been entitled if living *per stirpes* and not *per capita*; (*b*) that upon the true construction of the declaration contained in the second codicil relating to the testator's residuary real and personal estate in the case of death and failure of issue of his children such of the children of Michael Kenna and Margaret Cox as survived the testator took vested interests in equal shares *per capita* and not *per stirpes* in that residuary real and personal estate, the interest of each of such children being liable to be divested in the event of the death of that child before the date of distribution of such residuary real and personal estate (that is to say, before the date of the death and failure of issue of the testator's last surviving child) leaving issue and not otherwise, and that the issue of any such child so dying leaving issue were to take *per stirpes* and not *per capita* the share which such child would otherwise have taken.

The plaintiffs appealed to the High Court from the whole of the supplemental decree, the respondents to the appeal being the defendants in the suit.

H. C. OF A. 1938. KENNA v. CONOLLY.

Further facts appear in the judgments hereunder.

At the hearing of the appeal there was not any appearance by or on behalf of the respondents Lottie Kenna and Alwyn Leslie Kinna, although each had been notified thereof.

Mason K.C. (with him *Miller*), for the appellants. Upon the proper construction of the will the residuary estate should be divided into fourth parts. One of those fourth parts should go to each of the three children of the testator's brother Michael who were alive at the date of the death of the surviving life tenant, and, as John, the son of the testator's sister Margaret, predeceased the testator leaving issue who survived the testator, the other one-fourth part should be divided amongst that issue. The provision that the issue should take no more than the share to which the deceased parent would have been entitled if living *per stirpes* and not *per capita* means "if living at the period of distribution." The gift is a gift to a composite class; there is not any substitutional gift to the children of Margaret and Michael. The scheme of the will is that living persons should take thereunder. The following cases turn upon their own particular facts and either support the view now put forward on behalf of the appellants, or, where substitutional gifts are involved, take a different view (*Strother* v. *Dutton* (1); *In re Bennett's Trust* (2); *Goodier* v. *Johnson* (3); *Etches* v. *Etches* (4); see also *Jarman* on *Wills*, 7th ed. (1930), vol. II., pp. 1300, 1301; *Gibbs* v. *Tait* (5); *In re Monro* (6); *In re Hunter's Trusts* (7); and *Browne* v. *Moody* (8)). The "substitutional" cases are distinguishable from the case now before the court.

[McTIERNAN J. referred to *In re Coulden*; *Coulden* v. *Coulden* (9).]

This case is indistinguishable from the case of *Pearson* v. *Stephen* (10).

C. M. Collins and *Small*, for the respondent trustees.

(1) (1857) 1 DeG. & J. 675; 44 E.R. 886.
(2) (1857) 3 K. & J. 280; 69 E.R. 1114.
(3) (1881) 18 Ch. D. 441.
(4) (1856) 3 Drew. 441, at p. 447; 61 E.R. 971, at p. 973.
(5) (1836) 8 Sim. 132; 59 E.R. 53.
(6) (1934) G.L.R. (N.Z.) 21.
(7) (1865) L.R. 1 Eq. 295.
(8) (1936) A.C. 635.
(9) (1908) 1 Ch. 320, at p. 325.
(10) (1831) 5 Bli. (N.S.) 203; 5 E.R. 286.

Dudley Williams K.C. (with him *R. Le Gay Brereton*), for the respondents, Margaret Cox, Mary or Minnie Cox, Timothy Cox and Michael Cox. The will read as a whole is consistent with the decision of the court below. This is a gift of property to a class upon the happening of an event. There should not be imported into the constitution of the class itself the contingency of their being alive at the happening of the event on which the property vests (*Hickling* v. *Fair* (1); *Boulton* v. *Beard* (2); *In re Sutcliffe*; *Alison* v. *Alison* (3)). The contention put forward on behalf of these respondents is supported by the decisions in *Strother* v. *Dutton* (4); *In re Bennett's Trust* (5); and, particularly, *Etches* v. *Etches* (6). The words "if living" are merely demonstrative of the share referred to and were not intended to qualify the title to such share (*Browne* v. *Moody* (7)). This is a future gift of property to a class upon the happening of a contingent event. It is not a gift to a contingent class, or, in other words, a class the composition of which depends upon something personal to its members.

[DIXON J. referred to *Re Wood*; *Moore* v. *Bailey* (8).]

The view now put forward on behalf of these respondents comes within the three rules of construction laid down in that case. The will before the court in *In re Coulden*; *Coulden* v. *Coulden* (9) contained an express provision that the children there referred to had to be surviving at the date of distribution. A similar provision does not occur in the will now before the court. The words "*per stirpes* and not *per capita*" in the will are not redundant. If the word "shall" be a word importing futurity it must be read in that sense unless there is sufficient context to displace it (*In re Walker*; *Dunkerley* v. *Hewerdine* (10)). The point that is under discussion before this court was left open in *Pearson* v. *Stephen* (11), and it did not arise in *In re Monro* (12). The judgment in *Gibbs* v. *Tait* (13) is unsatisfactory and is no authority in the present case. The

(1) (1899) A.C. 15, at p. 34.
(2) (1853) 3 DeG.M. & G. 608; 43 E.R. 239.
(3) (1934) 1 Ch. 219.
(4) (1857) 1 DeG. & J. 675; 44 E.R. 886.
(5) (1857) 3 K. & J. 280; 69 E.R. 1114.
(6) (1856) 3 Drew. 441; 61 E.R. 971.
(7) (1936) A.C., at p. 648.
(8) (1880) 43 L.T. 730.
(9) (1908) 1 Ch. 320.
(10) (1917) 1 Ch. 38.
(11) (1831) 5 Bli. (N.S.) 203; 5 E.R. 286.
(12) (1934) G.L.R. (N.Z.) 21.
(13) (1836) 8 Sim. 132; 59 E.R. 53.

H. C. OF A. 1938. KENNA v. CONOLLY.

limitations imposed by the will before the court in *In re Hunter's Trusts* (1) make the decision in that case distinguishable; therefore it affords no assistance to this court. See also *Gibson* v. *Abernethy* (2) and *Gray* v. *Garman* (3).

Mason K.C., in reply. There is a fundamental difference between an original gift and a substitutional gift. The cases relied upon by the respondents are all cases involving substitutional gifts. The only possible exception is the case of *Etches* v. *Etches* (4), and the decision in that case is regarded as not good law (*Jarman* on *Wills*, 7th ed. (1930), vol. II., p. 1293, note; see also *In re Metcalfe*; *Metcalfe* v. *Earle* (5)).

Cur. adv. vult.

Sept. 16.

The following written judgments were delivered:—

RICH J. In the events which have happened—the death of all the testator's children without leaving issue entitled under the trusts of his will and codicils—the words of the gift over of residue contained in the second codicil fall to be considered. The precise words are set out in the judgment under appeal and I need not repeat them. In my opinion these words constitute a substantive, original gift to a compound class consisting of the children of the testator's brother Michael and of his sister Margaret and the issue of deceased children (*Loring* v. *Thomas* (6); *Martin* v. *Holgate* (7); *In re Woolrich*; *Harris* v. *Harris* (8)). The words "provided nevertheless that the issue . . . shall have no more than the share to which the deceased children would have been entitled if living *per stirpes* and not *per capita*," were necessary to show what share the issue "of a deceased child were to take amongst them" (*Tytherleigh* v. *Harbin* (9)).

There is here no vested gift liable to be divested upon a particular contingency, but everything remained in contingency until the death of the testator's last surviving child without issue. But the

(1) (1865) L.R. 1 Eq. 295.
(2) (1918) 18 S.R. (N.S.W.) 122; 35 W.N. (N.S.W.) 43.
(3) (1843) 2 Hare 268; 67 E.R. 111.
(4) (1856) 3 Drew. 441; 61 E.R. 971.
(5) (1909) 1 Ch. 424.
(6) (1861) 1 Dr. & Sm. 497; 62 E.R. 469.
(7) (1866) L.R. 1 H.L. 175.
(8) (1879) 11 Ch. D. 663.
(9) (1835) 6 Sim. 329, at p. 332; 58 E.R. 617, at p. 618.

contingencies relate only to the vesting of prior gifts. The gift in question is by the second codicil in contemplation of the failure of these prior gifts, which represent the testator's primary testamentary desires. The contingencies are in no way relevant to the ascertainment of the class and should not be imported into the description. Every member existing at the death of the testator or coming into existence after his death and before the ultimate failure of his issue is qualified to take without any further event personal to himself occurring and without any further event except the failure of the preceding gifts by the death without issue of the testator's surviving child. In this condition of the title of those members of the class who are nephews and nieces it does not seem to me to matter whether the provision for the inclusion of the children of those dying leaving issue is regarded as divesting or as defeating the prima facie title of the parents so dying. In effect it states specifically that the issue of children of persons who otherwise were members of the class should on their death leaving issue take the parents' place in the class. Such a provision should be confined to the specific event which it describes and should not be made the basis of an implication that survival to the period of distribution is a necessary qualification of members of the class in all events.

In my opinion the appeal should be dismissed.

STARKE J. The testator, Richard Kenna, died in 1879. His wife predeceased him but two sons and two daughters survived him. One of the sons married but died without issue ; the other children never married and are also dead. The last of the testator's children surviving him died in 1934. The testator made certain provisions for his children and their issue by his will and codicils, but the disposition which falls for consideration in this case is that providing for the death of all his children without issue, an event which actually happened, as already stated. " And I declare that in the case of the death and failure of issue of my said children as aforesaid all the residue and remainder of my real and personal estate whatsoever and wheresoever " (subject to a certain provision in favour of his wife, who, however, predeceased the testator) " shall be equally divided amongst the children of my brother Michael Kenna of the County

H. C. OF A. 1938. KENNA v. CONOLLY. Starke J.

Clare in Ireland and of my sister Margaret Cox the wife of Michael Cox of the same place and the issue (if any) of such children of my said last-mentioned brother and sister who shall be dead provided nevertheless that the issue of any deceased child of my said last-mentioned brother and sister shall have no more than the share to which the deceased child or respective deceased children would have been entitled to if living *per stirpes* and not *per capita*." Michael had several children. Two are still living, another died in 1930 a bachelor, and another in 1938. Margaret also had several children. Four died unmarried after the death of the testator but before 1934. A son John died in 1915 but left issue four children who are still living.

The question is whether the contingency of being alive when the last surviving child of the testator died, namely, in 1934, is imported into the gift to the issue of the children of Michael and Margaret who shall be dead. If so the residue according to the facts as at present known is divisible into four shares: otherwise into nine. An ordinary form of disposition is a gift to a class living at the time of distribution, as to the children of A living at a given period and the issue of those then dead. The parents only take if living at the time of distribution, but the contingency is not imported into the gift to the issue (*Martin* v. *Holgate* (1); *Lyon* v. *Coward* (2); *Re Wildman's Trusts* (3)). So also it has been held that under a gift to a class in certain events and the issue of them as shall then be dead, the members of the class dying without issue before the events happen take a share (*Etches* v. *Etches* (4); *Re Wood*; *Moore* v. *Bailey* (5)). But these so-called rules of construction are all subject to any contrary intention appearing in the will and codicils. It was said that the words used by the testator require the court to read the words "and the issue (if any) of such children . . . who shall be dead" as equivalent to the issue living at the death of the last surviving child of the testator. This accords with the view of *Knight Bruce* L.J. in *Penny* v. *Clarke* (6), but the decision in *Martin* v. *Holgate* (1) denies the importation of the contingency

(1) (1866) L.R. 1 H.L. 175.
(2) (1846) 15 Sim. 287; 60 E.R. 628.
(3) (1860) 1 John. & H. 299; 70 E.R. 761.
(4) (1856) 3 Drew. 441; 61 E.R. 971.
(5) (1880) 43 L.T. 730.
(6) (1860) 1 DeG.F. & J. 425; 45 E.R. 423.

into the gift to the issue. Further, some reliance was placed upon the words "provided nevertheless that the issue of any deceased child . . . shall have no more than the share to which the deceased child or respective deceased children would have been entitled to if living *per stirpes* and not *per capita*." But these words merely mark out the share the issue are to take among them. The result is that all the children of the testator's brother and sister, Michael and Margaret, who survived the testator take a share unless they died leaving issue before the testator's last surviving child, in which case the issue of such child or children take the parent's share.

In my opinion the judgment appealed from is right and this appeal should be dismissed.

DIXON J. The testator died in 1879 leaving him surviving two sons, Richard and Patrick, and two daughters, Mary and Eleanor. These four children have since died, all without issue. Patrick was the last survivor. The testator was entitled to real estate consisting of a number of parcels, of which he disposed by a general devise to trustees upon trusts primarily in favour of his sons and their issue with gifts over to his daughters and their issue. The trusts were limited by his will and the first codicil thereto. He limited an undivided moiety to each of his sons for life.

There may be a question as to the effect of the limitations in remainder expectant upon these life estates, but I think they amounted in the case of each moiety to contingent remainders to such of the children of the tenant for life as survived him and the issue then living of deceased children as tenants in common in equal shares *per stirpes*, with cross-remainders, if either son should die leaving no child or issue him surviving, to the other son for life and after his death to such of his children as survived him and the issue then living of deceased children as tenants in common *per stirpes*. In the event of both sons dying leaving no child or issue them surviving, the testator limited the entirety of the real estate over to his two daughters Mary and Eleanor as tenants in common in equal shares for their respective lives with remainder to their respective issue and with cross-remainders to the survivor, if one should die without leaving issue. At the stage when he made his first codicil,

H. C. OF A. 1938. KENNA v. CONOLLY. Dixon J.

the testator appears to have regarded these dispositions as a sufficient provision against intestacy. He did not, it would seem, contemplate the event, which actually happened, of all his four children dying without leaving issue. But by a second codicil he did provide for that event. The testator had a sister named Margaret, a brother named Patrick, and a brother named Michael, and they survived him. He chose their children as the objects of the limitations over to take effect if the gifts made to his grandchildren and their issue by his will and first codicil should fail. He first dealt specifically with one of the more valuable pieces of land that he had included in the general devise to the trustees. This he made the subject of a provision in the second codicil in favour of the eldest son of his brother Patrick. The provision took the form of a declaration that, in case of the death of all the testator's children without leaving issue entitled under the trusts of his will and codicils, the particular property should be in trust for his brother Patrick's eldest son, naming him, if living or of his lawful issue if dead, such issue if more than one to take in equal shares as tenants in common *per stirpes* and not *per capita*. This gift failed in the events which happened because the nephew in question, that is, the eldest son of the testator's brother Patrick, died without issue before the testator's son Patrick. The contingency of his living when the testator's children all died without leaving issue did not occur, and he had no issue to take under the alternative gift to his lawful issue. Up to this point, therefore, the dispositions of the corpus of the real estate all failed, in the events that happened. But the second codicil went on to supply what the will lacked, namely, a residuary devise and bequest, a residuary devise and bequest restricted however to the contingency of the failure of issue on the part of the testator's own children.

The question which the appeal raises for decision depends upon the effect of the limitations contained in this provision. It consists of a disposition in favour of the children of the testator's brother Michael and their issue and the children of his sister Margaret and their issue. Margaret had five children who survived the testator, but four of them died without issue before the death of the testator's last surviving child, that is, his son Patrick. The fifth also died before that event, but he left children who are still living. Michael

had four children who are known to have survived the testator; but one of them predeceased the testator's last surviving son Patrick leaving no issue.

The question which has arisen upon these facts is whether the legal personal representatives of Margaret's four children and Michael's child, who all survived the testator but predeceased his last surviving child, Patrick, without issue, are or are not entitled to share in the distribution of the residuary estate with the persons who unquestionably take, namely, the three children of Michael who survived the testator's last surviving child and the children of Margaret's child who survived the testator but predeceased Patrick, his last surviving child.

The question depends upon the terms of the gift over of residue, which is as follows, omitting immaterial expressions and references:—"And I declare that in case of the death and failure of issue of my said children as aforesaid all the residue and remainder of my real and personal estate whatsoever and wheresoever . . . shall be equally divided amongst the children of my brother Michael . . . and of my sister Margaret . . . and the issue (if any) of such children of my said last-mentioned brother and sister who shall be dead provided nevertheless that the issue of any deceased child of my said last-mentioned brother and sister shall have no more than the share to which the deceased child or respective deceased children would have been entitled to" (*sic*) "if living *per stirpes* and not *per capita.*"

The expression "in the case of the death and failure of issue of my said children as aforesaid" refers back to the contingency stated in relation to the devise to the eldest son of the testator's brother Patrick, namely, the contingency of the death of all the testator's children without leaving issue entitled under the trusts of his will and codicils, which occurred.

By the decree under appeal, *Nicholas* J. declared that upon the true construction of this provision such of the children of Michael and of Margaret as survived the testator took vested interests in equal shares *per capita* and not *per stirpes* in the residuary real and personal estate of the testator, the interest of each of such children being liable to be divested in the event of death of that child before

H. C. OF A. 1938. KENNA v. CONOLLY. Dixon J.

the date of distribution of such residuary real and personal estate (that is to say, before the date of the death and failure of issue of the last surviving child of the testator) leaving issue and not otherwise, and that the issue of any such child so dying leaving issue are to take *per stirpes* and not *per capita* the share which such child would otherwise have taken.

It will be noticed that under this declaration the children of Michael and Margaret who survive the testator are treated as taking a share which vests in interest before it vests in possession. But actually the limitations to those children remain contingent up to the death without issue of the last surviving child of the testator when they vest in possession. It is true that their survival of the death without issue of the testator's last surviving child is not among the contingencies which the limitation expressly states. But the whole limitation over is expressed to be contingent on the death without leaving issue of all four of the testator's children. Until the death without issue of the last surviving child, the gift over remained contingent. For " a possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties ; even though the donees be each of them an hundred years old " (*Blackstone's Commentaries*, vol. II., p. 125). And at the death of the testator leaving all four children him surviving the contingencies were numerous and the likelihood of them occurring was apparently remote. As the gift over must vest alike in interest and in possession on and not before the death without issue of the last surviving child of the testator, there could be no actual vesting and divesting of any of the future interests created by the limitation of residue. All that could in strictness be said, on the construction which *Nicholas* J. adopted, was that the contingencies, upon which the title of a child of Margaret or of Michael to share depended, were confined to the death without issue of all four of the testator's children and to that child's not himself dying in the meantime leaving issue.

To my mind it is this contingent character of the residuary gift that raises the point in the case. If the limitation of residue to the testator's nephews and nieces, being children of his sister Margaret or of his brother Michael, had been absolute and subject only to prior life interests so as to amount to remainders or other future

interests expectant only upon the determination of the precedent estate or interest in possession, I should have thought the established rules of construction would have produced the result stated in the decree. The prima facie rule is that a devise or bequest to the children of a named person to take effect absolutely upon the determination of a prior life estate whether given to that person or some other person confers an interest upon every such child who is in existence at the death of the testator or comes into existence after his death and before the determination of the life estate. The *quantum* of the interest may be diminished as additional members of the class come into existence, but otherwise the interest is vested. The addition, in the description of the class, of the words " and the issue (if any) of such children . . . who shall be dead " would have operated to qualify the interest of children who became members of the class only in the actual event to which the words refer, namely, the death of such a child leaving issue. The words would not be construed as implying that survival until the death of the tenant for life was necessary before a child could take an interest, or that death without issue operated to divest or defeat the interest he otherwise took (*Gray* v. *Garman* (1) ; *Wagstaff* v. *Crosby* (2) ; *Baldwin* v. *Rogers* (3) ; *In re Bennett's Trust* (4) ; *Strother* v. *Dutton* (5)). Thus a direction that, upon the death of the survivor of named persons, a fund shall be applied equally among the children of A and of B " and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living " has been construed by the Court of Appeal, not as a gift to such children of A or of B as shall be living at the death of the survivor of the named persons and the issue of such children as shall be then dead, but as a gift to all the children of A or of B whether living or not at that time, except such as have died leaving issue, and to such issue (*Goodier* v. *Johnson* (6)).

The presumption is in favour of early vesting ; the contingency of survival to the period of distribution or enjoyment is not imported

(1) (1843) 2 Hare 268 ; 67 E.R. 111.
(2) (1846) 2 Coll. 746 ; 63 E.R. 943.
(3) (1853) 3 DeG.M. & G. 649 ; 43 E.R. 255.
(4) (1857) 3 K. & J. 280 ; 69 E.R. 1114.
(5) (1857) 1 DeG. & J. 675 ; 44 E.R. 886.
(6) (1881) 18 Ch. D., at p. 447.

H. C. OF A. 1938. KENNA v. CONOLLY. Dixon J.

into the description of the class and an interest once vesting is not made the subject of a divesting condition except by express words or clear implication. Such considerations combine to produce the result.

For the purpose of considering whether survival until the determination of the prior interest or until the period of enjoyment or distribution is a necessary condition, it does not seem to be of much importance whether the gift to issue of deceased children takes a form appropriate for the expression of an original gift or of a substitutional gift. This might be of much importance on the question whether the class included the issue of a child dying before the will took effect or perhaps before it was executed. Of course, in a sense, to construe the gift to the issue of a deceased child as a substitutional gift is almost to beg or at all events to decide the very question. Because it means that in the specified event or events the limitation operates as a substitution for the gift to the deceased child which otherwise would be absolute. But a form of expression appropriate to an alternative original gift supplies no ground for implying that even when the stated contingency of leaving issue does not occur death before the determination of the prior life interest or other specified event is inconsistent with the donee's becoming or remaining a member of the class of persons entitled.

I therefore think the chief question here is whether the contingencies upon which the residuary gift depends make inapplicable what otherwise would be the prima facie construction. Authority is against the view that the contingencies displace the application of the presumptive construction. It must be remembered that the general rule for the ascertainment of the class includes gifts arising on a contingency as well as those expectant on a prior interest. Further, the contingencies here arise from prior dispositions of the property, and do not enter into the description of the donees or turn on anything personal to them. In *Re Wood*; *Moore* v. *Bailey* (1), *Fry* J., as he then was, in stating the rule said that where property is given to trustees upon trust for a person or persons for life or until a contingency and afterwards upon trust for a class of children or others the members of the class are those who are members of it

(1) (1880) 43 L.T. 730.

at the death of the testator and all who become members of it before the arrival of the event.

In *Wagstaff* v. *Crosby* (1) the testator made a gift to three named nephews and a niece contingently upon his daughter dying without children. The gift was to the nephews and niece and the survivors or survivor of them and they all predeceased the daughter. *Knight Bruce* V.C. did not accede to the argument that as everything remained in contingency until the death of the daughter without issue only those *in esse* at that time took, and he held that as all four were survived by the daughter their representatives were entitled.

The important consideration is not that the interest is vested but that it exists as a transmissible interest liable to be defeated in the contingency expressed and, unless an implication is made, not otherwise. The decision of *Knight Bruce* V.C. was explained on this ground by Lord *Hatherley* when Vice-Chancellor in *In re Sanders' Trusts* (2). He said: "The court sees an intention to give, in one event in one direction, and in another event in another; and what difference can it make whether you call these vested interests defeasible in a certain event, or contingent and transmissible interests, except perhaps this, that the court is less disposed to divest a vested estate than to say the estate does not vest until the event occurs one way or the other?"

Although the contingency thus lessens the weight of the considerations against defeating the transmissible interests, the presumptive construction has been applied to limitations very like the present arising upon a contingency (*Baldwin* v. *Rogers* (3)). It is true that in the form of decree set out at the end of the report of *Pearson* v. *Stephen* (4), the words "such of the appellants as shall be living at the time of the death" of the life tenant tend against this view but the inference which it is sought to draw from them is at variance with a dictum in the judgment delivered by Lord *Brougham* and, further, the decree has been criticized (*Lanphier* v. *Buck* (5) and *Re Flower*; *Matheson* v. *Goodwyn* [*No.* 2] (6)).

(1) (1846) 2 Coll. 746; 63 E.R. 943.
(2) (1866) L.R. 1 Eq. 675, at p. 684.
(3) (1853) 3 DeG.M. & G. 649; 43 E.R. 255.
(4) (1831) 5 Bli. (N.S.), at p. 218; 5 E.R., at p. 292.
(5) (1865) 34 L.J. Ch. 650, at p. 659.
(6) (1890) 62 L.T. 677, at p. 678.

H. C. OF A. 1938. KENNA v. CONOLLY. Dixon J.

For these reasons I think that according to the prima facie rule the limitation of residue should be taken to mean, unless sufficient indications to the contrary can be found, that all the children of the testator's sister, Margaret, and of his brother, Michael, who survived the testator should take in the events that have happened unless they died leaving issue before his last surviving child. I do not think that any sufficient indications to the contrary can be discovered.

The words " if living " in the proviso appear to me quite colourless, and the redundant reference to the stirpital distribution carries no significance.

The consideration that the devise and bequest is the testator's final attempt to find donees for his property tends, I think, in favour of and not against a construction giving transmissible interests.

Although the decree may not be strictly accurate in its application of the word vested, it declares the rights of the parties in a way which can cause no error.

In my opinion the appeal should be dismissed.

McTIERNAN J. In my opinion the appeal should be dismissed.

The question for decision is whether upon the true construction of the residuary gift any child of the testator's brother Michael or of his sister Margaret, who died without issue before the period of distribution, took an interest which was transmissible to the personal representative of such child. The residuary gift is expressed to depend on a future contingency which is in these terms : " in case of the death of all my children without leaving issue under the trusts of my will and codicil." The contingency is one which is irrespective of the nephews and nieces surviving the given period. " As far as I can discover," *Kay* J. said in *In re Cresswell* ; *Parkin* v. *Cresswell* (1), " the only case in which a contingent future interest is not transmissible is where the being in existence when the contingency happens is an essential part of the description of the person who is to take." The contingency here is a collateral event, and the observations of that learned judge apply. The residuary gift begins in this way : " I declare that in case of the death and failure of issue of my said children as aforesaid all the residue and remainder of my

(1) (1883) 24 Ch. D. 102, at p. 107.

real and personal estate . . . shall be equally divided amongst the children of my brother Michael . . . and of my sister Margaret." The presumption which would arise from these words is that the testator did intend that the nephews and nieces should be entitled in interest when the will and codicils took effect but not in possession until the period of distribution; and, accordingly, these words would then let in the personal representative of any nephew or niece dying before such period, as such nephew or niece would have taken a transmissible interest.

Does the following part of the gift contain a contrary intention to which the presumption must yield? The words which follow, "and the issue of any such children of my said last-mentioned brother and sister who shall be dead," clearly refer to a nephew or niece dying leaving issue. They are not capable in themselves of divesting the interest of any nephew or niece who died without issue. The concluding part of the gift is as follows: "provided nevertheless that the issue of any deceased child of my said last-mentioned brother and sister shall have no more than the share to which the deceased child or respective deceased children would have been entitled to if living *per stirpes* and not *per capita*." These words govern the *quantum* of interest to be taken by the issue of a deceased nephew or niece but they are not necessarily capable in themselves of divesting the interest of any nephew or niece who died without issue.

It is contended on behalf of the appellants that redundancy of expression should not be attributed to the testator and that the words, "would have been entitled to if living," show that the testator did not contemplate that those nephews and nieces who did not survive the period of distribution would be entitled to any interest whatever. The alternative constructions are either to hold that a redundancy was not intended, although one might appear from the words, or to imply in the residuary gift an additional contingency that would result in the exclusion from the class of the presumptive objects of the gift of nephews and nieces who were alive at his death but who died without issue before the period of distribution. The more natural, and, in my opinion, the correct

H. C. OF A. 1938.

KENNA v. CONOLLY.

McTiernan J.

construction is to admit the redundancy rather than to imply another contingency besides that upon which the gift is expressed to be dependent.

This conclusion is quite consistent with the testator's obvious plan of adding to his testamentary dispositions in order to avoid an intestacy. If it was his intention to make the residuary gift dependent on a contingency which would exclude all nephews and nieces dying without issue before the period of distribution, it does not appear that he would have eliminated the possibility of an intestacy arising. For all his nephews and nieces might have died before the period of distribution without leaving issue.

Appeal dismissed with costs.

Solicitors for the appellants, *Murphy & Moloney.*

Solicitor for the respondent trustees, *C. C. E. Kinna,* Molong, by *L. G. B. Cadden.*

Solicitors for the respondents, Margaret Cox, Mary or Minnie Cox, Timothy Cox, and Michael Cox, *Allen, Allen & Hemsley.*

J. B.