[HIGH COURT OF AUSTRALIA.]

GIBB-MAITLAND . . . . . APPELLANT;
DEFENDANT,

AND

THE PERPETUAL EXECUTORS TRUSTEES AND AGENCY COMPANY (W.A.) LIMITED
PLAINTIFF,

AND

FLINTOFF . . . . . RESPONDENTS.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1947.

PERTH, *Sept.* 8, 9.

MELBOURNE, *Oct.* 6.

Latham C.J., Rich and Dixon JJ.

Will—Construction—Vesting—Gift of capital and income of residuary estate after cesser of annuities charged on income—Gift of intermediate surplus income—Implication of joint tenancy—Implication of cross-executory limitations.

By his will a testator left annuities to his widow, his three sisters and his two daughters K. and J. The will further provided that after the death of the testator's wife and during the lifetime of his three sisters, all surplus income after payment of the annuities should be divided equally between K. and J., and after the death of his wife and the last survivor of his three sisters he directed that his trustee should hold both the capital and income of his residuary estate upon trust for K. and J. in equal shares as tenants in common. The will also contained a substitutionary clause which provided that in the case of either K. or J. dying before the testator or before the time of distribution, the issue of the one so dying was to take the share of the deceased parent. By a further clause the testator made provision for the maintenance of the issue. The testator's widow having died, J. next died without issue leaving surviving her K. and the three sisters of the testator.

Held, (1) That the share of K. and J. under the final gift vested at the date of the death of the testator and that upon J.'s death her share devolved upon her personal representative.

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(2) That there was no intestacy as to the share of J. in the surplus income of the residuary estate after payment of annuities, and that J.'s share devolved upon her personal representative.

Circumstances governing the implication of joint tenancy and cross-executory limitations discussed.

Epple v. *Stone*, (1906) 3 C.L.R. 412, applied.

Decision of the Supreme Court of Western Australia (*Dwyer* C.J.) in part affirmed and in part reversed.

APPEAL from the Supreme Court of Western Australia.

By his will made on 31st July 1936 the testator, Thomas Craig Boyd, appointed the Perpetual Executors Trustees and Agency Company (W.A.) Limited to be executor and trustee of his will. He devised and bequeathed all the residue of his real and personal estate to his trustee upon trust out of the income thereof to pay certain annuities to his wife, his two daughters, Katherine Mary Stowe and Jean Falconer Boyd, and his three sisters Katherine Falconer Boyd, Elizabeth Johnston Boyd and Annie Evelyn Boyd. He then provided that: "After the death of my wife and during the lifetime of either of them the said Katherine Falconer Boyd, Elizabeth Johnston Boyd and Annie Evelyn Boyd I DIRECT that all surplus income after payment of any annuities then payable shall be divided equally between my two daughters Katherine Mary Stowe and Jean Falconer Boyd and after the death of my said wife and the last survivor of my sisters abovementioned I DIRECT that my trustee shall hold both the capital and income of my residuary estate UPON TRUST for my two daughters Katherine Mary Stowe and Jean Falconer Boyd in equal shares as tenants in common."

The will also contained a clause substituting issue for a deceased child of the testator dying before him or before the period of distribution and a clause providing for maintenance of issue.

There was a codicil, dated 15th December 1947, to the will but it in no way affected the questions for determination on this appeal.

The testator died on 2nd March 1942. He was survived by his widow, his two daughters and his three sisters. One of the daughters, Katherine Mary Stowe (now Gibb-Maitland), was then married and the other, Jean Falconer Boyd, married Thomas Wickliffe Gordon Flintoff on 14th June 1943.

The testator's widow died on 7th February 1943, and Jean Falconer Flintoff died on 28th August 1944.

The respondent Thomas Wickliffe Gordon Flintoff was the sole beneficiary of the estate of Jean Falconer Flintoff deceased.

On an application by originating summons to the Supreme Court of Western Australia the following questions, (*inter alia*), were asked :

(*a*) What is the period of distribution mentioned in the will of the deceased.

(*c*) What is the interest of the estate of Jean Falconer Flintoff in the estate of the deceased.

(*e*) In what manner should the surplus income after payment of the annuities mentioned in the will of the deceased be distributed.

(*f*) What is the share and interest in the estate of Katherine Mary Gibb-Maitland.

Dwyer C.J. held that the interest of the daughters in the corpus of residue vested at the date of death of the testator and ordered and declared, *inter alia*, as follows :—

"1. The period of distribution mentioned in . . . the Will of . . . Thomas Craig Boyd deceased is when the wife of the said Thomas Craig Boyd deceased and the last survivor of his sisters Katherine Falconer Boyd, Elizabeth Johnston Boyd, and Annie Evelyn Boyd have died.

3. The personal representative of Jean Falconer Flintoff deceased one of the daughters of the said Thomas Craig Boyd deceased . . . takes the interest in the corpus of the Estate of the said deceased given to the said Jean Falconer Flintoff by the said Will, viz. an equal share of the residuary estate at the period of distribution.

5. The surplus income of the Estate of the said Thomas Craig Boyd deceased should be distributed pending the period of distribution as follows : One half to the daughter Katherine Mary Gibb-Maitland . . . and One half as on intestacy.

6. The said Katherine Mary Gibb-Maitland takes one half of the corpus of the residuary estate of the said deceased at the said period of distribution subject to the rights of her issue should she die before that time."

From this decision Katherine Mary Gibb-Maitland appealed to the High Court on the grounds that the will had been misconstrued and that the learned Chief Justice wrongly decided that the interest of the daughters in the corpus of the residue of the estate became vested in them at the date of his death.

Thomas Wickliffe Gordon Flintoff cross-appealed on the ground that the order of the Chief Justice appealed against was wrong in law in so far as he held that there was an intestacy as to the interest of Jean Falconer Flintoff in the surplus income of the estate.

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Negus, for the appellant. The question is whether the testator's daughter Jean took a vested interest on the testator's death. The testator did not intend vesting to take place until after the death of the last of his sisters (*Browne* v. *Moody* (1)). For the general rule see *Halsbury, Laws of England*, 2nd ed., vol. 34, p. 387. Vesting is postponed where the gift is a simple one to take effect on a further event (*Halsbury, Laws of England*, 2nd ed., vol. 34, p. 435). This proposition is qualified in *Browne* v. *Moody* (1), where an exception to it is to be found. [He also referred to *Halsbury, Laws of England*, 2nd ed., vol. 34, pp. 387, 389 ; *Jones* v. *Mackilwain* (2) ; *Potts* v. *Atherton* (3) ; *Greenwood* v. *Greenwood* (4) ; *Wood* v. *Drew* (5) ; *Re Eve* ; *Belton* v. *Thompson* (6)]. An annuity to a residuary beneficiary is inconsistent with a residuary gift. The facts in the present case which illustrate the tendency to lean to early vesting should be distinguished from those in *Browne* v. *Moody* (1). There the intervening interest was not an annuity (*Potts* v. *Atherton* (7)). In each of these cases though it was held that the interests were vested, the annuities were charged on the corpus (*Jones* v. *Mackilwain* (2)). The testator here clearly thought that he had disposed of the surplus income after the death of his wife.

The Chief Justice announced that the Court was of the opinion that the interest of the daughters was vested and did not require argument on that question.

F. C. Downing, for the respondent company. There is no intestacy as to the income. The order should be varied and the monthly instalments of the annuity paid out of the residue of the estate. The costs of the trustee should be paid as between solicitor and client, out of the estate.

Burt (with him *Wickham*), for the respondent Flintoff. In relation to the income there cannot in any event be an intestacy because there is a gift of general residue. The income would fall into residue (*Jarman* on *Wills*, 7th ed. (1930), pp. 926, 930 ; *Austin* v. *Abigail* (8)). But here the income and the residue are divided into equal shares and the beneficiary of the share of the residue is in each case the same as the beneficiary of the income from such residue. Therefore, the specific share of income follows the specific share of residue from which

(1) (1936) A.C. 635.
(2) (1826) 1 Russ. 220 [38 E.R. 86].
(3) (1859) 28 L.T. Ch. 486 [118 R.R. 869, at p. 870].
(4) (1939) 2 All E.R. 150 ; 55 T.L.R. 607.
(5) (1864) 33 Beav. 610 [55 E.R. 505].
(6) (1905) 93 L.T. 235.
(7) (1859) 28 L.T. Ch. 486 [118 R.R. 869].
(8) (1933) 49 C.L.R. 177, at p. 186.

it proceeds (*Re Curtis* (1)). The limitation of income is not for the respective lives of the beneficiaries but during the lifetime of others, and, therefore, the interest of the beneficiaries does not terminate on death. There is nothing here to suggest a life estate only. In other parts of the will the testator expressly limits a life estate when he so intends. The words " divide equally between " import a tenancy in common (*Theobald* on *Wills*, 9th ed., (1939), p. 352 ; *Jarman* on *Wills*, 7th ed. (1930), pp. 1768, 1769). Where there is a tenancy in common and the interest is not a life interest only, then the interest devolves on the personal representatives of the deceased beneficiary for the remainder of the period of the limitation (*Bryan* v. *Twigg* (2) ; *Jones* v. *Randall* (3) ; *Eales* v. *Cardigan* (4) ; *Epple* v. *Stone* (5)). This will be so unless there is anything in the will inconsistent with a tenancy in common (*Re Ward* ; *Partridge* v. *Hoare-Ward* (6)). On the question of cross remainder there can only be such an implication to avoid intestacy (*Re Hudson* ; *Hudson* v. *Hudson* (7)). As to implication of survivorship the cases referred to in *Re Foster* ; *Coomber* v. *Hospital for Maintenance of Exposed and Deserted Children* (8) are all concerned with the situation where a life estate is either express or implied. Those cases only establish that where there is a limitation to persons for their lives and remainder over to issue *per stirpes* then the issue will take in preference to the surviving life tenants (*Re Hutchinson's Trusts* (9) ; *Re Errington* ; *Gibbs* v. *Lassam* (10)). If this was a life estate only the rule in *Hutchinson's Trusts* (9) could apply, as, if there is a gift over here at all, there is a gift over to issue *per stirpes*. The other cases do not apply because there is no gap in the devolution, or implication of joint tenancy.

Negus, in reply on the cross-appeal. It is conceded that the word " equally " implies a tenancy in common but this is a case of cross remainder. Where there is a gift of income, it is suggested that the rule is that that means for the life of the recipient. If there is a gift of income to two persons there is no implication that those persons are alive when the income accrues (*Re Stanley's Settlements* ; *Maddocks* v. *Andrews* (11) ; *Re Hobson* ; *Barwick* v. *Holt* (12)). The testator did not intend a deceased daughter to receive any future income ; that is a proper implication (*Re Pringle* ; *Baker* v.

(1) (1920) N.Z.L.R. 178 at p. 186.
(2) (1866) L.R. 3 Eq. 433.
(3) (1819) 1 Jac. & W. 100 [37 E.R. 313].
(4) (1838) 9 Sim. 384 [59 E.R. 405].
(5) (1906) 3 C.L.R. 412.
(6) (1920) 1 Ch. 334, at p. 338.
(7) (1882) 20 Ch. 406, at p. 415.
(8) (1946) 1 Ch. 135.
(9) (1882) 21 Ch. D. 811.
(10) (1927) 1 Ch. 421.
(11) (1916) 2 Ch. 50.
(12) (1912) 1 Ch. 626, at p. 631.

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Matheson (1)). Testator's whole intention was to keep his money in the family.

Wickham, in reply.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This appeal from the Supreme Court of Western Australia (*Dwyer* C.J.) raises questions of the construction of the will of Thomas Craig Boyd, who died on 2nd March 1942. He left surviving him a widow, who did not marry again, and two daughters, one married, Katherine Mary Stowe (now Gibb-Maitland), and one unmarried, Jean Falconer Boyd, who married T. W. G. Flintoff on 14th June 1943. Mrs. Flintoff died on 28th August 1944. Her husband is the sole beneficiary under her will. The respondent, the Perpetual Executors Trustees and Agency Company, is the executor of her will. The wife of the testator died on 7th February 1943, that is, about sixteen months before the daughter Jean died. The testator also left surviving him three sisters who are still alive.

By his will the testator gave annuities to his wife, sisters and daughters. The will contained the following provision :—

> " (*d*) After the death of my wife and during the lifetime of either of them the said Katherine Falconer Boyd, Elizabeth Johnston Boyd and Annie Evelyn Boyd I DIRECT that all surplus income after payment of any annuities then payable shall be divided equally between my two daughters Katherine Mary Stowe and Jean Falconer Boyd and after the death of my said wife and the last survivor of my sisters abovementioned I DIRECT that my Trustee shall hold both the capital and income of my residuary estate UPON TRUST for my two daughters Katherine Mary Stowe and Jean Falconer Boyd in equal shares as tenants in common."

Two questions arise upon this appeal. The first question is whether the provision which I have quoted gives by its final words a vested interest to the daughters Katherine and Jean in the capital and income of the residuary estate. The learned judge held that the interest given was vested, so that the personal representative of Jean took one half of the said capital and income. It is contended by the appellant that the gift to each daughter was contingent upon her being alive at the death of the last survivor of " my said wife and the last survivor of my sisters."

(1) (1946) 1 Ch. 124, at pp. 133, 134.

The gift is a gift of residue. It takes the form of a trust of an entire fund consisting of capital and income. It is a gift to take effect upon future events which are certain to occur, namely the deaths of the wife and sisters. The taking effect in possession of the gift is postponed to a future date, not because of any circumstance personal to the beneficiaries, such as reaching a particular age, but in order to provide for the payment of the annuities during the lives of the sisters. I agree with *Dwyer* C.J. that the principles stated in *Browne* v. *Moody* (1), are applicable to this case, and I quote the following passage from the speech of Lord *Macmillan* in that case :—

> ". . . the date of division of the capital of the fund is a *dies certus*, the death of the son of the testatrix, which in the course of nature must occur sooner or later. In the next place, the direction to divide the capital among the named beneficiaries on the arrival of that *dies certus* is not accompanied by any condition personal to the beneficiaries, such as their attainment of majority or the like. The object of the postponement of the division is obviously only in order that the son may during his lifetime enjoy the income. The mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of the capital" (2).

The principles stated in this passage apply completely, in my opinion, to the present case and show that the interest of the daughter Jean in the capital and income was a vested interest and was not contingent upon her surviving her mother and the testator's three sisters.

The second question which arises relates to the surplus income, that is, the surplus after payment of current annuities during the period between the death of the testator's widow on 7th February 1943 and the death of his daughter Jean on 28th August 1944. After payment of the annuities to her sister Katherine and the testator's three sisters there was a surplus of income. Katherine takes half of it. The learned judge held that there was an intestacy as to the half which Jean would have taken if she had been alive.

The daughters are the donees of the surplus income during the lives of other persons and are the donees of corpus and income after the death of those persons. There is an express condition affecting the period during which the annuities are to be paid, that condition consisting in the continuance of the lives or a life of the widow and sisters. But no such condition affecting the gift of surplus income to the daughters of the testator is expressed.

(1) (1936) A.C. 635. (2) (1936) A.C., at pp. 644-645.

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In my opinion there is no intestacy as to the surplus income. If it is not otherwise disposed of it falls into the final gift, contained in the clause which I have quoted, of the capital and income of the residuary estate.

It has been argued for the appellant that the gift of the surplus income to the daughters is a gift in joint tenancy or a tenancy in common with implied cross-remainders. In my opinion this argument is met by the decision in *Epple* v. *Stone* (1), where the relevant cases are considered. This case provides authority for the conclusion that the personal representative of Jean takes one half of the surplus income which accrues during the period mentioned, that is to say, between the death of the testator's widow and the death of Jean.

My brother *Dixon* has examined in detail the various authorities to which reference was made in argument. I agree in his reasoning and conclusions upon both questions.

RICH J. In cases concerning the interpretation of wills one generally finds oneself overwhelmed by a sea of authorities not quite reconcilable with each other. One then is not only called upon to find a path through the wilderness of decisions but to ascertain the intention of the testator from the words he has used. Unless the cases lay down some principle or canon of construction they serve no good purpose. The use of a word or expression in one context is of no help in interpreting the same word or expression in a different context. In the instant case my brother *Dixon* has dealt faithfully with the authorities and adopted an interpretation of the will, and codicil, which accords with my own.

I agree with his reasons and with the order proposed by him.

DIXON J. Certain questions arose in the administration of the trusts of the will and codicil of the late Thomas Craig Boyd, a medical practitioner who died on 2nd March 1942. An application by originating summons was made to *Dwyer* C.J., who made an order containing eight declarations disposing of various questions raised by the summons. By an appeal and a cross-appeal the correctness of some of these declarations is now challenged before us. The matters that we are called upon to decide are, in effect, two, and they are both questions of interpretation.

The event which raised the two questions was the death in August 1944 of one of the testator's two daughters, both of whom survived him and their mother, the testator's widow, who died in February 1943. In the will the two daughters are named as the ultimate residuary

(1) (1906) 3 C.L.R. 412.

legatees but annuities are given to each of them and also to each of three aunts, sisters of the testator. Pending the death of the aunts, the widow being dead, the will directs that surplus income shall be divided between the two daughters and it is only when their aunts die that the ultimate residuary bequest takes effect, at all events in possession.

The two questions we have to decide are, first, whether the executor of the deceased daughter takes her half share of residue or whether there is an intestacy as to that share, and, second, who is entitled while the aunts live to the income which, but for her death, the deceased daughter would have received.

The daughter who died was named Jean Falconer Boyd. She did not reach full age and did not marry, until after the testator's death. Her married name was Flintoff. Her sister, whose married name is Katherine Mary Stowe, had married before the date of the will. The difference in the status of his daughters led the testator to provide specially for the increase upon her mother's death of the annuity bequeathed to Jean Falconer Boyd, if she should still be a spinster. To his widow he bequeathed an annuity of £250, evidently on the footing that Jean would live with her. To Jean, Katherine and his three sisters, whose names are Katherine Falconer Boyd, Elizabeth Johnston Boyd and Annie Evelyn Boyd, he bequeathed annuities of £50 each. Having regard to the value of his assets, the testator must have regarded these annuities as substantially distributing the probable income of his estate. He directed that the balance (if any) of the annual income should be paid to his wife during her lifetime, but he also directed that, in the event of such annual income proving insufficient to provide for the annuities in full, the deficiency should be made up out of capital. Next followed a direction that, if, on the death of his wife, Jean should be a spinster, she should be paid an annuity of £200 during her lifetime and spinsterhood in lieu of the annuity of £50, but that it should be reduced to £50 upon her marriage.

Then come the limitations upon which the questions in this appeal arise. As they must be construed it is as well to set out the text :— " After the death of my wife and during the lifetime of either of them the said Katherine Falconer Boyd, Elizabeth Johnston Boyd and Annie Evelyn Boyd I DIRECT that all surplus income after payment of any annuities then payable shall be divided equally between my two daughters Katherine Mary Stowe and Jean Falconer Boyd and after the death of my said wife and the last survivor of my sisters abovementioned I DIRECT that my Trustee shall hold both the capital and income of my residuary estate UPON TRUST for my two daughters

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Katherine Mary Stowe and Jean Falconer Boyd in equal shares as tenants in common."

There is a clause substituting issue for a deceased child of the testator dying before him or before the period of distribution and there is a maintenance clause. The terms of these clauses have a bearing upon the questions to be decided, but it is not necessary to set them out.

Another clause which bears upon one of the two questions before us is concerned with a particular investment forming part of the testator's residuary estate. The testator had invested in certain shares the value of which, if any, lay in the future rather than the present. The clause directed that they should not be sold but should be "divided equally between" (his) "two daughters at the period of distribution abovementioned."

It became necessary for *Dwyer* C.J. to decide in this context what was the effect, in the events that happened, of the direction that after the death of the testator's wife and the last survivor of his sisters the trustee should hold both the capital and income of his residuary estate upon trust for his two daughters in equal shares as tenants in common. His Honour decided that the effect of the direction was to give to the daughters vested interests in such residuary estate, that is interests which vested from the death of the testator. Accordingly there was no intestacy as to any part of the corpus of residue, but the half share of Jean Falconer Boyd passed on her death to her executor.

The Court heard an acute and learned argument in support of an attack upon this interpretation of the will but at its conclusion expressed the opinion that the decision in favour of vesting was correct.

The question turns on the final gift in the paragraph that has been set out, that is to say the direction that the trustees should hold both the capital and the income of the residuary estate upon trust for the testator's two named daughters in equal shares as tenants in common. Why should that not create an immediate vested interest in each daughter? What condition precedent to the daughters taking is to be imported into the limitation? The answer must surely be that the deaths of the widow and of the three sisters of the testator, nothing else, are conditions precedent to the gift. But these are certain future events, not contingencies. The answer for which the appellant contends is that, in addition, the daughter must be alive at the occurrence of those events, that is to say at the death of the last surviving aunt. No such additional condition is expressed in the words. But it is sought to establish that the bequest so intends

by adducing several considerations found in the context which, it is supposed, evidence such an intention. The disposition is said to be a future limitation expressing the gift and the time of payment in the same words. The contention involves or contemplates a prima-facie canon or mode of construction within which the form of the limitation certainly does not fall. But it is urged that the particular direction to divide the proceeds of the specific investment between the two daughters does fall within the rule and reflects its meaning back upon the residuary gift. To this it is enough to say, that it is a particular and subordinate direction containing no expressions inconsistent with vesting from the death of the testator. The appellant's citation of *Re Eve* ; *Belton* v. *Thompson* (1) is sufficiently met by the passage in *Theobald, Law of Wills*, 8th ed. (1927), p. 656. The clause is subordinate because its purpose is to secure the retention *in specie* of property forming part of the residue and otherwise governed by the residuary clause.

There is no ground for drawing from the use in the clause of the word " divide " an inference controlling the prima-facie construction of the main gift. In any case, the canon or rule is inapplicable, because the postponement of the ultimate residuary gift is for no reason personal to the donees but simply because of the prior annuities, that is to say, because of the position of the property (*Leeming* v. *Sherratt* (2) ; *Re Bennett's Trust* (3) ; *Browne* v. *Moody* (4) ; *Greenwood* v. *Greenwood* (5)).

Reliance was also placed upon the form of the clause for the substitution of issue in case of the death of a child of the testator before the period of distribution. The period of distribution must mean the death of the survivor of the widow and the three sisters of the testator. From this it is sought to infer that a condition of the gift of the residue is that the child, that is Katherine Mary Stowe or Jean Falconer Boyd as the case may be, must be alive at that event.

The clause is, no doubt, badly drawn, but upon its express language there are two grounds suggesting a contrary inference. For, first, it describes the share of a child of the testator (which means Katherine Mary Stowe or Jean Falconer Boyd, as the case may be) as " the share of my residuary estate which such deceased child would have taken if she had survived me." This is said to be a confusion and so conceivably the clause may be. But, if so, it is not unreasonable

(1) (1905) 93 L.T. 235.
(2) (1842) 2 Hare 14 [67 E.R. 6].
(3) (1857) 3 K. & J. 280 [69 E.R. 1114].
(4) (1936) A.C. 635.
(5) (1939) 55 T.L.R. 607.

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to explain the confusion on the ground that the draughtsman instinctively felt that vesting took place on the death of the testator.

In the second place, the class of issue to take under the clause includes grandchildren alive either at the testator's death or at the period of distribution or at any time between those two events, which seems to point to a policy on the part of the testator of giving transmissible interests.

For the appellant it was pointed out that, if the final residuary gift is construed as vesting upon the testator's death, the specific direction as to intermediate income might just as well have been omitted and instead the simple words " subject to the foregoing annuities " might have been written after the words—" I direct that " where they last occur.

The fact, as no doubt it is, that the testator relied on the annuities as affording the chief provision for his beneficiaries and as amounting to the substantial distribution of the income of his estate, was used as one of the circumstances explaining his subsequent limitations. To make up the annuities it might be necessary to resort to capital and this he expressly authorized. His daughter, Jean, was a minor and a spinster. Her mother's annuity of £250 and hers of £50 would provide a joint establishment for them, and, upon her mother's death, she would receive £200 a year, if she were a spinster, and that annuity might continue to be payable after her aunts had all died. It was urged that, in view of all these considerations, the testator had no purpose in providing for the distribution of surplus income during the continuance of the annuities to his widow and his sisters, except to dispose of a possibly unexhausted fund of income. He must have contemplated the possibility of his daughters surviving his widow and sisters and of Jean Falconer Boyd being then unmarried with the result that one daughter would be still in receipt of an annuity of £200 and the other one of £50, which must be deducted before income of residue was ascertained.

The foregoing considerations, it was said, all pointed to an intention on the part of the testator that his daughters must be alive and capable of personal enjoyment of the ultimate gifts of residuary corpus and income.

In my opinion all the matters to which I have referred when added together are incapable of controlling the construction of the gift. Nothing can be extracted from them but a highly speculative view of the testator's intentions providing no sound basis for construing his actual language.

It is necessary to remember that it is a residuary disposition that we are called upon to construe. " It is to be observed " said *Romilly*

M.R. in *Pearman* v. *Pearman* (1) " that the subject of the gift is residue, in which case the decisions show a strong inclination in the court, in all cases where it is possible, to make the gift vested in order to avoid an intestacy." (2)

No doubt the considerations relied upon by the appellant are cumulative but, in my opinion, they do not authorize any construction of the residuary gift to the daughters other than that required by the application of the well-settled rules to the plain and unqualified form in which it is expressed.

The decision that Jean Falconer Boyd took a vested interest which survived to her executor is, in my opinion, right.

The second question which this Court is called upon to decide, though of less importance to the parties, presents rather more difficulty. The question concerns the destination of the surplus income after paying annuities during the period from the death of Jean Falconer Boyd in August 1944 and the death of the last survivor of her three aunts, the testator's sisters. The view adopted by *Dwyer* C.J. was, in effect, that the gift to the testator's two daughters of surplus income after the death of his widow and during the lifetime of " either of " his sisters amounts to a gift to Katherine Mary Stowe of half the income during the life of the testator's sisters or the survivor of them, should Katherine Mary Stowe so long live, and another such gift of half the income to Jean Falconer Boyd, should she so long live. As Jean Falconer Boyd had predeceased the testator's sisters, the surplus income in the meantime was, in his Honour's view, undisposed of and was to be distributed as on an intestacy. Even conceding the premises, it is difficult to see how there could be an intestacy. The ultimate gift expressed in the words " after the death of . . . the last survivor of my sisters . . . my trustees shall hold both the capital and income of my residuary estate " would, on ordinary principles, apply to intermediate income otherwise undisposed of. But neither party concedes the premise that the intermediate income is not otherwise disposed of. For the appellant Katherine Mary Stowe (now Gibb-Maitland), it is claimed that upon the death of her sister the intermediate income became payable to her. Her counsel accepts the view that the gift of income during the period from the death of Jean Falconer Boyd until the death of the survivor of the testator's sisters means that, during such period each sister is to receive half the surplus income while she lives. But he contends that it is implied that upon the death of one of the two sisters during that

(1) (1864) 33 Beav. 394 [55 E.R. 420].

(2) (1864) 33 Beav., at p. 396 [55 E.R. at p. 421].

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period the survivor is to receive the whole income. This result he obtains in either of two ways. One of them is to construe the gift of income to the two sisters as a joint tenancy, notwithstanding the words " divide equally between," which, upon this view, must be treated not as indicating the nature of the interest given, viz., tenancy in common, as is usual, but as stating the shares in which the joint donees were entitled to the joint interest. The other way of obtaining the same result is to treat the gift as a tenancy in common but to imply cross-executory limitations of the intermediate income to the survivor of the two daughters, should one of them die during the lifetime of her aunts, the testator's sisters, or of the longest liver of them.

The mode of construction upon which this contention is based is explained by *Parker* J. in *In re Hobson*; *Barwick* v. *Holt* (1) in a passage which it is desirable to set out :—" In my opinion it is quite clear on the authorities that where there is a gift equally between A., B., and C. during their respective lives and after the death of the survivor of them the whole property is given over, the Court has implied an intention on the part of the testator that the survivors or survivor of A., B., and C. shall after the death of one or more of them be entitled to the whole income down to the period of distribution, and that conclusion appears to have been arrived at in one of two ways. In the first place and in the earlier cases the judges have said that a gift in equal shares during their respective lives only prima facie creates a tenancy in common, and that, if the Court can gather an intention on the face of the will that the tenancy was intended to be not a tenancy in common but a joint tenancy, it will treat the words " in equal shares " or other similar words as not destructive of what would otherwise be a joint tenancy; and that interpretation is one which would in the ordinary course lead to the desired effect. On the death of A., for instance, B. and C. would continue to be joint tenants of the whole, and on the death of B., C. again would become tenant of the whole. That is one way of meeting the difficulty and of avoiding an intestacy; but in other cases the rule has been rested on different grounds in this way. It has been said that where there is a gift to A., B., and C. equally during their respective lives, and after the death of the survivor over, an intention is manifested that A., B., and C., or such of them as shall be living for the time being, shall enjoy the property down to the period of distribution, and that the best way of effecting that intention is to imply a gift over on the death of any of them of his or her share as well original as accruing to the survivors or survivor; and some of

(1) (1912) 1 Ch. 626.

the cases have, I think, been decided on what I may describe as a mixture of those two theories." (1)

It will be seen that the assumption upon which the alternative construction stated by Lord *Parker* proceeds is that the gift equally to A., B., and C. is limited to their respective lives and does not give each of them a transmissible interest. It is at this point that the respondent claiming under the will of Jean Falconer Boyd attacks the application of the mode of construction invoked by the appellant. Counsel for the former, in his very clear argument, pointed to the words " during the lifetime of either of them the said Katherine Falconer Boyd, Elizabeth Johnston Boyd and Annie Evelyn Boyd " as measuring the duration of the gift of all surplus income equally between the testator's two daughters. He denied that there was any ground for also restricting the duration of the interest in surplus income of either daughter of the testator to her life. Accordingly, if, during the lifetime of the three named sisters of the testator, either daughter died, the duration of her interest in the surplus income not having ended, the interest devolved upon her legal personal representative for the remainder of its duration and formed part of her estate.

Some reliance was placed also upon another way of reaching the same result. The intermediate gift of surplus income in equal shares to the daughters and the gift of ultimate residue to them in equal shares show an intention to divide income and corpus of residue, subject to the annuities, between the testator's two daughters in equal shares. Moreover, the maintenance clause, which could have no practical relevance except to Jean Falconer Boyd, displays the same intention and directs that the income not required for maintenance &c. shall be accumulated and further directs that it shall be added to the " original share and devolve therewith." From the intention thus disclosed of dividing residuary corpus and income between the daughters in equal shares there was deduced the consequence that the income during the period after the death of Jean Falconer Boyd until her aunts should all die, followed the course of division, so that an equal half share devolved like the further share of corpus upon her executors.

In my opinion we ought not to apply to the intermediate limitation of income the interpretation placed upon the gift by the appellant, under which she would take the whole income after the death of her sister Jean Falconer Boyd, whether in virtue of a right of survivorship or of an implied cross-executory limitation. It is possible to place such a construction upon a limitation of a life interest (at all

(1) (1912) 1 Ch., at pp. 631, 632.

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events in personalty or notional personalty) to several designated persons for their lives, although there are words of division or severance and even if the gift is expressed to be as tenants in common. It is done to avoid what otherwise would be a hiatus if the limitation is followed by a limitation of the fund or property as an entirety to other subsequent takers expectant upon the dropping of all the lives. If the manner in which the earlier limitation is expressed allows of a construction making the interest joint and not an interest in common, as any of several tenants for life dies his interest accrues by survivorship to those who outlive him. Words of equal division do not necessarily preclude this, because in a proper context they may be treated as describing only a quality of joint tenancy, what the law would imply: See *Turkerman or Tuckerman* v. *Jeoffreys or Jeffries* (1). But if it appears that a tenancy or interest in common for the respective lives of the first takers was intended, cross-executory limitations may nevertheless be implied taking effect in favour of the survivors or survivor as each of the first takers dies, so that the last of them will become solely entitled to the income during the remainder of his life. Thus in *Re Stanley's Settlement*; *Maddocks* v. *Andrews* (2) the provision in question actually contained an express exclusion of joint tenancy and yet the cross-executory limitations were implied. The instrument was not a will but a settlement of leasehold property. The income was limited to the settlor's daughters Annie and Mary "during the terms of their natural lives as tenants in common and not as joint tenants . . . and from and immediately after the decease of the survivor of them . . . to the use of the respective child or children of the said Annie and Mary share and share alike as tenants in common and not as joint tenants." (2) Annie died before Mary leaving children. Mary died without issue. *Sargant J.* held that Mary took a life interest in her sister's share on Annie's death—not on the ground that there was a joint tenancy because that was expressly excluded, but following the rule of construction that a life interest is to be implied in favour of the survivor of the tenants in common: See (3).

But the principal cases laying down and illustrating the rule of construction relate to gifts of successive interests to different donees. The characteristic features of the limitations are that the interest of each of the donees taking under the preceeding gift does not extend beyond his or her life and thus the subsequent gift does not take effect in possession until the death of the last surviving donee under the prior gift, and that the subsequent gift is a disposition

(1) (1706) Holt 370 [90 E.R. 1104]; 11 Mod. 108 [88 E.R. 930].
(2) (1916) 2 Ch. 50.
(3) (1916) 2 Ch., at p. 55.

of the fund or property as an entirety or mass. The construction to be placed upon any disposition must of course depend on intention and it is therefore obvious that the presence or absence of any particular indicia cannot be said to be indispensable to a given construction. Any sufficient indication will be enough. But where the Court is asked to apply a method of construction as one shown by case law to be appropriate to the circumstances, it is important to see what have been the considerations which have led to the adoption of that mode of construction. The rule is an old one and it will be enough to mention as illustrations a few of the cases more commonly referred to, together with two recent decisions.

In *Malcolm* v. *Martin* (1) the limitation was to a composite class of children for life in equal division and at their decease betwixt their children. Thus the whole was given over to the children's children. So it was held that what looked like a tenancy in common in income could not be so construed. " The principal being only given over after the death of the children occasions a necessity to consider it as a joint tenancy ": Lord *Alvanley* (2). In *Armstrong* v. *Eldridge* (3) Lord *Thurlow* considered that a joint tenancy was shown by the context consisting of the limitation to four named persons equally between them share and share alike for their respective natural lives, followed by a gift of corpus from and immediately after the decease of the survivor of them to their children equally to be divided between them share and share alike. Again there were the same characteristics. In *Pearce* v. *Edmeades* (4) the limitation was to two named persons during their respective lives in equal shares and after their decease to a composite class of their children in equal shares. Lord *Abinger* decided that the named persons took a joint interest because it was clear " that the mass of the property is to be divided amongst the children who might survive both the parents, per capita and not per stirpes. This would be quite inconsistent with a tenancy in common of the parents " (5). In *Cranswick* v. *Pearson* (6) the limitation possessed the peculiarity that it was expressed to be during the lives of named persons and the survivor of them during their or his natural life. The gift over was after the decease of the survivor. Lord *Romilly* considered it to be a joint tenancy not in form but to this extent, that the whole interest survived to the last of the named persons until she died. Again are to be seen the same

(1) (1790) 3 Bro. C.C. 50 [29 E.R. 402].
(2) (1790) 3 Bro. C.C., at p. 53 [29 E.R., at p. 403].
(3) (1791) 3 Bro. C.C. 215 [29 E.R. 497].
(4) (1838) 3 Y. & C. Ex. 246 [160 E.R. 693].
(5) (1838) 3 Y. & C. Ex., at p. 253 [160 E.R., at p. 696].
(6) (1862) 31 Beav. 624. [54 E.R. 1281]; 9 L.T. 215; affirmed 9 L.T. 275.

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features, limitation of successive interests to different donees, the precedent interests of each donee extending no further than her life and the subsequent interest taking effect on the death of the last survivor of them and then in the property as a mass.

In *Re Tate*; *Williamson* v. *Gilpin* (1) *Sargant* J. applied the construction to limitations of income of realty among children in equal shares with a substitutionary gift to the issue of those dying before the others and with a trust from and after the decease of all the children to sell and divide the proceeds among grandchildren equally *per stirpes*. His Lordship considered that the substitutional gift in the case of a child leaving issue made no difference to the case of a child dying without issue and implied cross-remainders for life to the surviving child and the children of any dying with issue. Nor did the stirpital distribution affect the result. "I think", said *Sargant* J., "that the testator is intending that the property shall be kept together as a whole until the death of the survivor of his children and that the income shall go amongst the children who survive either by themselves or by their respective issue, the issue being substituted for his or her parent. It is clear that they are so substituted for the parents in respect of original shares, and if so I see no reason why they are not equally so substituted in respect of an accruing share given over by way of cross-remainder." (2) With this decision may be compared and contrasted *Re Browne's Will Trusts*; *Landon* v. *Browne* (3) where indications were found by the same learned judge of an intention that after the death of each tenant for life a remainder in a corresponding share of corpus to the ultimate donees should at once take effect. This construction was described as distributive. It was *Sargant* J. who decided in *Re Stanley's Settlement* (4), which has been already mentioned. In *Re Ragdale*; *Public Trustee* v. *Tuffill* (5) one half the net income of a fund was to be paid to A. and the other half to B. and from and after their decease the fund was to be held upon trust for a charity. Here *Farwell* J. held that, upon the death of A., B. took the whole income under an implied cross-executory limitation. He rejected the so-called distributive construction because he considered that "from and after their decease" referred to the event of both being dead and did not mean from and after their respective deaths. He excluded an intestacy and, it being treated as one fund held for the charity, the case for the implication of cross-executory limitations was complete. A similar and perhaps even clearer case was decided

(1) (1914) 2 Ch. 182.
(2) (1914) 2 Ch., at p. 185.
(3) (1915) 1 Ch. 690.
(4) (1916) 2 Ch. 50.
(5) (1934) Ch. 352.

by *Simonds* J. in *Re Riall*; *Westminster Bank* v. *Harrison* (1). His Lordship simply followed and applied *Re Ragdale* (2).

In two recent cases the rule has been discussed and applied.

In *Re Pringle*; *Baker* v. *Matheson* (3) *Cohen* J. construed an inartificial codicil as meaning to bequeath income to A. and B. for life and, after the death of both, the corpus to C. Having rejected the view that the remainder could take effect in respect of a corresponding share of corpus on the death of one of the life tenants before the other, namely the distributive construction, and having rejected the view that income was limited to A. and B. until the death of the survivor, that is to A. and B. and their respective executors, administrators and assigns until the death of the survivor, and having adopted the view "that the testatrix intended to dispose of the whole of the capital only after the death of the survivor of" A. and B., *Cohen* J. almost necessarily implied cross-executory limitations of income between A. and B. during the life of the survivor of them. In *Re Foster*; *Coomber* v. *The Hospital for the Maintenance of Exposed and Deserted Children* (4) the bequest to be construed took the form of a direction as follows: "The residue of my estate to be divided equally between my brother and my four sisters during their life time but after their death to be evenly divided between my nephews and nieces." The brother died before his sisters and *Romer* J. held that the income was divisible among the four sisters and the survivors or survivor of them for the time being. After discussing some of the authorities, His Lordship referred to certain considerations arising on the limitations, including (*a*) the fact that nephews and nieces must, in any event, await the deaths of the testator's sisters before becoming entitled to payment of the capital; (*b*) that the fund was intended to pass to them as one entirety or mass; and (*c*) that they would take *per capita* and not *per stirpes*.

The limitations to be interpreted in the case before us are of a very different kind from those dealt with in the foregoing authorities or from any to which the construction they adopt has been applied. In the first place, the gift of income and the ultimate gift are to the same named persons in the same shares. Intermediate surplus income is made the subject of a separate precedent gift only because the gift of corpus is postponed until the cesser of the annuities charged on income, two of which are payable to the same named donees. The necessity of making any implication is lessened by the fact that the residuary gift would catch a half share of income otherwise undisposed of, though, if it did so, it would operate again to divide the half share so caught between the residuary legatees.

(1) (1939) 3 All E.R. 657.
(2) (1934) Ch. 352.
(3) (1946) 1 Ch. 124, at p. 131.
(4) (1946) 1 Ch. 135.

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Finally, there is the consideration, which is perhaps the most important of all, that the duration of the gift of income is expressly measured by other lives, namely the lives of the testator's sisters, the aunts of the legatees. There is nothing express to impose still another limitation upon the duration of the interests in income namely a restraint to the lives of the donees. If made, that must be the result of implication. One consequence of this consideration is that implication of cross-executory limitations would not remove the whole difficulty. For if the surviving daughter predeceased her aunts there would be another hiatus.

In my opinion the mode of construction for which the appellant contends is inapplicable.

The interpretation that should be adopted is that under which the legal personal representative of a daughter dying before the last surviving sister of the testator takes her share of surplus income during the period ending with the death of the last surviving sister. This applies to both daughters and closes not only the gap between the death of Jean Falconer Boyd and the dropping of her aunts' lives, but also the like possible gap if her sister should die before the last of such lives drop. This construction is supported both by the plain inference to be drawn from the equal division between the two daughters after the widow's death both of intermediate surplus income and on the final disposition of the residuary estate. It is further supported by the substitutionary clause and by the terms of the direction to accumulate the surplus income of a minor's expectant share and for its devolution. But it is justified by the terms of the gift itself of intermediate surplus income, because the gift to each daughter is expressly measured, not only by her own life, but by the lives of the testator's sisters.

The method of construction we have adopted is authorized by the decided cases. In *Jones* v. *Randall* (1) an annuity was bequeathed to children in equal shares to continue during their lives and the life of the survivor of them. The last words were treated by *Plumer* M.R. as regulating the duration but not the persons who are to participate in the annuity. Accordingly the executors of the children dying took their respective shares. In *Bignold* v. *Giles* (2) three several annuities were made payable out of the income of stock to three named persons and, after the death of the survivor of them, the stock was bequeathed to a fourth. *Kindersley* V.C. held that upon the death of one of the three named persons his annuity passed to his representative. After noticing the absence of any language

(1) (1819) 1 Jac. & W. 100 [37 E.R. 313].

(2) (1859) 4 Drew. 343 [62 E.R. 133].

indicating an intention to limit the gift to the life of the named persons, his Honour said :—" What is there, if we stopped here, to prevent the parties taking for ever, if there were no subsequent language to alter it ? It is really no more than a gift of dividends to A. for life and afterwards to B. It happens however that there is in this will a direction to terminate the duration ; the will says, after the decease of the survivors of the three the fund is to go over." (1) In *Bryan* v. *Twigg* (2) the same learned Judge gave a like construction to the bequest of an annuity to be equally divided between two named persons during their joint lives and the life of the survivor of them. He said :—" I am of opinion that it is a gift of an annuity to two persons to commence at a given period, and to continue during their joint lives and the life of the survivor, and that it is given to them as tenants in common and not as joint tenants. The consequence is, that the legal personal representative of the deceased annuitant will be entitled to one moiety of the annuity until the death of the survivor " (3).

On a like limitation of another annuity by the same will the decision was approved by *Rolt* L.J. who gave the bequest the same construction. His Lordship said :—" In some cases, where a gift of income to a class has been followed by words referring to survivorship, the courts have shown an inclination to construe the gift as creating a joint tenancy, or a tenancy in common with benefit of survivorship ; but it is important to observe, that in many of the authorities the duration of the annuity was one of the points to be decided, and I think that where the duration of the annuity is not clearly defined a gift over on the death of the survivor is material, but it is immaterial where the duration of the annuity has already been distinctly marked out as extending till the death of the survivor " : *Bryan* v. *Twigg* (4). To the same effect is the decision of *James* V.C. in *Chatfield* v. *Berchtoldt* (5).

These were annuity cases, but in *Epple* v. *Stone* (6) this Court applied the same construction to a trust to pay income to two named persons in equal shares during their respective lives and the life of the survivor of them. After that event there was a trust for sale and for a stirpital division of the proceeds among the children of the named persons. The Court relied upon the foregoing decisions of Sir *John Rolt* and Sir *William James.* The decision of *a'Beckett* J. in the Supreme Court was affirmed. In the course of his judgment that learned judge happened to state by way of illustration almost

(1) (1859) 4 Drewry, at p. 348 [62 E.R., at p. 135].
(2) (1886) L.R. 3 Eq., at p. 433.
(3) (1866) L.R. 3 Eq., at p. 435.
(4) (1867) L.R. 3 Ch. App. 183, at pp. 185, 186.
(5) (1870) 18 W.R. 887.
(6) (1906) 3 C.L.R. 412.

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the very case before us. He said :—" Supposing that, instead of giving shares to the daughters, whose lives are the measure of the period, shares had been given in the same words to other persons, and the direction had been to pay the income in equal shares to A and B during the lives of the two daughters, and of the survivor of them, then there could be no contention that, on the death of A, A's share would go to B by survivorship. A and B might both die, but the income during the period fixed would still go in equal shares to their representatives " : *Stone* v. *Epple* (1).

I agree in the view expressed by *a' Beckett* J. and applying it to this case I think that the surplus income of the estate should be divided between the appellant and the executor of the late Jean Falconer Boyd or Flintoff.

Some amendment is necessary or desirable in the language of the declaration in the order of the Supreme Court relating to the interest of the appellant in residue ; and the decision of this Court that there is no intestacy as to surplus income makes necessary a consequential alteration of the order relating to apportionment of the annuity given by the codicil, an order the correctness of which is not a matter for our consideration.

Appeal dismissed. Cross appeal allowed. Vary the order of the Supreme Court dated 16th July 1947 as follows :—

(*a*) *In paragraph 5 of the order strike out the words " and one half as on an intestacy " and substitute therefor the words " and one half to the executor of Jean Falconer Flintoff deceased (in the said will referred to as Jean Falconer Boyd).*"

(*b*) *For paragraph 6 of the order substitute the following paragraph :—*

" 6. *In the events which have happened the interest of the said Katherine Gibb-Maitland in the capital and income of the testator's residuary estate after the death of the last survivor of his sisters named in the will is no more than an equal half share as tenant in common, subject to the contingent interest of the children of the said Katherine Gibb-Maitland under clause 7 of the will in case of her death before that of such last survivor of the sisters of the testator. Save as aforesaid question (f) in the summons is not answered.*"

(*c*) *In paragraph 8 of the order strike out the words " The undisposed of income of the estate of the said Thomas*

(1) (1906) V.L.R. 82, at p. 84.

Craig Boyd deceased should first be applied as far as may be in payment of each monthly instalment of the said annuity and any balance required," and substitute therefor the words " Each monthly instalment of the annuity."

The costs of appeal of all parties to be paid out of the estate, those of the respondent trustee as between solicitor and client.

Solicitors for the appellant, *Parker & Parker (Perth)*.

Solicitors for the respondent company, *Villeneuve Smith, Keall & Hatfield.*

Solicitors for respondent Flintoff, *Muir & Williams.*

P. A. L.