[HIGH COURT OF AUSTRALIA.]

BRENNAN . . . . . APPELLANT;
DEFENDANT,

AND

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED AND OTHERS } RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 31; *Aug.* 17.

Rich, Starke, Dixon and Williams JJ.

*Will—Construction—"Who shall survive me."*

After directing that the income of certain legacies was to be paid to the respective legatees for their sole and separate use and without power of anticipation, a will provided that after or in the case of the decease of each of the said legatees then the sum given for her benefit was to be held upon trust "for all her children who shall survive me and attain the age of twenty-one years or die in my lifetime leaving issue." At the date of the will, which was made one year before the testator's death, six of the twelve legatees, nieces of the testator, were married and had children. Since the testator's death other legatees had married and more children had been born.

*Held*, by *Rich*, *Dixon* and *Williams* JJ. (*Starke* J. dissenting), that the provision in question included all children of the nieces of the testator who lived after his death and attained or should attain the age of twenty-one years whether such children were born in his lifetime or after his death.

Decision of the Supreme Court of New South Wales (*Roper* J.), by majority, reversed.

APPEAL from the Supreme Court of New South Wales.

William Edward Sparke, who died on 27th July 1905 at the age of seventy-five years, left a will made by him on 5th July 1904, wherein he appointed his nephew Wallace John Carson to be the executor and trustee thereof and to whom probate thereof was granted on 29th August 1905.

By his will the testator, *inter alia*, directed his trustee to set apart and invest for his five named nieces, the daughters of his sister Fanny, and their respective issue, if any, five several legacies being the sum of £7,000 to one of those nieces, the sum of £5,000 to another of those nieces, and the sum of £3,000 to each of the other three of those nieces, such legacies to be settled upon each of them respectively and their respective children in the manner thereinafter declared. The testator also directed his trustee to set apart and invest and settle in like manner for his seven named nieces the daughters of his deceased brother Edward Joseph Sparke and their respective issue, if any, certain legacies being the sum of £15,000 to one of those nieces and the sum of £13,000 to each of the other six of those nieces. After making provision for other gifts, devises and bequests not material to this report the testator devised certain real estate upon the trust thereinafter declared for the benefit of Charlotte Maud Gilbert and for her issue, and he gave, devised and bequeathed the rest, residue and remainder of his real and personal estate to his nephew the said Wallace John Carson his heirs, executors, administrators and assigns for his own use and benefit absolutely but in the event of his death in the testator's lifetime without leaving issue " or in the event of his surviving me and dying without having made a fresh will or otherwise disposing of his property subsequently to my death and without issue " then the testator gave devised and bequeathed the same or so much as should remain undisposed of to all his next of kin. The testator further directed and declared that the several cash legacies or sums of money in the will bequeathed to or in trust for or directed to be settled for the benefit of his said respective nieces and their respective children and also of the said Charlotte Maud Gilbert should not lapse with their deaths in his lifetime if they died leaving issue. And that the same or the investments set apart to satisfy the same should be invested in the name of his trustee or of separate trustees as therein provided and should be held upon trust " to pay the income of the said legacies or sums of money respectively to the said respective legatees named during their respective lives for their sole and separate use and without power of anticipation and after or in case of the decease of each of the said legatees then to hold the sum given for her benefit upon trust for all her children who shall survive me and attain the age of twenty-one years or die in my lifetime leaving issue and if more than one in equal shares." The testator declared with respect to the real estate devised in trust for the benefit of Charlotte Maud Gilbert and for her issue that his trustee should hold, manage and let the same from time to time upon trust

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during her infancy to apply such portion not exceeding one moiety of the rents and profits thereof towards the maintenance, education and advancement of the said Charlotte Maud Gilbert and after providing for the necessary repairs of the premises " to accumulate the balance of such rents and profits by way of compound interest by investing the same and the resulting income thereof . . . until the said Charlotte Maud Gilbert shall marry or attain the age of twenty-one years and then to settle the accumulated fund upon trusts for her and her issue similar to those next hereinbefore contained with respect to other legacies settled on females." The testator directed also that if for any cause any legacy or devise under the will should become the subject of a separate trust it should be lawful for his trustee to resign the trusts of such legacy or devise without resigning the general trusts of his will and in every such case to substitute and appoint any other person or persons or any trustee company as trustees or trustee thereof with such powers and discretions as should be required for the limited purposes of such separate trust. The testator declared that all legacies and other benefits given under the will to any female should be for her sole and separate use free from marital control in the case of married women and if not absolutely vested should be without power of anticipation.

By a decretal order made by the Supreme Court of New South Wales in its equitable jurisdiction on 13th September 1907, it was declared that the testator's nieces mentioned in his will took only life interests in the pecuniary legacies directed by the will to be set apart, invested and settled for their benefit respectively and their respective issue if any and that in the event of the failure of the trust declared by the will in favour of the children of a niece the money subject to such trust would fall into and form part of the testator's residuary estate.

By a declaration of trust made on 14th October 1908, Wallace John Carson, the executor and trustee of the testator's will, declared that he would stand possessed of certain lands and premises specified therein as having been set aside and appropriated in satisfaction of the said pecuniary legacies, and the rents and profits thereof and the proceeds of sale thereof subject to the powers, discretions and authorites, so far as applicable, contained in the will upon trust for the persons then or thereafter to become entitled to the legacies in the proportions to which the respective legacies bore to each other and to the total amount of all such legacies according to the several estates and interests of such persons therein under the will.

On 15th December 1930 Permanent Trustee Company of New South Wales was appointed the sole trustee of the trusts declared by the above-mentioned declaration of trust.

With the exception of one niece who died a spinster on 25th January 1923, all the nieces of the testator referred to in the will were alive at the date of the originating summons hereinafter mentioned. Particulars in respect of those nieces were as follows :—

Niece A—married 1892 ; issue five children—born 1893, 1896, 1899, 1902 and 1908 respectively.

Niece B—married 1895 ; issue six children—born 1896 (died 1897), 1898, 1900, 1901 (died 1901), 1903, 5th February 1905 (died 1907) respectively.

Niece C—born 1867, married 1896 ; issue five children—born 1897, 1899, 1903 (died 1943), 25th November 1905, 1907 respectively.

Niece D—born 1876, married 1897, 1906, 1914 ; issue one child—born 1898.

Niece E—born 1878, married 1901 ; issue three children—born 1902, 1903, and 16th April 1905 respectively.

Niece F—married 1902 ; issue four children—born 1903, 1906, 1912 and 1915 respectively.

Niece G—born 1869, married 1905 ; no issue.

Niece H—born 1885, married 1906 ; issue three children—born 1907, 1909 and 1912 respectively.

Niece I—married 1910, 1918 ; no issue.

Niece J—born 1880, married 1911 ; issue one child—born 1916.

Niece K—married 1920 ; no issue.

Wallace John Carson died on 5th June 1937 and probate of his will and codicils was granted to the executors and trustees named therein and to whom he bequeathed his residuary estate in equal shares as tenants in common.

An originating summons was brought in the equitable jurisdiction of the Supreme Court by Permanent Trustee Co. of New South Wales Ltd. for the determination of, amongst others, the following question :—

Whether on the true construction of the said declaration of trust and of the will of William Edward Sparke deceased and in the events which had happened the class of beneficiaries interested under the said will in the corpus of the legacies respectively bequeathed thereby to the testator's nieces therein mentioned and their respective children include such children of the said nieces as were born or might be born after the death of the testator and as had attained or should have attained the age of twenty-one years ?

The defendants to the originating summons were : Richard Sparke Manchee, who represented for the purposes of the suit the class consisting of such of the children of the testator's nieces as were

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born prior to his death and had attained the age of twenty-one years; William Edward Sparke Brennan, who represented for the purposes of the suit the class consisting of such of the children of the testator's nieces as had been or might be born after his death and had attained or might attain the age of twenty-one years; and Edward Donald Sparke and Arthur Frederick Manchee as executors and trustees of the will of Wallace John Carson, deceased.

The Supreme Court (*Roper* J.) held that the class of beneficiaries interested under the will of William Edward Sparke deceased in the corpus of the legacies respectively bequeathed thereby to his nieces therein mentioned and their respective children did not include such children of those nieces as were born or might be born after the testator's death and as had attained or should attain the age of twenty-one years.

From that decision the defendant William Edward Sparke Brennan appealed to the High Court, the respondents to the appeal being the plaintiff and the other defendants.

*Weston* K.C. (with him *Walsh*), for the appellant.

*Street*, for the respondent Permanent Trustee Co. of New South Wales Ltd.

*Asprey*, for the respondent Richard Sparke Manchee.

*Henry*, for the respondents Edward Donald Sparke and Arthur Frederick Manchee.

*Cur. adv. vult.*

Aug. 17.

The following written judgments were delivered:—

RICH J. The testator in this case was minded to distribute his wealth in a particular fashion among his kith and kin. He effected this purpose after giving a number of charitable legacies and annuities. A chief concern of his appears to have been to provide for his nieces, who were both young and numerous—some married and some not married. For that purpose he bequeathed a number of legacies which he called cash legacies, considerable in amount. In the clause of the will in which he proceeds to deal with these legacies he begins by directing his trustee "to set (them) apart and invest in trust for my . . . nieces . . . and their respective issue." This shows his general intention. He goes on to carry it out by directing and declaring that the legacies shall be settled in the manner which he describes. He again uses words showing his general intention.

He speaks of " the benefit of my respective nieces and their respective children." And he directs that the legacies shall not lapse by the death in his lifetime of nieces if they die leaving issue. But unfortunately the draftsman of the will failed to observe the cautionary precept against the use or misuse of the word " survive." After directing that the income of the legacies is to be paid to the respective legatees for life for their sole and separate use and without power of anticipation, the will proceeds: ". . . after or in case of the decease of each of the said legatees then to hold the sum given for her benefit upon trust for all her children who shall survive me and attain the age of twenty-one years or die in my lifetime leaving issue and if more than one in equal shares."

As of course would be expected, several of the nieces married after the testator's death and had children. The question is whether their children are excluded from participation in their mother's legacies by the testator's use of the word " survive." Can we without impropriety hold that a child, who was unborn at the testator's death, benefits under the gift for children who shall survive him and attain full age? No one can doubt that according to the correct use of English the word " survive " imports life before and after the event survived. A man does not survive another unless he was born before the other's death. But the testator and his draftsman do not appear to have been masters of English. There is no evidence in the document that either was brought up on strict grammatical principles, although the testator, and probably his draftsman, belong to a generation among whom Lindley Murray was a familiar name. Nor is there any reason to suppose that either of them possessed a copy of Dr. Johnson's dictionary, although according to *Re Clark's Estate* (1), the great lexicographer is suspected of some unsoundness concerning the true meaning and implications of the word " survive." But it is clear that, according to exact English usage the literal application of the word " survive " would exclude after born nieces, *postnatae*. No one denies that the meaning of English language is governed by usage; *Si volet usus, quem penes arbitrium est et jus et norma loquendi.* But courts of construction recognize that testators, in common with others, may misuse language. Indeed, we have here another instance of the perpetual conflict between the two ways of solving questions of interpretation. The one is to give effect to rules of grammar or of construction at the expense of what intuition tells us is the real meaning of the man who penned the instrument. The other is to search the whole document and obtain as much light as possible from the circumstances and give

(1) (1864) 3 DeG. J. & S. 111, at p. 115 [46 E.R. 579, at p. 581].

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effect to the intention you find disclosed notwithstanding grammar, philology, logic, and all the prima facie meanings that case law can supply.

Here is the voice of Lord *Northington* upon the same contrast, speaking in 1761. "It is the fate of all courts of justice upon wills, it is the peculiar destiny of this court in contracts, wills, and trusts, to be the authorized interpreters of nonsense, and to find the meaning of persons that had no meaning at all,—*Ex fumo dare lucem,—ut speciosa dehinc miracula promat.* A creative power is required to bring light out of darkness, and sound or specious determinations from unintelligible instruments. Civil polity, however, requires that there must be some supreme seer who is finally to arbitrate all disputes with certain justice and unquestionable satisfaction. Thank God, it is not this court! The rise of all these difficult questions seems to have been from the law, like all other sciences, using technical expressions not understood by the vulgar, and frequently as little by those they employ; and as the genius of this country abhors, and ought to abhor, all arbitrary determinations on right and property, the ablest and greatest judges successively seem to have laboured to bring these cases, primarily anomalous, to some rule, or analogy of rule; and indeed the exceptions have not been properly such (that is, not simple exceptions), but rather an arrangement of cases excepted under another and stronger legal rule, *the intent of the testator.* This is the capital rule . . ." : *Le Rousseau* v. *Rede* (1).

One hundred and eighty-two years later this is how the matter is dealt with by another great master of equity "*non patriae degener artis*," Lord *Romer* :—"In many of the cases to be found in the books the court is reported to have said that the construction it has put on a will has probably defeated the testator's intention. If this means, as it ought to mean, that the court entertains the strong suspicion to which I have just referred, no sort of objection can be taken to it, but if it means that the court has felt itself prevented by some rule of construction from giving effect to what the language of the will, read in the light of the circumstances in which it was made, convinces it was the real intention of the testator, it has misconstrued the will. . . The rules of construction, in other words, should be regarded as a dictionary by which all parties, including the courts, are bound, but the court should not have recourse to this dictionary to construe a word or a phrase until it has ascertained from an examination of the language of the whole will, when read in the light of the circumstances, whether or not the testator has indicated his

(1) (1761) 2 Eden 1, at pp. 4, 5 [28 E.R. 795, at p. 796].

intention of using the word or the phrase in other than its dictionary meaning—whether or not, in other words, to use another familiar expression, the testator has been his own dictionary": *Perrin* v. *Morgan* (1).

The question in the present case is whether the testator has not sufficiently shown that he did not attach to the word "survive" its full and precise meaning, even if it amount to a grammatical solecism. I think that there are clear indications that he has misused the word "survive" and that all that he meant was that the children should not predecease him.

In considering the question I begin with the gross *a priori* improbability of his intending to exclude the children of his unmarried and the children of his married nieces born after his death. Then there is the clear declaration in the words I have already quoted of his general intention to benefit nieces and their issue. Finally, there is a most important clause to which Mr. *Weston* drew the Court's attention, which in my opinion indicates how the testator understood his own will. I refer to the trust in favour of Charlotte Maud Gilbert. Although that trust related to realty the testator treated it as governed by the same limitations as the "cash legacies" and he included it as part of the subject of those limitations. But immediately after so doing, he proceeded to deal with the intermediate income arising therefrom between his death and C. M. Gilbert's attaining twenty-one or marrying. He directed that part of that income should be accumulated and that his trustee should "settle the accumulated fund upon trusts for her and her issue similar to those hereinbefore contained with respect to other legacies settled on females."

Now the testator's hypothesis was that C. M. Gilbert was unmarried at the time of his death. Clearly, therefore, her issue must have been born after his death to benefit under the trust. He has therefore provided an exegesis of the very clause in question, and I think that this is a decisive consideration. It is true that the testator speaks of "similar" trusts, but I reject the notion that he used the word "similar" to describe the very dissimilar trusts which would result if one limitation were construed to exclude the children of nieces born after his death, and the other to include them.

I am therefore clearly of opinion that the testator intended to include such children in both cases.

The appeal should be allowed and the order varied by a declaration that the clause in question includes all children of the nieces of the testator who lived after the death of the testator and attained or

(1) (1943) A.C. 399, at pp. 420, 421.

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should attain the age of twenty-one years, whether such children were born in his lifetime or after his death. Costs of all parties as between solicitor and client out of the estate.

STARKE J. The testator Sparke made a will in 1904. He was then 74 years of age. He died in 1905. By his will he directed that certain cash legacies which he had given to several named nieces, the daughters of his sister Fanny and his brother Edward, should be settled upon each of them and their respective children in manner thereinafter declared. He directed that the legacies should not lapse if they died in his lifetime leaving issue. And he directed that the legacies or the investments thereof should be held in trust to pay the income thereof to the said respective legatees for their sole and separate use and without power of anticipation and after and in case of the decease of each of the legatees "*then to hold the sum given for her benefit upon trust for all her children who shall survive me and attain the age of twenty-one years or die in my lifetime leaving issue and if more than one in equal shares.*"

At the date of the will some of these nieces were married and some were not. Some of their children were born in the testator's lifetime and others were born after his death. The question is whether the words " who shall survive me " mean children born in the lifetime of the testator and living at his death or children living after his death.

In construing a will the object of the Courts is to ascertain the intention of the testator. But as Lord *Wensleydale* said in *Abbott* v. *Middleton* (1), " the use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation, that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means " or by just reasoning can be collected from surrounding circumstances where such circumstances can be called in aid.

A majority of this Court in *Knight* v. *Knight* (2) declared that the expression " who shall survive me " imports according to its ordinary and natural signification in the English language that the person who is to survive must be alive at and after the death of the person whom he is to survive. It is said, however, that the testator used the expression " who shall survive me " in the sense of children living

(1) (1858) 7 H.L.C. 68, at p. 114 [11 E.R. 28, at p. 46].

(2) (1912) 14 C.L.R. 86.

after his death. The ordinary signification of words may no doubt be controlled by the context of a will or other expressions used in a will with the aid of any relevant surrounding circumstances. And here it is said that the words " who shall survive me " are so controlled. The argument is that the will itself and the surrounding circumstances plainly indicate that the expression is used in the sense of children of the testator's nieces living after his death. It cannot be denied that the gift to the children of his nieces " who shall survive " him operates in a capricious manner if the expression be given its ordinary and natural signification, but " many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily " (*Bird* v. *Luckie* (1) ). Apart from the terms of the gift in the will to Charlotte Maud Gilbert, which apparently was not relied upon in the Court below, though I do not suppose that it escaped the attention of the learned primary judge, there is nothing in the context or in the will or the surrounding circumstances warranting any departure from the ordinary and natural signification of the expression used by the testator.

So to the gift to Charlotte Maud Gilbert I turn. The testator devised and bequeathed to his trustee certain real property for the benefit of Charlotte Maud Gilbert and for her issue. And he directed that during her infancy his trustees should apply portion of the rents and profits thereof for her maintenance, education and advancement and to accumulate the balance until she should marry or attain the age of twenty-one years " and then to settle the accumulated fund upon trusts for her and her issue similar to those next hereinbefore contained with respect to other legacies settled on females." It is true enough that Charlotte Maud Gilbert might not marry and have children in the lifetime of the testator and equally true that she might. The material before the Court does not state the age of Charlotte at the date of the will, whether she was married and had children or not, but for aught that the Court knows Charlotte may not have been an infant at the date of the will and may have died unmarried, which having regard to certain information before me is not so improbable as might be thought from the terms of the will. The testator's expressed intention is that the trusts in her favour and that of her issue shall be " similar " to those in favour of the children of his nieces which are therefore the governing trusts and one might have thought expressed the testator's real intention, capricious though it be. The clear and unambiguous expression of that intention with

(1) (1850) 8 Hare 301, at p. 306 [68 E.R. 375, at p. 378].

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respect to the gifts to the children of his nieces should not be controlled or modified by gifts to other persons on "similar" trusts, but on the contrary should control those gifts and make clear his intention with respect to them.

The result is that this appeal should be dismissed.

DIXON J. The testator, being then in his seventy-fourth year, made his last will on 5th July 1904. He died a year later. The will bequeathed substantial legacies in favour of each of the seven daughters of a brother of the testator named E. J. Sparke and in favour of each of the five daughters of a sister named Fanny Friend. Of the twelve nieces six were unmarried at the date of the will. At that date some of the married nieces had children. Since the testator's death nieces have married and more children have been born. Under the terms of the will the legacies were settled. The limitations upon which they were settled are for the legatee for life and after her death for all her children who should survive the testator and attain the age of twenty-one years or die in his lifetime leaving issue if more than one in equal shares. The question for decision is whether the children who were born after the testator's death are excluded from this gift of the corpus of the legacies by the word "survive."

No one doubts that the natural meaning of the word "survive" is to remain alive after the termination of some other continuing thing or after the occurrence of some event. In short it means to outlive. Accordingly, if the word "survive" receives its natural meaning only, those children who were born to nieces before the death of the testator could survive him and take under the limitation.

But, to determine the meaning of the will, the language of the testator must be read in the sense which he himself appears to have attached to the expressions he used, that is, unless a rule of law gives them some fixed operation. When the main purpose and intention of the testator are ascertained to the satisfaction of the court, if particular expressions are found in the will which are inconsistent with that intention, though not sufficient to control it, such expressions must be discarded or modified. The language of the testator should be moulded to carry into effect as far as possible the intention which, in the opinion of the court, the testator has, on the whole will, sufficiently declared. That is the rule of interpretation expressed in the well-known passage in the judgment delivered in the Privy Council by Lord *Kingsdown* in *Towns* v. *Wentworth* (1),

(1) (1858) 11 Moore P.C. 526, at p. 543 [14 E.R. 794, at p. 800].

Further, the court may take into account the circumstances to which the will is to be applied as they existed at the time it was executed.

There can be no doubt that these circumstances raise an *a priori* improbability of some strength against an intention on the part of the testator to exclude the children of unmarried nieces from a gift made in succession to a life interest to his nieces. The improbability extends to an intention to exclude children of married nieces born after his death. For it would hardly be reasonable to settle legacies in favour of twelve women, six only of whom were married, and to settle them upon limitations on the legatee for life, and after her death only upon those children in existence at the date when the will came into operation.

But an improbability of this kind can only be taken into account when the will itself is so framed or expressed as to disclose an intention at variance with the use of the word " survive " in its natural meaning.

In the present case, I think the context raises a strong presumption that the testator did not use the word " survive " in its correct sense, and did not intend that the gift of corpus should be confined to the children of his nieces who had been born before his will took effect.

The limitations which are in question are separated by a number of provisions from that part of the will in which he gives his first direction in reference to the legacies. That direction begins by requiring the trustee to set apart and invest in trust for his five nieces thereinafter named, the daughters of his sister Fanny Friend and their respective issue, if any, the five several legacies that follow. A similar direction is then made to set apart and invest and settle in like manner for his seven nieces, daughters of his brother E. J. Sparke, and their respective issue, if any, the seven legacies thereinafter mentioned.

The reference to their respective issue, while not necessarily inconsistent with a bequest to a limited class of issue, certainly raises an expectation that the bequest will go to all children. Having mentioned the amounts of the legacies, the will says that they are to be settled upon each of the nieces respectively and their respective children in manner thereinafter declared. The reference to " children " strengthens the presumption that all children are to be benefited. Indeed, it amounts almost to a direct expression of that intention.

Before the legacies are taken up again, the will devises certain land upon trusts thereinafter declared for the benefit of one Charlotte Maud Gilbert. Then, in introducing again the subject of the legacies, the testator proceeds to provide that the legacies bequeathed

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to or in trust for or directed to be settled for the benefit of his respective nieces and their respective children and also of the before-named Charlotte Maud Gilbert shall not lapse with their deaths in his lifetime if they die leaving issue. He confuses the devise to Charlotte Maud Gilbert with a bequest of a legacy, but that is immaterial. What is important is that the legacies are described as settled for the benefit of the nieces and their children, and perhaps further, that lapse is provided against if any issue is left by a niece dying in the testator's lifetime.

Having included the devise to Charlotte Maud Gilbert, the will proceeds to set out the trusts upon which the legacies and the land devised are settled upon the respective legatees and devisees, describing them all as legatees. The limitation with which we are concerned occurs in this provision, that is, the limitation containing the word "survive."

After the limitation upon which the question of the meaning of "survive" arises, the testator proceeds to deal with the devise to Charlotte Maud Gilbert whom he supposed to be an infant, though, it is said, mistakenly. He declares that the trustee shall manage the property devised, and lease it and, during the devisee's infancy, apply half the rents and profits towards her maintenance, education and advancement and, after providing for repairs, accumulate the balance until she shall marry or attain the age of twenty-one years, and then settle the accumulated fund upon trusts for her and her issue similar to those next thereinbefore contained with respect to other legacies settled on females. As he has included the devise among the legacies and placed it under the same trusts, what is true of the trusts upon which the land is settled is true of the trusts upon which the legacies are settled.

Now, as Charlotte Maud Gilbert is dealt with in the will as an unmarried infant, it is quite clear that in this particular provision he contemplates the possibility of her issue taking under the trusts, notwithstanding that they were born after his death. When he speaks of trusts similar to those with respect to other legacies he cannot mean to refer to trusts that differ to the extent of including children born after his death, although the former trusts exclude such children. The result would be to settle the accumulated fund on entirely different trusts from the property from which the accumulations arose. It is evident that the accumulations are to go upon the same trusts as the land. It therefore follows that in this reference to the trusts governing the legacies the testator has plainly shown his belief that he has settled the corpus of the legacies upon all the

children who live after his death, whether they were born in his lifetime or not.

These considerations appear to me to show what meaning the testator attached to the expression "survive" as he used it in the material clause in his will, and to indicate an intention which requires the modification of the natural meaning of the word "survive." The surrounding circumstances greatly strengthen the inference thus drawn from the test of the will.

I am therefore of opinion that we should construe the trust for all the children of the nieces who shall survive the testator and attain twenty-one or die in his lifetime leaving issue as including all children of nieces who did not predecease the testator, whether they were born in his lifetime or not. I should add that I have had the advantage of reading the judgments of *Rich*, *Starke* and *Williams* JJ. and upon full consideration I find myself in agreement with the judgments of *Rich* and *Williams* JJ.

I think the appeal should be allowed.

WILLIAMS J. This is an appeal from a declaration in a decretal order made by *Roper* J. sitting as the Supreme Court of New South Wales in its equitable jurisdiction in an originating summons brought to construe certain provisions in the will of William Edward Sparke relating to pecuniary legacies bequeathed to twelve nieces, five of whom were the children of his sister, Fanny Friend, and the other seven children of his deceased brother, Edward Joseph Sparke. The Supreme Court declared that the class of beneficiaries interested in the corpus of these legacies did not include such children of the nieces as were born or may be born after the death of the testator and as have attained or shall attain the age of twenty-one years.

At the date of the will, namely 5th July 1904, the testator was aged seventy-four years, three of the children of his sister were married and two unmarried, while four of the children of his late brother were married and three unmarried, the ages varying between thirty-seven and nineteen years. The testator died on 27th July 1905.

By the will the testator directed his trustees to set apart and invest in trust "for my five nieces the daughters of my said sister Fanny Friend and their respective issue if any" five legacies totalling £21,000, "such nieces' legacies to be settled upon each of them respectively and their respective children" in manner thereinafter declared; and to set apart and invest and settle in like manner "for my seven nieces daughters of my said late brother Edward Joseph Sparke and their respective issue if any" seven legacies totalling

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£93,000; and directed and declared "that the several cash legacies or sums of money hereinbefore bequeathed to or in trust for or directed to be settled for the benefit of my respective nieces the daughters of my sister Fanny Friend and of my said late brother Edward Joseph Sparke and their respective children and also of the before-named Charlotte Maud Gilbert shall not lapse with their deaths in my lifetime if they die leaving issue and that the same or the investments set apart to satisfy the same shall be invested . . . and shall be held upon trust to pay the income of the said legacies or sums of money respectively to the said respective legatees named during their respective lives for their sole and separate use and without power of anticipation and after . . . the decease of each of the said legatees . . . to hold the sum given for her benefit upon trust for all her children who shall survive me and attain the age of twenty-one years or die in my lifetime leaving issue and if more than one in equal shares."

It will be seen that the provisions relating to the legacies to the twelve nieces contain a reference to Charlotte Maud Gilbert as if there had been a previous bequest of a legacy to her, but the previous gift was a devise of certain real properties "upon the trusts hereinafter declared for the benefit of Charlotte Maud Gilbert . . . and for her issue." The testator subsequently declared that the trustees should let these properties upon trust during her infancy to apply such portion not exceeding one moiety of the rents and profits as the trustees should see fit towards her maintenance education and advancement, and after providing for necessary repairs to accumulate the balance until she should marry or attain the age of twenty-one years "and then to settle the accumulated fund upon trusts for her and her issue similar to those next hereinbefore contained with respect to other legacies settled on females."

His Honour in his reasons for judgment held that the ordinary grammatical meaning of the crucial words in the will "who shall survive me" is "who shall outlive me," that is to say "shall be alive at my death," and that there was no context in the will which enabled him to construe these words to mean children who were alive after his death, whether they were born in his lifetime or not.

It was not, and indeed could not be, contended on behalf of the appellant that the word "survive" does not ordinarily refer to the longest in duration of lives running concurrently (*Knight* v. *Knight* (1); *Halsbury's Laws of England*, 2nd ed., vol. 34, p. 279), but it was contended that the facts of the case and the context of the will were sufficient to displace this primary meaning, and that in this will the

(1) (1912) 14 C.L.R. 86.

words mean " who shall be living after me " (*Re Clark's Estate* (1) ; *Re Delany* ; *Delany* v. *Delany* (2) ; *Re Sing* ; *Sing* v. *Mills* (3) ).

Having regard to the ages of the nieces, to the fact that some of them were not married at the date of the will, and to the age of the testator, it is difficult to believe that the testator could have intended to benefit the children of his nieces who were born in his lifetime to the exclusion of those children who might be born after the date of his death, and there is in my opinion a sufficient context in the will to indicate that the testator intended, as one would expect, that the class should include all children who lived after him. The indications of intention to this effect appear not only in the bequests to the nieces but also from the direction that upon Charlotte Maud Gilbert marrying or attaining the age of twenty-one years the accumulated fund is to be settled upon trust for her and her issue upon trusts similar to the trusts of the settled legacies. As the will provides for an accumulation of this fund until she marries or attains the age of twenty-one years, the testator must have contemplated that at his death she might be unmarried, in which event all her children must have been born after his death. If the words " who survive me " are used in their ordinary sense there could be no similar referential trusts of the accumulated fund in favour of such children. The will directs that the legacies are to be settled upon each of the nieces and their respective children in manner thereinafter appearing. From this direction it would appear that the testator intended that all the children of each niece should benefit. After the death of a niece the corpus is given to all her children who shall survive the testator and attain the age of twenty-one years or die in his lifetime leaving issue, and if more than one, in equal shares. It is not clear how the testator intended that the gift of corpus should operate in the case of children who died in his lifetime leaving issue. There is no gift to the issue, and it would appear that the testator intended to give the share to the estate of the parent. It is unnecessary to decide whether this gift would have been effective (cf. *In re Greenwood* ; *Greenwood* v. *Sutcliffe* (4) ). But having regard to his intention already expressed to benefit all the children, the division of the children of a niece into those who survived the testator and attained twenty-one and those who died in his lifetime leaving issue points to an intention on his part to divide all the children that a niece might have, or to use his own words " her issue if any," into two classes, namely those who lived after him and attained twenty-one

(1) (1864) 3 DeG. J & S. 111 [46 E.R. 579].
(2) (1895) 39 Sol. Jo. 468.
(3) (1914) W.N. (Eng.) 90.
(4) (1912) 1 Ch. 392.

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years and those who died before him leaving issue. In all these circumstances, I think that we may, in the words of *Knight Bruce* L.J. in *Re Clark's Estate* (1), " without impropriety hold the words ' who shall survive me ' to mean ' who shall be living after me.' " (2).

For these reasons I am of opinion that the appeal should be allowed, and that there should be substituted for the present declaration a declaration that the class includes all children of the nieces of the testator who lived after the testator and attained or should attain the age of twenty-one years whether such children were born in his lifetime or after his death.

*Appeal allowed.*

Solicitors for the appellant, *Creagh & Creagh.*
Solicitors for the respondents, *Norton, Smith & Co.*

J. B.

(1) (1864) 3 DeG. J. & S. 111 [46 E.R. 579].

(2) (1864) 3 DeG. J. & S., at p. 115 [46 E.R., at p. 581].