[HIGH COURT OF AUSTRALIA.]

NEIL . . . . . APPELLANT;
DEFENDANT,

AND

McDONNELL AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 7, 8; *May* 5.

Latham C.J., Dixon and Williams JJ.

Will—Construction—Residuary estate—Gift to testator's "daughters for life in equal shares with remainder in fee to their issue in equal shares, their grandchildren, if any, taking per stirpes"—Per capita or per stirpes — Res judicata — Costs.

By his will, M., after making certain bequests and specific devises, gave to his trustees his residuary estate upon trust (subject to the payment of certain annuities) for his two daughters G. and E. for life in equal shares with remainder in fee to their issue in equal shares, their grandchildren if any taking *per stirpes*. Upon the death of E. in 1937 the Supreme Court held that thereafter G. during her lifetime was entitled to the whole of the income. That Court, upon the death of G. in 1948, held that the gift of residue was a gift to the issue of G. and E. *per capita* in equal shares. Upon appeal,

Held, by *Dixon* and *Williams* JJ. (*Latham* C.J. dissenting), that by virtue of the decision of the Supreme Court in 1937, the matter was, in the circumstances, *res judicata* until the death of G., but upon that event the gift of residue was a gift *per stirpes*, with the result that the issue of G. took one moiety and the issue of E. took the other moiety in equal shares.

Sumpton v. *Downing*, (1947) 75 C.L.R. 76, referred to.

In cases where the High Court allows an appeal by a party to a suit for the construction of a will, the ordinary practice is to make the same order as to costs as is usually made in the Supreme Court of the State from which the appeal is brought.

So *held* by the whole Court.

Decision of the Supreme Court of New South Wales (*Sugerman* J.), reversed.

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APPEAL from the Supreme Court of New South Wales.

William McDonald, of Inverary, Concord, New South Wales, who died on 11th June 1904, left a will dated 11th September 1902, in which he provided, so far as material to this report, as follows:— "I give all my cash in hand or on current account in Bank to my daughters Grace McDonnell Widow and Emily Sarah McDonald Spinster in equal shares I give my furniture horses carriages household effects and chattels in and about my residence at Inverary to my said daughter Grace McDonnell except the furniture of the bedroom occupied by my daughter Emily Sarah McDonald which I leave to her I give all my furniture horses carriages and household effects in and about my house at Medlow to my said daughter Emily Sarah McDonald I give all other my real and personal estate to my Trustees and Executors hereinafter named as to my residence and land Inverary Concord upon trust for my daughter Grace McDonnell for her life with remainder in fee to her children Stanley McDonnell, Wilfred McDonnell and Ines McDonnell or such of them as shall attain the age of twenty-one years or have issue before attaining that age which issue shall survive him or her in equal shares But if all of them shall die under age leaving no issue then upon trust for my daughter Emily Sarah McDonald for life with remainder in fee to her children if any in equal shares And as to my house and forty acres of land at Medlow upon trust for my daughter Emily Sarah McDonald for her life with remainder in fee to her children (if any) who shall attain the age of twenty-one years or have issue before that age which issue shall survive him or her in equal shares But if she has no issue or they all die under age leaving no issue then upon trust for my daughter Grace McDonnell for her life with remainder in fee to her children Stanley McDonnell Wilfred McDonnell and Ines McDonnell or such of them as shall attain the age of twenty-one years or have issue before that age which issue shall survive him or her in equal shares And as to the rest and residue of my real and personal estate upon trust (subject to the annuities hereafter mentioned) for my said two daughters Grace McDonnell and Emily Sarah McDonald for life in equal shares with remainder in fee to their issue in equal shares their grandchildren if any taking per stirpes I charge my residue with life annuities hereinafter mentioned." Provision was then made in the will for payment of certain specified annuities to a son, another daughter, and three grandchildren respectively of the testator.

The testator's daughter Grace McDonnell was born on 20th December 1860, married Percy Stanislaus McDonnell on 8th April

1891, and died, a widow, on 4th July 1948 leaving her surviving her son Stanley Augustine and her daughter Ines Marie Augusta, children of the marriage, both of whom had prior to 1937 attained the age of twenty-one years. Another son of the marriage, Wilfred Francis McDonnell, attained the age of twenty-one years prior to 1937, married, and died on 12th December 1948, survived by an infant son, John Arthur Xavier McDonnell. Probate of the will of Wilfred Francis McDonnell was granted to his widow Marie Frances McDonnell.

Stanley Augustine McDonnell married and there were six children of the marriage three of whom, including Sheila Grace McDonnell, had, prior to 1948, attained the age of twenty-one years. Ines Marie Augusta McDonnell subsequent to 1937 married one Campbell and there was one child of the marriage, who was born in or about the year 1940.

The testator's daughter referred to in the will as Emily Sarah McDonald was born on 11th August 1865, married Gerard Ashley Darvall on 21st September 1904 and died on 8th June 1937, survived by the only child of the marriage, Ena Gertrude, who had attained the age of twenty-one years and had married John Newland Neil. There had not been any child of this marriage.

In 1937 a suit by way of originating summons was brought in the Supreme Court of New South Wales in its equitable jurisdiction by the then trustees of the will, Alfred Newmarch and Arthur Joseph McDonald, the defendants thereto being Ena Gertrude Neil, Grace McDonnell, Stanley Augustine McDonnell, Wilfred McDonnell and Ines Marie Augusta McDonnell, for the determination of the following questions:—Whether upon the true construction of the will and in the events which had happened—(*a*) the defendant Ena Gertrude Neil was (subject to the annuities mentioned in the will) entitled to (i) one-half; or (ii) any other and if so what proportion of the income of the residuary estate of the testator; and (*b*) the defendant Ena Gertrude Neil was (subject to the said annuities) entitled to a vested interest in (i) one-half; or (ii) any other and if so what proportion of the corpus of the said residuary estate.

According to an affidavit sworn by one of the trustees in July 1937, the testator's residuary real and personal estate comprised real estate of the value of £42,908, and personalty of the value of £6,232. The residuary real and personal estate then yielded annually an income of £4,575. The annual net income available from that residuary estate was the sum of £3,344 after the payment of the annuities.

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Nicholas J. (as he then was), in September 1937, made a decretal order declaring that upon the true construction of the will and in the events which had happened Ena Gertrude Neil was not entitled to any portion of the income of the residuary estate during the lifetime of Grace McDonnell and that Grace McDonnell was entitled during her lifetime to the whole of the income of the residuary estate available for distribution. By the same decretal order his Honour ordered that question (*b*) should stand over generally.

On 7th October 1937, the parties to the originating summons executed a deed of arrangement and compromise wherein it was recited that the facts and circumstances relating to the will were fully set out in the originating summons and the affidavits filed in connection therewith; that the parties to the deed were the parties in the originating summons; that the originating summons was heard before *Nicholas* J. in September 1937; that a decretal order was made in respect of questions (*a*) and (*b*) as mentioned above; that Ena Gertrude Neil claimed that notwithstanding the decretal order she was entitled to one-half of the income of the residuary estate during the lifetime of Grace McDonnell as from the death of her mother Emily Sarah Darvall subject to the annuities, or, in the alternative, that she and Stanley Augustine McDonnell, Wilfred Francis McDonnell and Ines Marie Augusta McDonnell were entitled to one-half of the income of that residuary estate during the lifetime of Grace McDonnell as from the date of the death of Emily Sarah Darvall in equal shares as tenants in common subject to the annuities; that in consideration of Ena Gertrude Neil abandoning her right of appeal to the High Court against so much of the decretal order as declared that she was not entitled to any share of the said income during the lifetime of Grace McDonnell and in order to save the costs and uncertainty of an appeal and to avoid delay, it had been agreed by and between the parties by way of family arrangement and compromise:—(1) that Grace McDonnell should during her lifetime continue to receive a one-half share of the said income as theretofore but subject to the annuities; (2) that the remaining half of the said income should during the lifetime of Grace McDonnell as and from the date of the death of Emily Sarah Darvall be divided between Ena Gertrude Neil, Stanley Augustine McDonnell, Wilfred Francis McDonnell and Ines Marie Augusta McDonnell in equal shares as tenants in common but subject to the annuities; (3) that nothing in the arrangement should prejudice or affect the rights of the other defendants after the death of Grace McDonnell in (*a*) the said income, or (*b*) the corpus of that residuary estate; (4) that the arrangement was

expressly limited to dealing with the said income during the lifetime of Grace McDonnell and after her death all the defendant parties thereto other than Grace McDonnell were to be at liberty to prosecute any claim whatsoever in respect of the said income after the death of Grace McDonnell and in respect of the said corpus as if the deed of arrangement and compromise had never been executed; and (5) that subject to the foregoing the deed should bind all the parties thereto their and each of their executors, administrators and assigns and should take effect in substitution for and variation of the will and the decretal order in so far as they and the deed were mutually inconsistent.

Upon the death of Grace McDonnell in July 1948, the then trustees of the will, Arthur Joseph McDonald and Anstey Withers Rockwell, by order of revivor, caused the originating summons to be restored to the list. The summons so restored was amended by showing the alteration of the surname of Ines Marie Augusta McDonnell to Campbell, adding as defendants Sheila Grace McDonnell, Marie Frances McDonnell (as executrix of the will of Wilfred Francis McDonnell) and John Arthur Xavier McDonnell (an infant), deleting question (*b*) and adding questions as follow:—Whether on the true construction of the will and in the events that have happened— . . . (*b*) the corpus of the said residuary estate was divisible *per stirpes* or *per capita* among the children of Grace McDonnell and of Emily Sarah Darvall respectively and in the case of the children of Grace McDonnell, which of them; and (*c*) the grandchildren of Grace McDonnell and if so which of them took any interest in the corpus and if so what interest; and that it be ordered that the decretal order of September 1937 made in the summons be varied by substituting the name of Sheila Grace McDonnell for the name of Stanley Augustine McDonnell.

The estate of Grace McDonnell, not having any further interest, was not represented at the hearing.

Sugerman J. in the course of his judgment pointed out that not all the persons interested in the questions before the court were parties to the deed and that, so far at any rate as its express terms were concerned the deed did not purport to relate to the effect of the decretal order as an estoppel, and said that in terms the deed was restricted to the disposition of income during the lifetime of Grace McDonnell, and left the parties free to pursue their claims to both corpus and income after her death. His Honour held (i) that he should follow the reasons for judgment of *Nicholas* J. upon the determination of question (*a*); (ii) that there was but

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one gift of the remainder after the death of Grace McDonnell and Emily Sarah Darvall; (iii) that the terms of the will were such as to exclude the inference of a stirpital division amongst the children of the life tenants; and (iv) that the corpus of the residuary estate of the testator was divisible amongst Ena Gertrude Neil, Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell in equal shares; and made the order asked as above.

From that decision Ena Gertrude Neil appealed to the High Court.

Wallace K.C. (with him *Stuckey*), for the appellant. Prior to the gift of residue the testator had given specific gifts to the same two daughters and he had in mind a conception of effecting equality between those two daughters even as regards those specific gifts. The word "issue" as used in the will means children and not grandchildren. The gift to the children was *per stirpes*. On the true construction of the will the appellant had a vested interest in remainder on the death of her mother. The gift was to Grace and Emily as tenants in common in equal shares and to their respective children, and the prima-facie rule is that the respective children get the share in respect of which their parent had the income. *Willes* v. *Douglas* (1); *Turner* v. *Whittaker* (2); *In re Hutchinson's Trusts* (3) and *Sumpton* v. *Downing* (4) were cases in which there were present factors which showed that the testator intended that there should be a *per capita* distribution in that there was not to be any distribution until the death of the life tenant. The words in the residual clause "with remainder in fee to their issue" must mean with remainder in fee to their respective children. The classes of people interested in corpus are determinable by different events at different times. The principles, rules and factors applicable are set forth in *Sumpton* v. *Downing* (5). In the circumstances it is most unlikely that the testator intended that if Grace died shortly after his death and Emily should live forty or fifty years thereafter, the children of Grace should be completely unprovided for as far as the residuary clause was concerned, but it is likely that on the contrary the testator had in mind that, firstly, Grace and Emily should be given, as tenants in common equally between them, a share in residue. The annuities, in strong contrast to the situation in *Sumpton* v. *Downing* (4), have

(1) (1847) 10 Beav. 47 [50 E.R. 499].
(2) (1856) 23 Beav. 196 [53 E.R. 77].
(3) (1882) 21 Ch. D. 811.
(4) (1947) 75 C.L.R. 76.
(5) (1947) 75 C.L.R., at pp. 84, 87-92.

a neutral effect. As the life estates are appropriated, as it were, to separate halves, the remainders are associated with those same respective separate halves. The factors relied upon in *Sumpton* v. *Downing* (1) are absent from this case. There certainly is not present the factor of presumption against intestacy. In *In re Ragdale*; *Public Trustee* v. *Tuffill* (2); *Re Stanley's Settlement*; *Maddocks* v. *Andrews* (3); *In re Pringle*; *Baker* v. *Matheson* (4); *Arrow* v. *Mellish* (5); *In re Hutchinson's Trusts* (6) and *Sumpton* v. *Downing* (1) reference was made to a death as an event happening at some time. The reason why some of those decisions went one way and some the other turned on the presence of the words there used. In all cases it is necessary that there be a remainder and the real issue is whether or not a remainder goes down under the original stock. The deciding feature in *In re Errington*; *Gibbs* v. *Lassam* (7) was not the phrases referred to by the judge. The testator did not intend that on the death of one of his daughters the other should take the whole of the income. This serves as an indication as to the destination of the corpus. The fact that the words present in *In re Hutchinson's Trusts* (6) are not present in this case is in the appellant's favour. The remainder should have vested on the death of the particular life tenant. The judge of first instance undervalued the rule in *In re Hutchinson's Trusts* (6) followed in *In re Browne's Will Trusts*; *Landon* v. *Brown* (8) and also in *Sumpton* v. *Downing* (9). He undervalued the absence of features in this case, which in other cases have enabled or caused courts to depart from the rule in *In re Hutchinson's Trusts* (6). The judge misconceived the objective of the substitutional clause and, as a corollary thereto, overvalued the presence and meaning of the phrase *per stirpes* appearing in that clause. He ought not to have deprecated the matter of whether the word "issue" in the residual clause meant children, and he was in error in stressing the point that there were two questions involved, and that the solution of the former one relating to income did not assist in the solution of the present one relating to corpus. Even if "issue" means something more than children it cannot mean further than grandchildren, therefore it means a gift in remainder to his children or grandchildren and the substitutional clause operates from preventing grandchildren from competing with their parents. In the residual

(1) (1947) 75 C.L.R. 76.
(2) (1934) 1 Ch. 352.
(3) (1916) 2 Ch. 50.
(4) (1946) 1 Ch. 124.
(5) (1847) 1 De G. & Sm. 355 [63 E.R. 1102].
(6) (1882) 21 Ch. D. 811.
(7) (1927) 1 Ch. 421.
(8) (1915) 1 Ch. 690, at p. 695.
(9) (1947) 75 C.L.R., at pp. 85, 88.

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clause after the use of the word "issue" there is an immediate reference to the grandchildren. "Issue" means children (*Cursham* v. *Newland* (1)). An example of some intrinsic factor limiting the meaning of the word is shown in *Pope* v. *Pope* (2). The judge of first instance decided the case exclusively on the ground that because the testator had made a stirpital distribution in the case of grandchildren, he could not have meant a stirpital distribution in the case of children. That was not the correct way of interpreting the will. Distribution *per capita* was considered in *Swabey* v. *Goldie* (3). The prima-facie rule was followed in *In Browne's Will Trusts*; *Landon* v. *Brown* (4). The point involved in *In re Foster*; *Coomber* v. *Governor and Guardian of the Hospital for the Maintenance and Education of Exposed and Deserted Young Children* (5) was different from the point involved in this case. That case shows that it does not necessarily follow that merely because the corpus goes over in one mass, in its entirety, the subsequent distribution thereof must be *per capita* (6). The presence of the phrase "in equal shares" both in the life gift and in the gift of the remainder does not affect the matter, because that factor was present also in *Arrow* v. *Mellish* (7) where notwithstanding that the words were "to be by them divided equally, share and share alike" the decision of the court was *per stirpes*. The use of the singular in the word "remainder" is a very normal use of the singular in wills. The cases show that the rule is most clearly applicable when the remaindermen are children of the life tenants (*In re Browne's Will Trusts*; *Landon* v. *Brown* (8)). The gift to the grandchildren is a true substitutional clause. The whole object of the clause was to provide for the non-competition of the grandchildren with the children, and it does not matter whether the gift to the issue be a gift to children or a gift to children and grandchildren, the same result flows. None of the factors referred to in *Sumpton* v. *Downing* (9) are present in this case. The principles involved favour the appellant. The rule in *In re Hutchinson's Trusts* (10) quoted in *In re Browne's Will Trusts*; *Landon* v. *Brown* (11); *In re Errington*; *Gibbs* v. *Lassam* (12) and *Jarman* on *Wills*, 7th ed. (1930) vol. 3, p. 1690, is clear. The decision made by the Supreme Court in 1937 in relation to this will has not any

(1) (1838) 4 M. & W. 100 [150 E.R. 1359].
(2) (1851) 14 Beav. 591 [51 E.R. 411].
(3) (1875) 1 Ch. D. 380, at p. 384.
(4) (1915) 1 Ch., at p. 693.
(5) (1946) 1 Ch. 135, at p. 144.
(6) (1946) 1 Ch., at pp. 140, 141.
(7) (1847) 1 De G. & Sm. 355 [63 E.R. 1102].
(8) (1915) 1 Ch., at p. 694.
(9) (1947) 75 C.L.R. 76.
(10) (1882) 21 Ch. D. 811.
(11) (1915) 1 Ch. 690.
(12) (1927) 1 Ch. 421.

binding effect either on this Court by which, doubtless, it will be taken into consideration, or upon the parties, they having entered into an agreement thereafter, under which an appeal to this Court was not pursued, without prejudice to the rights of the parties thereto to argue the true destination of the corpus at the appropriate time. That decision was not correct, therefore the next step should be taken, namely, distribution *per stirpes*.

Hardie K.C. (with him *Kerrigan*), for the respondents Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell. The earlier decision of the Supreme Court binds the parties to that decision as to the income and also as to the corpus. The appellant is precluded from arguing that a one-half share of the corpus should have been distributed and paid to her on the death of her mother. Notwithstanding the agreement it was competent for any of the parties to have appealed from that decision to this Court if they had been so minded. Once it be established by a court of competent jurisdiction, and not appealed against, that there is one distribution, namely at the death of the last life tenant, it must be very difficult for the appellant to contend that there should be a distribution of corpus *per stirpes*. Apart from that point the construction of the will as appearing in the judgment appealed against is right. There is not any ambiguity in the will on the question as to whether the distribution of corpus should be *per capita* or *per stirpes*. The whole of the residue is, subject to the charge thereon of the annuities, to be held in trust for the two daughters for life in equal shares and the income of that residue goes to the daughters for life. There is not any division during the continuance of the life of either daughter. The gift is a gift to each of them during the life of each of them (*Sumpton* v. *Downing* (1)). That would not necessarily mean for their respective lives, but means during the lives of both of them and, upon the death of one of them, the life of the survivor. The words " with remainder " following after the word " equal " show that the will contemplates one interest that terminates at one point of time with remainder in fee. The use of the words " remainder in fee " supports the contention that the testator had in mind one division. The phrase " with remainder " used in the singular was considered in *Burden* v. *Burville* (2) where the court attached importance to the use of the word " remainders " and took the view that the testator indicated that it should not take effect until the

(1) (1947) 75 C.L.R., at p. 85.

(2) (1801) 2 East 45 [102 E.R. 285 (note), at p. 287 (note)].

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death of the last daughter without issue. The gift is to the two daughters for life in equal shares. The use of the word "life" tends to support the construction contended for, that is, a joint tenancy. The phrase "for life in equal shares" followed by the phrase "with remainder" establishes that there was one gift of corpus to be distributed on one event, namely, the death of the longer liver of the two, and up to that point of time the income goes to both at first and then to the one who survives the other. It is significant that the real gift of residue contains the words "with remainder in fee to their issue in equal shares", and that the testator did not use the phrase "respective issue." The testator meant "equal shares" and not unequal shares as contended for by the appellant. Stressing the phrases "with remainder" and "equal shares" and the omission of the word "respective" before the word "issue" it cannot be doubted that the testator intended the residuary estate to be distributed on the death of the survivor of the life tenants between the issue of the life tenants equally, that is, *per capita*. This construction is supported by the final words of the gift "their grandchildren if any taking *per stirpes*". A gift of property to a number of people in equal shares prima facie indicates a distribution *per capita*. Any ambiguity which might be thought to exist on this clause as to whether the distribution between children of the life tenants should be *per capita* or *per stirpes* is capable of being resolved by the application of the presumption in favour of a distribution *per capita*, and, alternatively, by various provisions in the will other than those contained in the gift of residue by which specific gifts are made to the life tenants, e.g. the gift of annuities charged on residue. This will resembles the will considered in *Sumpton* v. *Downing* (1) which justifies the conclusion that the gift is a gift to the children of the life tenants *per capita* and not *per stirpes*. A construction of the will other than as above would create the position that the testator deliberately exposed his estate to the possibility of an intestacy as to one-half of the residue.

Slattery, for the respondents Sheila Grace McDonnell and Marie Frances McDonnell, submitted to such order as the Court saw fit to make.

Henry, for the trustees.

Wallace K.C., in reply. There is an important difference in the position in which the words "subject to" appear in this will and

(1) (1947) 75 C.L.R. 76.

the position in which the words " subject thereto " appear in the will considered in *Sumpton* v. *Downing* (1). In that case the words " subject thereto " qualify only the gifts of the remainder but in the will now under consideration the words " subject to " qualify the whole gift of residue before the creation of the life interests. The words " hold the moneys aforesaid " do not appear in this will but they were stressed as important in *Sumpton* v. *Downing* (2). Upon the facts an intestacy is most improbable. *Burden* v. *Burville* (3) has no special application to this case.

Hardie K.C., by leave. If the appeal be dismissed the costs should be paid by the appellant.

Cur. adv. vult.

May 5.

The following written judgments were delivered :—

LATHAM C.J. The will of William McDonald, after providing for certain bequests and specific devises of lands, gave to his trustees the rest and residue of his real and personal estate " upon trust (subject to the annuities hereafter mentioned) for my said two daughters Grace McDonnell and Emily Sarah McDonald for life in equal shares with remainder in fee to their issue in equal shares their grandchildren if any taking per stirpes."

The testator died in 1904, being survived by his daughter Grace McDonnell and his daughter Emily, who became Mrs. Darvall. Emily died in 1937, leaving one child, Ena Gertrude Neil, the appellant. Grace died in 1948. Her son Percy had died without issue in 1892. Another son Wilfred Francis, who died in 1947, left a son John Arthur Xavier, an infant, and another son Stanley is still alive and has six children. A daughter Ines, who became Mrs. Campbell, is alive, and has an infant daughter Ann, who was born in the life of her grandmother Grace.

It has been held by *Sugerman* J. that the corpus of the residue is divisible equally between the children of the daughters, namely, Mrs. Neil, Mrs. Campbell, Stanley and the son of Wilfred, John Arthur Xavier, who takes the share which his father would have taken if he had survived his mother Grace. It was held that the children of Stanley and the daughter of Mrs. Campbell took no interest. Mrs. Neil appeals to this Court, contending that she is entitled to one-half of the residue in succession to her mother Emily.

The will provided that, subject to certain annuities which have not yet all fallen in, the residue of testator's estate should be held

(1) (1947) 75 C.L.R., at pp. 78, 83.
(2) (1947) 75 C.L.R., at pp. 85, 91.
(3) (1801) 2 East 45 [102 E.R. 285 (note)].

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upon trust (1) for his daughters Grace and Emily for life in equal shares; (2) with remainder in fee to their issue in equal shares; (3) their grandchildren, if any, taking *per stirpes*. The form of the gift to the grandchildren shows that grandchildren (that is, grandchildren of Grace and Emily) are included in "issue" of Grace and Emily. Thus *Sugerman* J. has held that the gift to grandchildren is substitutional, and that grandchildren who were alive at the time of the death of the last life tenant, that is Grace, take their parent's share by substitution only and do not take in competition with their parents. There is no appeal against this decision, which is plainly supported by the words of the will. Thus John Arthur Xavier McDonnell takes the share of his father Wilfred Francis McDonnell, but the children of Stanley, Mrs. Neil, and Mrs. Campbell, do not take any interest. The question which arises upon this appeal is whether the ultimate gift of the residue is a gift to the issue of Grace and Emily in equal shares, that is *per capita*, or whether, on the other hand, the issue of Grace take one-half and the issue of Emily the other half of the residue, that is *per stirpes*. *Sugerman* J. has held that the division of the residue among the issue should be *per capita* and not *per stirpes*.

When Grace and Emily were both alive the income was paid in equal shares to them. After the death of Emily there was no doubt that Grace was entitled to at least one-half of the income. But a question arose as to whether the other half of the income should be paid to the appellant Mrs. Neil, the issue of Emily, or whether it should be paid to Grace, the surviving life tenant. Mrs. Neil contended that she was entitled to take the whole of her parent's share of income. In proceedings by way of originating summons before *Nicholas* J. it was decided that Grace took the whole of the income for her life, his Honour taking the view that the will dealt with the residue as a single mass. *Nicholas* J. drew attention to the fact that in the earlier part of the will there were specific devises to the daughters separately with provisions relating to the issue of each of them, but that in the case of the residue there was only a single gift constituted by the words "with remainder in fee to their issue in equal shares" and that the whole of the residue was given "subject to the annuities hereafter mentioned." He held that the testator meant that there should be only one division and one class of ultimate beneficiaries, and that the residue should be given over at one time. The result of this construction of the will was that the surviving life tenant Grace took the income of the whole of the residue for her life.

The originating summons with which *Nicholas* J. dealt inquired as to the disposition of the income, and also as to the disposition of the corpus, bnt his Honour answered only the question with respect to the disposition of the income, leaving unanswered the question as to the corpus. Mrs. Neil proposed to appeal from the decision, which excluded her from any share in the income. She claimed that she was entitled to one-half of the income of the residue during the lifetime of Grace. A compromise was arranged whereby Grace continued to receive one-half of the income and the remaining half during the lifetime of Grace was, as from the date of the death of Emily, divided between Mrs. Neil and the then living children of Grace, namely Stanley, Wilfred and Ines. In the case of each half of the income, it was declared to be subject to the annuities for which the will provided. It was expressly agreed that nothing in the compromise should prejudice or affect the rights of the parties in respect of the income of the residuary estate after the death of Grace and in respect of the corpus thereof.

The decision of *Nicholas* J. was a decision only as to income, but the reasoning upon which that decision was based depended upon the construction of the whole will and in particular upon the view which his Honour took that the corpus was dealt with as one mass, so that it should be retained undivided while either of the life tenants was alive, and that the provision relating to the income dealt with the whole income up to the period of division of the corpus. The actual decision, however, was a decision only as to the disposition of the income and does not stop the parties from submitting any contention as to the corpus. The decision of *Nicholas* J. therefore does not operate by way of estoppel, but it is a decision to which other courts will naturally pay respect in relation to any question affecting the construction of the will which may come before them.

The originating summons was amended and *Sugerman* J. on 3rd September 1948 answered the following questions:—"Whether upon the true construction of the will and in the events which have happened (i.e. have now happened), including the death of Grace:—(*b*) The corpus of the residuary estate of the above-named Testator is divisible equally per stirpes or per capita among the children of Grace McDonnell deceased and of Emily Sarah Darvall deceased respectively and in the case of the children of Grace McDonnell, which of them. (*c*) The grandchildren of the said Grace McDonnell, and if so which of them take any interest in

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the corpus and if so what interest." The answers given have already been stated.

Sugerman J. made an independent investigation of the questions which arose, regarding the reasons for judgment of *Nicholas* J. as a matter of authority, not as creating an estoppel. *Sugerman* J. was of opinion that it was at least clear that there was only one gift of the remainder. The gift was a single gift to the children of the daughters of the testator in equal shares, "their grandchildren if any taking *per stirpes*." His Honour called attention to the fact that an express provision was made for stirpital division in the case of the grandchildren of the daughters of the testator, but that no such provision was made in the case of the children of the daughters.

When there is a gift to A for life followed by a gift to a class in equal shares it is obvious that the members of the class take equally. Where there is a gift to A and B for life and then in equal shares to a class which is not defined by reference to relationship to A and B the position is the same. Where the gift is to A and B for life and then to the children of A and B, and A and B are either of the same sex, so that they cannot have children in common (as in the present case), or A and B do not marry each other but each have children, the question arises as to whether the children are entitled *per capita* or *per stirpes*. If the terms of the disposition show that the testator intended that the property which is the subject of the gift should be kept together in a single mass until its ultimate disposition the answer to the question will be that the children take *per capita* under the ultimate gift. If, on the other hand, the terms of the disposition show that separate gifts of undivided parts of the property were made to the parents and that it was intended that the children should take separate subsequent interests upon the several events of the deaths of their respective parents, then the ultimate division will be *per stirpes* and not *per capita*.

In the present case the gift to the issue of the daughters of the testator is a gift to the issue as tenants in common—the direction is express that the property is to be held for "their issue in equal shares."

The general rule as stated in *Hawkins* on *Wills*, 2nd ed., (1912) p. 149, is—"Under a devise or bequest to the children of A and of B as tenants in common, *prima facie* the children take *per capita*, not *per stirpes*: *Lady Lincoln* v. *Pelham* (1)." In *Sumpton* v. *Downing* (2) the rule was stated by *Dixon* J. in the following words :—

(1) (1804) 10 Ves. Jun. 166 [32 E.R. 808].

(2) (1947) 75 C.L.R., at pp. 87, 88.

"Prima facie, under a gift to the children of named persons as a class, the children take *per capita* and not *per stirpes*. It has been said that no man who was guided only by a knowledge of English speech would suppose that a direction to distribute money between the children of A and of B equally could mean anything but a division in which each child took a share equal with that of every other child, whether his parent was A or B. However this may be, it is enough that at least the prima-facie legal meaning of such a direction is that the distribution should be *per capita*. . . . 'But this mode of construction will yield to a very faint glimpse of a different intention in the context': *Jarman* on *Wills*, 7th ed. (1930), p. 1688. The intention to the contrary has been discerned in gifts to several for life with remainder to their children when the form of the gift creates a tenancy in common in those taking for life and remainders expectant upon the determination severally of the interest of each tenant in common. Thus a gift to A, B and C for their lives and at their deaths to their children in equal shares is construed as a limitation to A, B and C for their respective lives as tenants in common with remainders severally expectant upon their respective deaths. It is easy to take the next step and say that the several remainders are to their respective children *per stirpes* and not to the children of all of them as a composite class taking *per capita*."

The prima-facie rule can therefore be displaced if the words of the will disclose an intention to make separate gifts upon the separate events of the deaths of the parents of the children who take after them. Thus, as *Dixon* J. said in *Sumpton* v. *Downing* (1):—"A gift to A, B and C for their lives as tenants in common and 'at' their deaths remainder to their children suggests more strongly that a distinct future interest is expectant upon the death of each. An expression denoting no more than that the future interest takes effect at a time when the previous takers are dead is consistent with, if not indicative of, an intention that the subsequent estate or interest must await the death of all." Thus in many cases attention is drawn to the fact that the interest given to the children is not given merely as a future interest which follows upon the termination of a preceding estate, but that it is given as at or after or upon the deaths of the parents of the children who are the ultimate beneficiaries.

In the case of *In re Hutchinson's Trusts* (2) a catalogue of a number of cases will be found. A consideration of these cases shows that where a gift is given after life tenancies an intention that a subse-

(1) (1947) 75 C.L.R., at pp. 88, 89. (2) (1882) 21 Ch. D. 811.

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quent gift to children should take effect as a series of gifts upon the events of the deaths of the life tenants may be shown by the appearance in the words "preceding the later gift" (I quote from *In re Hutchinson's Trusts* (1)) of such expressions as "after the decease," "after death," "at her death," "at their decease," "from and after the decease," "at the death," "at their death," "for the period of their natural lives." In *Hutchinson's Case* (2) the life tenants were both males (in the present case they are both females—Emily and Grace), therefore no child could be a child of both the life tenants. The gift was "after the decease" of the said F.H.S. and R.S. to their children "share and share alike." It would have been unreasonable to construe the former words as applying only to a single event of contemporaneous death of the life tenants. It was therefore held that the words "after the decease" should be read as meaning "after the death of each," and "to their children" as "to their respective children." Accordingly one moiety belonged to the representatives of F.H.S. and the other moiety was divisible equally between the children of R.S. and the persons claiming under them. The decision depended upon the facts that there was not merely a provision that the ultimate interest awaited the termination of the prior interests, but that there was an express reference to the death of the life tenants, and that the death of the life tenants was constituted by two separate events, so that an intention to make two several gifts was disclosed—each taking effect upon the death of a life tenant.

In *In re Errington ; Gibbs* v. *Lassam* (3), *Romer* J. explained the exception to the prima-facie rule which has already been stated. The manner in which the exception is stated indicates the importance of there being something more in the provision than a mere subsequent interest. There must be some reference to the events of the deaths of the life tenants before the exceptional rule which was stated in *In re Hutchinson's Trusts* (2) applied. *Romer* J. stated the exception in the following terms:—"Where a testator gives the income of his estate to two people, A and B, for their lives and follows that gift by a direction that at their death, or at their deaths, or at or after the death or deaths of A and B the property is to go to their issue, the court does not construe the gift as a gift only to take effect on the death of both in favour of the issue of both, but construes it as a gift, to take effect on the death of each, of the share to the income of which the deceased was entitled, to the issue of the deceased" (4).

(1) (1882) 21 Ch. D., at pp. 814-816.
(2) (1882) 21 Ch. D. 811.
(3) (1927) 1 Ch. 421.
(4) (1927) 1 Ch., at p. 425.

In *Jarman* on *Wills*, 7th ed., (1930), vol. 3, p. 1690, the same emphasis is placed upon the necessity of words referring to the deaths of the life tenants as necessary to displace the operation of the prima-facie rule of distribution *per capita* among the children of life tenants where they take after the determination of the interests of the life tenants. In *Jarman* on *Wills*, 7th ed. (1930), vol. 3, p. 1690 the rule is stated in the following words :—" Where property is given to A, B, and C for their lives as tenants in common, and ' afterwards ' or ' at their death ' it is given to their children in equal shares, this is generally construed to mean that ' at their deaths ' it is to go to their respective children ; that is, the division is *per stirpes*. . . . But of course this construction is inadmissible if the income is expressly disposed of until the death of all the tenants for life, and the capital is then given to all the children in equal shares ; in such a case the division will be *per capita*, unless there are words in the ultimate gift requiring a division *per stirpes*."

In the present case there is no reference to the death of either or both of the life tenants. There are no words upon which to ground a contention that the testator made two separate gifts to the respective issue of his daughters. The gift to the issue is not a gift at or after the deaths or respective deaths of the life tenants. It is expressed simply in the words " with remainder in fee." Those words are apt to describe a single gift taking effect at a particular time and are not apt to describe two several gifts taking effect, the first at the death of the first life tenant when one-half of the corpus could be distributed, and the second taking effect at the death of the other life tenant, when the other half of the corpus could be distributed. I agree with *Nicholas* and *Sugerman* JJ. that the will shows an intention that the residue should be held together, that the whole income should be paid (as held by *Nicholas* J.) to the daughters or the survivor of them, and that the residue should then go over in one mass to the children of the life tenants, their grandchildren taking by substitution. I agree also with *Sugerman* J. that the provision that the whole residue is subject to annuities and the express reference to stirpital distribution in the case of the grand-children assist in some degree towards the exclusion of stirpital distribution in the case of the issue. In my opinion the general rule and not the exceptional rule applies, the decision of *Sugerman* J. was right and the appeal should be dismissed.

My brethren are of opinion that the appeal should be allowed. I agree with the order proposed as to costs.

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WILLIAMS J. delivered the following written judgment on behalf of himself and DIXON J. This is an appeal from a decretal order made by *Sugerman* J., sitting as the Supreme Court of New South Wales in Equity, whereby he declared that upon the true construction of the will of William McDonald and in the events which have happened the corpus of the residuary estate of the testator is divisible amongst the appellant Ena Gertrude Neil and the respondents Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell in equal shares. The appellant claims that his Honour should have declared that this corpus is divisible one-half to herself and the other half among these respondents in equal shares. The testator died on 11th June 1904 having duly made his last will and testament on 11th September 1902 whereby, after certain specific bequests and devises, he gave his real and personal estate to his trustees and executors upon trust as to the rest and residue thereof (subject to certain annuities) for his "two daughters Grace McDonnell and Emily Sarah McDonald for life in equal shares with remainder in fee to their issue in equal shares, their grandchildren, if any, taking *per stirpes*".

At the dates of the will and death Grace McDonnell was a widow with three surviving children, Stanley, Ines and Wilfred, a fourth child Percy having died without issue on 10th March 1892. Grace died on 4th July 1948 survived by Stanley and Ines but predeceased by Wilfred who died on 12th December 1947 survived by one child, the respondent J. A. X. McDonnell. At the date of the will the other daughter, Emily, was aged thirty-seven and unmarried but she married Gerard Ashley Darvall soon after the death of the testator on 21st September 1904 and died on 8th June 1937, survived by one child, the present appellant.

The suit in which the declaration under appeal was made was first instituted by originating summons soon after the death of Emily on 31st July 1937 and came on for hearing before *Nicholas* J. on 27th September 1937 when his Honour declared that the present appellant was entitled to no portion of the income of residue during the life of Grace and that Grace was entitled to the whole of the income of residue between the death of Emily and her own death. His Honour thought that the scheme of the will was that there should be only one division of corpus upon the death of both life tenants amongst one class of remaindermen which meant that the whole of the residue should vest in possession in all the remaindermen at the same time, that is to say on the death of both tenants for life, and that in the meantime the share of income of the daughter who first died should vest in the survivor for her life. His

Honour ordered that the second question asked in the originating summons, which raised the questions decided by *Sugerman* J., should stand over generally. The originating summons was amended before it was heard by *Sugerman* J. and the questions which he was asked to answer were as follows: Whether upon the true construction of the above-mentioned will and in the events which have happened, (*b*) the corpus of the residuary estate of the above-mentioned testator is divisible equally *per stirpes* or *per capita* among the children of Grace McDonnell deceased and of Emily Sarah Darvall deceased and in the case of Grace McDonnell, which of them, (*c*) the grandchildren of the said Grace McDonnell and if so, which of them take any interest in the corpus and if so what interest.

It was implicit in the declaration of *Nicholas* J. that the class of remaindermen should be ascertained upon the death of the survivor of the life tenants and *Sugerman* J. considered that he should follow this reasoning of *Nicholas* J. He was independently of opinion that, whatever else was obscure, it was at least clear that there was but one gift of the remainder to the issue of Grace and Emily (which we understand to mean a devise and bequest *in futuro* of the corpus of the estate as a whole to a single class of beneficiaries) into which was introduced a qualification affecting the interests of grandchildren, and this led him to hold that residue then became divisible *per capita* amongst the children of both life tenants as a single class with a substituted gift to their children of the share of any of them who died before the period of distribution leaving children. In this way J. A. X. McDonnell succeeded to the one-fourth share which his father would have taken if he had survived Grace. In this Court we are not bound by the reasoning of *Nicholas* J. although we must give it careful attention and we are therefore able to approach the true construction of the will free from any fetters.

The trusts of residue are (1) to Grace and Emily for life in equal shares; (2) remainder in fee to their issue (that is the issue of Grace and Emily) in equal shares; (3) with a substituted gift to their grandchildren (that is the grandchildren of Grace and Emily) *per stirpes*, so that the children of Grace and Emily who lived after the testator would take vested interests in remainder in residue with a substitutional gift to his or her child or children of the share of any child who died before his or her interest in residue vested in possession leaving issue. "Issue" in the second trust may mean children and it is so used in this sense in other parts of the will, but we prefer

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to construe the word as meaning children and grandchildren of Grace and Emily.

There is no appeal from the declaration of *Sugerman* J. that J.A.X. McDonnell is entitled to the share which his father would have taken if he had survived Grace. The question at issue before us is whether he and the two surviving children of Grace are each entitled to a one-fourth or one-sixth share of residue. His Honour thought and we agree with him that the words "*per stirpes*" in the trusts of residue refer to the children of Grace and Emily as the *stirps* and not to Grace and Emily themselves, but it by no means follows from this that residue as a whole only became divisible on the deaths of both Grace and Emily amongst the children of Grace and Emily *per capita* with a substituted gift *per stirpes* to the children of any such children who died before the period of distribution leaving issue. The stirpital provision would operate equally effectively if one-half of residue became divisible amongst Grace's children on her death *per capita* with a similar substituted gift *per stirpes* to their children and the other half of residue became divisible on Emily's death amongst her children *per capita* with a similar substituted gift *per stirpes* to their children. The question at the root of the matter is whether *Nicholas* and *Sugerman* JJ. were right in thinking that on the true construction of the will no part of residue vested in possession in the remaindermen until the deaths of both Grace and Emily.

We cannot agree with *Sugerman* J. that it is clear that there is but one gift of the remainder. We think that the will raises problems of interpretation similar to those recently discussed in this Court in *Sumpton* v. *Downing* (1). We consider that the trusts of residue are certainly open to two interpretations, (1) that the moieties given to Grace and Emily for life vested in possession in the remaindermen upon their respective deaths; (2) that no part of residue vested in possession in the remaindermen until the deaths of both Grace and Emily, an interpretation which found favour with their Honours in the court below. It can be said in favour of the first interpretation that it would be unreasonable to impute to the testator an intention to leave the children of Emily or Grace, as the case might be, unprovided for during the life of the survivor. On the other hand Emily was thirty-nine and unmarried at the death of the testator (although she married shortly afterwards and may have then been engaged) and the interpretation contended for by the appellant would mean that if Emily had not married and had a child there would have been an

(1) (1947) 75 C.L.R. 76.

intestacy after her death of a moiety of residue. These considerations would appear at least to balance one another. Since, however, Grace was a widow with three children, perhaps more weight should be attached to the former than the latter consideration. It was also contended that the fact that the trusts of residue were expressly made subject to the payment of the annuities indicated an intention that residue should vest in possession in the remaindermen as a whole. It was said that in this respect the will resembled the will in *Sumpton* v. *Downing* (1) but in that will it was the gift of corpus which was subjected to the charge of the annuity and of income to one or both of the sisters, whereas in the present will the whole of the trusts of residue including those in favour of Grace and Emily are made subject to the payment of the annuities. No light is thrown on the crucial question by this provision.

The trusts of residue as a whole appear to fall within the class of cases referred to in *Jarman* on *Wills*, 7th ed. (1930), vol. 3, p. 1690, where the learned author says " Accordingly, where property is given to A, B and C for their lives as tenants in common, and ' afterwards ' or ' at their death ' it is given to their children in equal shares, this is generally construed to mean that ' at their deaths ' it is to go to their respective children ; that is, the division is *per stirpes*. The rule applies to substitutional gifts." So many of the cases on this point were recently discussed in *Sumpton* v. *Downing* (1) that it is unnecessary to cite them again. A typical case is *Wills* v. *Wills* (2) where there was a bequest of residue, the interest thereof to be paid to C. and J. the sons of the testator equally for their lives and " at their death " the principal to be divided equally between the children of C. and J. *Jessel* M.R. said :— " In the first place, the will makes a provision for the testator's two children primarily, and then for his grandchildren. The natural course would be, under these circumstances, that after the death of either of the children, his children should be provided for. It is, therefore, very unlikely that he intended that there should be no provision for one branch until the head of the other branch should be dead. The testator gives the income of the residue of his estate to his two sons equally for their lives. That would not give to either of them more than a moiety. . . . The expression ' at their death ' cannot be literal. . . . There are two possible constructions. The literal construction will not do. The natural and probable construction is that by the children he means the respective children. This was the view taken in *Arrow* v. *Mellish* (3)

(1) (1947) 75 C.L.R. 76.
(2) (1875) L.R. 20 Eq. 342.
(3) (1847) 1 De G. & Sm. 355 [63 E.R. 1102].

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where the words 'their children' were held to mean 'their respective children'." (1) The present will appears to be open *a fortiori* to the construction that each moiety vests in possession in the remaindermen independently because there is no express reference to the deaths of Grace and Emily and there is therefore no necessity to put a gloss on any words of the will. In this respect the will resembles those in *Arrow* v. *Mellish* (2) and *Abrey* v. *Newman* (3). It is after all a question in the case of every will of ascertaining the testator's intention from the language of the particular will. The first trust of residue in the present will is a trust of residue to Grace and Emily for life in equal shares. It is not a trust of the income of residue but of residue for life in equal shares. The words "for life" fix the duration of their respective interests in residue. The use of the singular number is natural in describing estates for life although there may be more than one life. Residue is therefore separated into two undivided moieties from the date of the commencement of the trusts, and this suggests that there will be succeeding trusts under which interests in remainder will fall into possession on the termination of the preceding life estates. In the second trust, as we have said, there is no express provision that the remainder is to fall into possession at or after the death or deaths of Grace and Emily. An estate in remainder is an estate which is immediately expectant upon the natural determination of a preceding estate of freehold. The will uses the word remainder in the singular and this led his Honour to hold that all the estates in remainder vested in possession at the same time, but the words "for life" are also used in the singular when they plainly mean respective lives, and the word remainder is in our opinion used in the same sense to mean the remainders expectant upon the deaths of Grace and Emily respectively. The only interposed estates that prevent the estates in remainder from immediately falling into possession are the life estates given to Grace and Emily. These are each life estates in one-half of residue so that prima facie one-half of residue would become an estate in possession on the death of Grace and the other half would become an estate in possession on the death of Emily. In the third trust the words "their children" and "their grandchildren" are apt to refer to the children and grandchildren of Grace and Emily respectively because they cannot be the children and grandchildren of both of them. There is therefore no difficulty in dividing the trusts so that there is one

(1) (1875) L.R. 20 Eq., at pp. 344, 345.
(2) (1847) 1 De G. & Sm. 355 [63 E.R. 1102].
(3) (1853) 16 Beav. 431 [51 E.R. 845].

series of trusts of one moiety of residue for Grace for life with remainder to her issue and a second series of trusts of the other moiety to Emily for life with remainder to her issue.

This is, we think, the true meaning of this particular will and one which is in line with authority. It does not involve choosing between holding that there would be an intestacy of one-half of the income of residue during the life of the surviving sister and implying cross remainders of the income of the deceased sister in favour of the surviving sister during the balance of the life of the latter on very fragile material. If it were not for the declarations made by *Nicholas* J. we would be prepared to declare that the appellant became entitled to a moiety of residue upon the death of Emily. But these declarations are *res judicata* and settle the rights of the parties until the death of Grace. We can therefore only make a declaration from that date.

We are of opinion the appeal should succeed and that the decretal order of the court below should be varied by striking out the declaration appealed from and inserting in lieu thereof a declaration that upon the true construction of the will of the testator and in the events which have happened the corpus of the residuary estate has been divisible since the death of the testator's daughter Grace McDonnell between the appellant as to one moiety thereof and the respondents Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell as to the other moiety thereof equally between them. The costs of the appeal remain to be dealt with. It is clear that they must be ordered to be paid out of the estate, those of the respondent trustees as between solicitor and client and those of Sheila Grace McDonnell and Marie Frances McDonnell as submitting defendants. The practice of this Court has not been uniform with respect to directing that the costs of appellants and respondents other than trustees which are ordered to be paid out of the estate should be paid as between party and party or as between solicitor and client. We consider that the ordinary practice when an appeal of this kind is allowed should be to make the same order as is usually made in the Supreme Court of the State from which the appeal comes. In this case, following what we believe to be the general practice in the Supreme Court of New South Wales on appeals in its Equity jurisdiction, we order that the costs of the appellant and of the respondents, Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell should also be paid out of the estate as between solicitor and client.

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Appeal allowed. Decretal order varied by striking out the declaration with respect to the division of the corpus of the residuary estate and inserting in lieu thereof a declaration that upon the true construction of the will of the testator and in the events which have happened the corpus of the residuary estate has been divisible since the death of the testator's daughter Grace McDonnell between the appellant as to one moiety thereof and the respondents Stanley Augustine McDonnell, Ines Marie Augusta Campbell and John Arthur Xavier McDonnell as to the other moiety thereof equally between them. Costs of all parties of the appeal, those of the respondents Sheila Grace McDonnell and Marie Frances McDonnell as of submitting defendants, to be paid out of the estate as between solicitor and client.

Solicitors for the appellant and the respondents, *Salwey & Primrose.*

J. B.