[PRIVY COUNCIL.]

McDONNELL AND OTHERS . . . . APPELLANTS;

AND

NEIL AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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1951.
Feb. 8, 12; *March* 6.
Lords Simonds, Morton of Henryton, MacDermott, Radcliffe and Tucker.

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.

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 of New South Wales 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 the residue was a gift to the issue of G. and E. *per capita* in equal shares. The High Court held, by a majority, that by virtue of the decision in 1937, the matter was, in the circumstances, *res judicata* until the death of G., but upon that event the gift of the 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.

Held that upon the true construction of the will there was a trust of one moiety for G. for life with remainder to her issue and a trust of the other moiety for E. for life with remainder to her issue.

Decision of the High Court of Australia: *Neil* v. *McDonnell*, (1949) 79 C.L.R. 177, affirmed.

APPEAL from the High Court to the Privy Council.

This was an appeal by the respondents—consisting of the plaintiffs and some defendants—from the judgment of the Full Court of the High Court in *Neil* v. *McDonnell* (1).

(1) (1949) 79 C.L.R. 177.

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NEIL.

G. Upjohn K.C. and *John H. Sparrow*, for the appellants.

Raymond Jennings K.C. and *Michael Albery*, for the respondents.

Their Lordships took time to consider their advice.

March 6.

LORD SIMONDS delivered the judgment of their Lordships as follows:—This appeal from a judgment of the High Court of Australia raises a question of construction of the will of William McDonald, who died on 11th June 1904, and was survived by his daughters Grace, the widow of Percy Stanislaus McDonnell, and Emily, then a spinster.

By his will, which was dated 11th September 1902, the testator made certain specific devises and bequests as follows (a) his residence and land at Inverary, Concord upon trust for his daughter Grace McDonnell for life with remainder in fee for her children and issue upon the trusts therein declared with a trust over in favour of his daughter Emily and her children (b) his furniture and other chattels in and about Inverary (with certain exceptions) to his daughter Grace (c) his house and forty acres of land at Medlow to his daughter Emily for life with remainder in fee to her children and issue upon the trusts therein declared with a trust over in favour of his daughter Grace and her children as therein mentioned. The testator then devised and bequeathed the residue of his real and personal estate upon trust (subject to certain annuities thereinafter mentioned) in the following terms which have given rise to the present dispute, viz.: "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". He then charged his residue with certain annuities, some of which are still subsisting, and made certain other provisions not material to the present question.

At the date of his will and of his death the state of the testator's family was as follows:—(a) his daughter Grace (who was born on 20th December 1860) was a widow with three children, viz., the appellant Stanley Augustine McDonnell (who was born on 26th April 1893) Wilfred (who was born on 10th March 1895) and the appellant Ines Marie Augusta Campbell (who was born on 14th April 1897). Grace had had one other child only, viz., Percy McDonnell who died an infant in 1892; (b) his daughter Emily (who was born on 11th August 1865) was a spinster.

On 21st September 1904, shortly after the testator's death, his daughter Emily married one Darvall. By him she had one child, the respondent Ena Gertrude, who married one Neil. Emily died on 8th June 1937.

Of the children of the testator's daughter Grace Wilfred predeceased her leaving one child John Arthur Xavier McDonnell an infant, who is an appellant in this appeal. Her son, Stanley, and her daughter, Ines, survived her and are also appellants. Both of them had children who by representation or otherwise were made parties to the proceedings, but, conceding that they cannot take in competition with their parents, have made no claim to any interest in the testator's estate.

On 4th July 1948 Grace McDonnell died and at once the question arose who was entitled to the corpus of the testator's residuary estate, the respondent Ena Neil claiming that she was entitled to one-half of it and the children of Grace to the other half, the appellants on the other hand claiming that the estate was divisible in fourths of which Ena Neil took one and each of them one-fourth. But before considering the immediate question which has given rise to differences of opinion in the Supreme Court of New South Wales and the High Court of Australia it is necessary to mention that a similar question had arisen upon the death of Emily in 1937. In that year an originating summons was taken out on behalf of the trustees of the will in the Supreme Court of New South Wales, in Equity, by which it was asked whether upon the true construction of the will and in the events which had happened the respondent Ena Neil was entitled to (a) one-half or any other and if so what proportion of the income of the residuary estate of the testator and (b) a vested interest in one-half or any other and, if so, what proportion of the corpus of the said estate. Upon the first question *Nicholas* J., who heard the summons, decided that Ena Neil took no interest in the income of the estate during the lifetime of Grace but that the latter was entitled to the whole of the income during the remainder of her life. The learned Judge did not determine the question in regard to corpus but directed that this part of the summons should stand over generally. Ena Neil was dissatisfied with this order, but abandoning her right of appeal from it, entered into a deed of compromise with her aunt and cousins under which (subject to the annuities) the former was to continue to enjoy one-half of the income of the estate and the other half of it was to be equally divided between Ena Neil and her cousins. The income was in fact dealt with in this way during the remainder of the life of

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Grace. It has not been suggested in the present appeal that the order of *Nicholas* J. could operate as *res judicata* upon the question of the disposition of the corpus of the estate. Its relevance lies in the weight which must necessarily be attached to the opinion of that learned Judge.

On the death of Grace the originating summons was duly revived and was amended by alteration of parties and by substituting for question (b) the following questions, viz., whether "(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 the corpus and, if so, what interest." As has been already stated, it was conceded that no grandchild takes in competition with his or her parent. The only grandchild who claims an interest is the appellant John Arthur Xavier McDonnell whose father, Wilfred, predeceased Grace.

The amended summons coming before *Sugerman* J. in the Supreme Court of New South Wales that learned Judge gave judgment on 3rd December 1948, and having first disposed of the questions of estoppel or *res judicata* and of the competing claims of grandchildren (which are no longer alive) upon the final and more material question came to the conclusion which he summed up in these words: "in the result and viewing the gift as a whole I think what the testator intended was a gift to the issue of his daughters in equal shares *per capita*, any question of stirpital division being postponed until the generation of grandchildren of daughters and grandchildren then taking stirpitally in substitution for, and not in competition with a parent". It appears to their Lordships that in coming to this conclusion the learned Judge largely relied on the opinion which had previously expressed (agreeing therein with *Nicholas* J.) that "whatever else is obscure, it is at least clear that here there is but one gift of the remainder."

From this decision Ena Neil appealed to the High Court of Australia, which, on 5th May 1949, allowed the appeal by a majority (*Dixon* and *Williams* JJ., *Latham* C.J. dissenting (1)). In their turn the present appellants have brought this appeal by which they seek to restore the judgment of *Sugerman* J. From the preceding narrative it is clear that the relevant words of the testator's will, few in number and at first reading simple enough,

(1) (1949) 79 C.L.R. 177.

give rise to great difficulty, but their Lordships, having had the advantage of the careful analysis of this will and the exhaustive review of pertinent authorities which distinguish the judgments in the Supreme Court of New South Wales and the High Court of Australia, have come to the clear conclusion that the reasoning of *Dixon* and *Williams* JJ. is to be preferred and that this appeal must be dismissed. They would indeed be content to adopt as expressing their own view the majority judgment of the High Court, but in deference both to the dissentient judgment and to the argument addressed by learned counsel will make the following observations.

It has already been pointed out that it was for *Sugerman* J. (as it had been for *Nicholas* J.) the decisive factor that there was "but one gift in remainder". The same view was taken by *Latham* C.J., who agreed that the will showed an intention that the residue should be held together and that the whole income should be paid to the daughters or the survivor of them. It appears that there are two steps in this reasoning, the first that there is only one gift in remainder, and the second that there is by implication a gift of the whole income to the surviving daughter; by implication, for there is no such express gift. Whether, the first step being taken, it was proper to take the second, is not now the question. It may well be that, if the clear conclusion is reached that there is no gift of corpus until the death of both life tenants, a life interest in the whole corpus in favour of the survivor of them should be implied. Such a conclusion at least avoids an intestacy in one-half of the income during the survivor's life and is justified by ample authority. But it is the first step which is itself open to question. It appears to their Lordships, as it did to *Dixon* and *Williams* JJ., that without the invocation of authority or of any artificial rule of construction the residuary trust for the testator's two daughters for life in equal shares with the remainder in fee to their issue in equal shares ought to be construed as meaning that upon the death of either daughter the gift in remainder of the equal share of the corpus, of which she enjoyed the income during her life, is to take immediate effect. It is true that, if the will were so construed, there would be an intestacy as to one-half of the corpus in the event of a daughter dying without issue, unless indeed cross limitations in respect of corpus can be implied with the same readiness as was a cross limitation of a life interest. But in their Lordships' opinion this consideration is outweighed by the counter-consideration that upon the alternative interpretation, which *Latham* C.J. favoured, if Grace had predeceased Emily, the

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result would have been to leave Grace's children unprovided for during Emily's lifetime except for the property specifically devised. At the date of the will Grace was a widow with three young children. It is not readily to be attributed to the testator that he intended such a disposition; see e.g. *Wills* v. *Wills* (1).

In coming to this conclusion their Lordships do not think it necessary to look beyond the language of the will, but, in so far as cases upon the construction of other wills can assist, they observe that there is a long line of authority, which points in the same direction. In *In re Hutchinson's Trusts* (2) *Kay* J. thought himself bound by what he regarded as a rule of construction to depart from the natural meaning (as it appeared to him) of the language he had to construe and to hold that a gift to F. H. S. and R. S. share and share alike " and after the decease of the said F. H. S. and R. S. to their children share and share alike and to their heirs forever " must be construed as a gift after the respective deaths of F. H. S. and R. S. to their respective children. A similar construction has been adopted in a large number of cases, whether based on a rule or, as their Lordships prefer to think, upon the intention of the testator to be gathered from the language and tenor of his will. Against this construction in the present case stress has been laid on the fact that the gift over of corpus is not expressed to take effect " at " or " upon " the " death " or " deaths " of the life tenant or life tenants. But this appears to afford no valid distinction, for the words " with remainder " written large, mean " with remainder upon the determination of the precedent life estate " and point as clearly as do the words " at the death " to the same point of time. And it is to be noted that both in *Hawkins* on *Wills*, 3rd ed. (1925), p. 150, and in *Jarman* on *Wills*, 7th ed. (1930), p. 1690, the words " with remainder " are used to exemplify the so-called rule.

Learned counsel for the appellants relied also on the fact that the final words of the gift refer expressly to a stirpital distribution " their grandchildren if any taking *per stirpes* ". Their Lordships do not think that any weight should be given to this consideration. For whatever construction is placed upon the earlier part of the gift it would be apposite to provide that the grandchildren should take *per stirpes*. Reliance also was placed on the fact that the gift of residue was made subject to the payment of certain annuities as indicating that the whole residue was intended to go over in one mass, and reference was made to *Sumpton* v. *Downing* (3).

(1) (1875) L.R. 20 Eq. 342.
(2) (1882) 21 Ch. D. 811.
(3) (1947) 75 C.L.R. 76.

This case contains a valuable summary of the authorities, and it is significant that *Dixon* J., who in the case now under appeal was in favour of a stirpital distribution, there held that a distribution *per capita* was intended. The distinction between the two cases, which their Lordships accept, is thus expressed by *Dixon* J. ". . . in that will it was the gift of corpus which was subject 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."

Their Lordships therefore are of opinion that upon the true construction of the will there was a trust of one moiety for Grace for life with remainder to her issue and a trust of the other moiety for Emily for life with remainder to her issue.

It must finally be observed that the appellants upon the footing that the construction, which alone had the favour of *Sugerman* J. in the Supreme Court of New South Wales and of *Latham* C.J. in the High Court was rejected, urged a further alternative construction, viz. that upon the death of Emily the corpus of one moiety was divisible in fourths between Ena Neil and the three children of Grace and that upon the death of Grace a similar division of the other moiety should take place. Their Lordships do not willingly entertain a contention upon which they have not the advantage of the judgment of the High Court or of the Supreme Court of New South Wales and which is not to be found in the appellants' formal case and it appears to them sufficient to say that such a construction is clearly not admissible. For if as has been held, the true construction of the will is that there are several trusts of each moiety, a trust of one moiety for Grace for her life and a trust of the other moiety for Emily for life, it can only be consonant with this to interpret the remainder in fee to their issue as a remainder to their respective issue.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed.

The appellants must pay the costs of the appeal.

Solicitors for the appellants, *G. & G. Keith, agents for Salwey & Primrose.*

Solicitors for the respondents, *Young, Jones & Co., agents for McDonell & Moffit.*

J. B.