[HIGH COURT OF AUSTRALIA.]

BUICK . . . . . APPELLANT;
DEFENDANT,

AND

EQUITY TRUSTEES EXECUTORS AND AGENCY CO. LTD. AND OTHERS } RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 3, 4; *Oct.* 10.

Dixon C.J., Fullagar and Kitto JJ.

Will—Construction—Meaning of "issue"—Whether "children" or "lineal descendants"—Gift to class—Whether rule of convenience applicable to close class and prevent gift from being bad for remoteness.

Dispositions of residue contained in a will were as follows:—"I give devise and bequeath all my real estate and the residue of my personal estate to my Trustees upon trust to pay a one-third of the net income arising therefrom to my wife during her life and the balance of the remaining two-thirds of the net income to be divided between my children in equal shares and on the death of my said wife the income shall be paid to my children in equal shares and on the death of any of my children the portion of my real and personal estate to which such deceased child was entitled shall be divided between the issue of such child *per stirpes* on each of such issue attaining the age of twenty-one years provided that if any child of mine shall die in my lifetime leaving issue who shall survive me and who being male shall attain the age of twenty-one years or being female shall attain that age or marry under that age such issue shall take and if more than one equally between them the share which their his or her parent would have taken of and in my residuary estate if such parent had lived to attain a vested interest."

Held by *Dixon* C.J. and *Kitto* J., *Fullagar* J. dissenting, that issue as used in the will meant all lineal descendants and not simply children of the testator's children.

Held further by *Dixon* C.J. and *Kitto* J. that the class consisting of lineal descendants was subject to no limitation either as a matter of construction of the will or the application of the rule in *Andrews* v. *Partington* (1791)

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3 Bro. C.C. 401 [29 E.R. 610] which would save the disposition from being bad for remoteness and, consequently, that there was an intestacy as to the disposition of corpus subject to the life interests in income of the testator's widow and children.

Decision of the Supreme Court of Victoria (*Martin* J.), reversed.

APPEAL from the Supreme Court of Victoria.

John Buick died on 23rd November 1925 leaving a will dated 13th October 1925, probate whereof was granted by the Supreme Court of Victoria on 18th March 1926 to Daisy Buick and Frank Stanley Berry. The last-named executor having died on 2nd March 1954, pursuant to the terms of the said will probate was duly granted by the said court in his stead to the Equity Trustees Executors and Agency Co. Ltd.

On 1st August 1956 the Equity Trustees Executors and Agency Co. Ltd. caused to be issued out of the Supreme Court of Victoria an originating summons seeking a determination, without administration, of certain questions. The defendants to the summons were James William John Buick, Nancy Isabella Hart, Jill Margaret Buick Hart, John Stephen Hart (who was sued personally and as representing all children of each of the defendants James William John Buick and Nancy Isabella Hart respectively who might be born in future) and Daisy Buick. The questions were as follows :— 1. Upon the proper construction of the will of the testator and in the events which have happened what persons are now entitled to the capital of the investments and choses in action and other property now representing the real estate and residuary personal estate of the testator and for what precise interests and in what shares and proportions and in particular—(a) Are the defendants James William John Buick and Nancy Isabella Hart presently entitled to have paid over to them in equal shares as tenants in common two-thirds or some other and what part of the said capital ? (b) Are the defendants James William John Buick and Nancy Isabella Hart together entitled absolutely in remainder to any and what part of the said capital expectant only upon the death of the defendant Daisy Buick ? (c) Have the defendants Jill Margaret Buick Hart and John Stephen Hart any and what precise interest in the said capital ? (d) Is there an intestacy as to any and what part of the said capital ? (e) Is the defendant Daisy Buick entitled to any and what interest in the said capital ? (f) In trust for what persons and for what precise interests shall the plaintiff hold the said investments choses in action and other property upon the death of the defendant Daisy Buick ?

An affidavit sworn in support of the summons was, so far as material, as follows:—"5. The testator left him surviving his widow Daisy Buick who is a defendant to the originating summons herein and two children only namely the defendants James William John Buick and Nancy Isabella Hart each of whom is over the age of twenty-one years. The said James William John Buick is married but has no children. The said Nancy Isabella Hart is a married woman and has had three children only namely the defendant Jill Margaret Buick Hart (who was born on 28th March 1937) the defendant John Stephen Hart (who was born on 6th July 1939) and Richard Buick Hart (who was born on 18th November 1934 and who died on 19th November 1934). 6. At the date of his death the testator left real estate in Victoria sworn not to exceed in value the sum of £13,415 and personal estate in Victoria sworn not to exceed in value the sum of £2,512 15s. 5d. 7. As at 1st June 1954 (when the plaintiff obtained a grant of probate of the testator's will) the real estate remaining unadministered in the testator's estate was sworn not to exceed in value the sum of £18,500 and the personal estate therein remaining unadministered was sworn not to exceed in value the sum of £421 7s. 9d. Since the death of the testator all his real estate has been sold and all his residuary personal estate consisting of money has been converted into money and invested and the property in the testator's estate now consists of a house property at 1 Mons Street Glen Iris (purchased by the testator's executors out of the proceeds of sale of the testator's residence known as 'Wedgwood' in Black Rock) balances of purchase money due on sales of real estate cash in hand and inscribed stock. There are now no liabilities of the testator's estate. 9. Since the testator's death the net income of his real estate and residuary personal estate has been annually distributed between the defendants Daisy Buick, James William John Buick and Nancy Isabella Hart in equal shares of one-third each save and except as to:—(a) the net income arising from the balance of the proceeds of sale of the Testator's property 'Wedgwood' Bluff Road Black Rock and (b) the net rents of the property known as 1 Mons Street Glen Iris which income and rents have been paid since 25th July 1951 to the defendant Daisy Buick pursuant to an authority in writing in that behalf executed by the defendants James William John Buick and Nancy Isabella Hart and delivered to the testator's executors. 10. The plaintiff has been requested by the defendants James William John Buick and Nancy Isabella Hart to issue the originating summons herein to have determined the question (*inter alia*) whether the said defendants are together presently entitled

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to have paid over to them two-thirds or some other and what part of the corpus of the testator's estate."

The application by way of originating summons was heard before *Martin* J. who, in a written judgment delivered on 17th January 1957, held that the questions should be answered as follows. 1 (a)—No. 1 (b)—No. 1 (c)—Yes, each of them together with any issue of her or him living at the death of Nancy Isabella Hart but the extent of such interest should not be determined at present. 1 (d)—Not to be answered at this time. 1 (e)—No.

From this decision the defendant James William John Buick appealed to the High Court. The arguments of counsel are sufficiently set out in the judgments hereunder.

H. R. Newton, for the appellant.

R. G. De B. Griffith, for the respondent the Equity Trustees Executors and Agency Co. Ltd.

N. M. Stephen, for the respondents Jill Margaret Buick Hart and John Stephen Hart.

Daisy Buick appeared by her solicitor to admit service of the necessary documents.

Cur. adv. vult.

Oct. 10.

The following written judgments were delivered :—

DIXON C.J. John Buick died on 23rd November 1925. He was survived by his widow, a son and a daughter, all of whom are living. The son and the daughter are married. The son has no children; the daughter has two, a girl now aged twenty and a boy now aged eighteen. Neither of these is married. The estate has been partly administered but the trustees of the will hold assets said to be worth at present £20,000 or thereabouts. John Buick's will was made shortly before his death. It is a short document the chief provision of which is a disposition of residue for the benefit of his wife and children. The disposition, even with a proviso which in the events that happened could have no operation, covers only twenty lines but it contrives to set a problem of interpretation susceptible under the rules of construction of one or other of at least six possible solutions. At all events six rival solutions were placed before us in the able arguments of counsel.

The trust of residue begins with a direction to pay a one-third of the income arising therefrom to the testator's wife during her life and to divide the balance of the remaining two-thirds between

his children in equal shares. So far there are no difficulties and that is the direction governing the state of facts presently existing. But naturally the children wish to know what rights result from the limitations which follow and more particularly what are the rights in corpus. That depends on the immediately ensuing direction which is as follows :—" And on the death of my said wife the income shall be paid to my children in equal shares and on the death of any of my children the portion of my real and personal estate to which such deceased child was entitled shall be divided between the issue of such child *per stirpes* on each of such issue attaining the age of twenty-one years ".

The first matter to note about the foregoing limitation is that *in terms* there is no portion of the corpus of the testator's real and personal estate given by the will to his children. In terms there is a gift only of equal shares of income. What is " the portion of my real and personal estate to which such deceased child " is treated as having been entitled ? To what do these words refer ? One suggestion that was made, perhaps a little faintly, can be put aside, namely that they refer to a share in income for life, so that what is to be divided between the issue of such child *per stirpes* is a share of income, the objects comprised within this gift to issue taking for life, with an ultimate intestacy of corpus and income. The suggestion can be put aside because the words seem clearly enough to refer to a share extending to corpus. The proviso already mentioned which follows lends support for this view. It is a proviso dealing with the contingency of a child of the testator dying during his lifetime but leaving issue surviving the testator and attaining twenty-one or being female marrying under that age. The proviso says that in that event " such issue shall take and if more than one equally between them the share which their his or her parent would have taken of and in my residuary estate if such parent had lived to attain a vested interest ". I do not think " issue " in this clause means " children " but of course it includes them. It is a clause in which " issue " has a " sliding " application and the word " parent " has a corresponding application. It applies to the parent of whatever particular " issue " in the successive order is found to be the specific descendant who takes under the clause. There is therefore nothing in the use of the word " parent " warranting the cutting down of the natural sense of the word " issue " to mean " children ". But nevertheless the clause is expressed upon the footing that the children as issue might take a share of residue. With this support for the inference it seems necessary to conclude that the direction to divide among a child's issue " the portion of

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my real and personal estate to which such deceased child was entitled" was intended to pass a share of corpus. To imply from this however an actual gift of shares of corpus to the children goes a step further. Whether the step should be taken is an important question in the case. The primary argument in support of the claim that, subject to the widow's one-third share of income, the testator's children are entitled to the corpus in equal shares consists in three steps. The first of these steps is that the gift to the children, on their mother's death, of income without restriction to their respective lives, when it is coupled with the two references already discussed to their shares in residue, will be seen to mean that the gift is considered as a gift of shares in corpus. The second step is to construe the gift that follows as a substitutional gift, that is to say a substitution in the event of the death of a child during the widow's lifetime. The third step is to treat the gift to issue *per stirpes* on attaining twenty-one as contingent upon a donee attaining that age and further as extending to remoter issue who might not be born before the death of the testator's child constituting the *stirps* so that his interest might not vest within the period required by the rule against perpetuities. The first of these steps appears to me to be very difficult. As you read down the trust of residue you find that an interest is given in income for the wife for life and subject thereto the income is to be paid to the children. While this is not in so many words limited to life, it is immediately followed by the words "on the death of any of my children". It seems almost an inevitable construction to treat these words as introducing a limitation expectant upon the determination of what is a prior life interest. The two references that have been discussed to the portion or share of corpus of children provide no doubt a consideration of some weight tending to the contrary conclusion. But they will not suffice to give a meaning to the limitation actually expressed which seems quite contrary to that which its words naturally bear. The will is not drawn in a way which makes it impossible to reason with any confidence from the terms which are employed in another clause. Such references carry no plausible inference. It is much more probable that the words "the portion of my . . . estate to which such deceased child was entitled" are only a clumsy way of referring to the share of corpus carrying the income to which he was entitled and that the reference to the proviso is simply due to a misguided use of words intended to possess a general operation.

The words "on the death of any of my children" do not suggest that such death must occur in the lifetime of the widow. They do

not convey the idea of that or of any other contingency, as the words "in the event of" might have done, had they been used. According to their natural meaning the words "on the death" simply signify that it is from and after such death whenever it occurs that the next gift shall take effect. I construe the limitation of income to the children as giving each of them a life interest upon the determination of which the gift of the share of corpus to issue *per stirpes* attaining twenty-one is expectant. But upon that construction the question arises whether the gift of the share of corpus is valid. It is a question which of course would arise also, if the gift were construed as substitutional. If the word "issue" means descendants of the testator's children and is not confined to their children it seems to follow that the clause would make it possible for the vesting in a member of the class to take place outside the period allowed by the rule against perpetuities unless by one or other of two suggested constructions that possibility is excluded. One of the two constructions by which such a possibility might be excluded consists in confining the class of issue who take to those who may be *in esse* at the death of the testator's child.

The other of the two constructions is to treat the words "on each of such issue attaining the age of twenty-one" as not governing vesting but as either relating only to the time of payment or as directed to divesting a vested interest in issue. It is hardly necessary to say that these two constructions are not mutually exclusive. Indeed if the second were adopted, it would seem almost inevitable that the first would be combined with it. That in fact was the course which was taken by *Martin* J. from whose order this appeal comes. His Honour said: "Although the will is almost unintelligible I think the phrases 'the portion of my real and personal estate' and 'my residuary estate' show an intention to dispose of the corpus as well as the income and that those who were to take such corpus were to be the issue of any child of the testator living at the time of such child's death subject to a divesting of the share of any such issue who died before attaining the age of twenty-one". I do not think that this construction can be supported. The words "on each of such issue attaining the age of twenty-one years" naturally describe a condition precedent to the title to share in the division which is directed by the words "shall be divided between": cf. *In re Mervin*; *Mervin* v. *Crossman* (1). The anterior expression introducing the gift, viz. "on the death of any of my children" cannot be regarded as demanding an immediate distribution. In the expression "on" means no more than "after" and the expression has the effect simply of making the ensuing gift subject to and

(1) (1891) 3 Ch. 197, at p. 201.

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expectant upon the prior life interest: see *In re Jobson*; *Jobson* v. *Richardson* (1) and *Re Davies*; *Davies* v. *Mackintosh* (2), per *Vaisey* J. and *Re Taylor* (*dec'd.*) *Lloyds Bank Ltd.* v. *Jones* (3), per *Upjohn* J. In *Leake* v. *Robinson* (4) Sir *William Grant* M.R. said:—"If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description *when* they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to *such* of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim anything under such a gift" (5). It seems to me to be impossible to treat the gift to issue "on each of such issue attaining the age of twenty-one", as anything but contingent upon attaining full age. Nor can I see any tenable reason (assuming always that "issue" does not mean "children") for confining the class to those living at the date of the death of the ancestor, that is to say, of the testator's child.

Take two illustrations. Suppose that a child of the testator had died in the latter's lifetime leaving a child who after the testator's death became twenty-one. He would take under the proviso. Suppose however that the testator's child had died not in his father's, but in his mother's, lifetime having had an only child and that this child had attained twenty-one but predeceased him. Does it mean that there is an intestacy as to his share? Vary the second illustration by supposing that the last mentioned child is a daughter who survives her father but does not attain twenty-one; she marries under that age after her father's death and has a child but dies before attaining twenty-one. Is the last mentioned child outside the class and incapable of taking so that there is an intestacy?

The fact is that there is no positive ground for implying the restriction to issue living at the death of the testator's child and the consequences of doing so would defeat the general purpose of the gift. Nor is it a case for the direct application of the rule of convenience closing the class. For the class is so to speak closed by its own nature. On the hypothesis that issue is not confined to the children of a child of the testator, the gift is to the issue of such child *per stirpes* who attain twenty-one. It being a stirpital distribution the issue of no donee taking, once his interest vested, could compete with him. Thus suppose a child of the testator had

(1) (1889) 44 Ch. D. 154, at p. 158.
(2) (1957) 1 W.L.R. 922, at p. 925.
(3) (1957) 1 W.L.R. 1043, at p. 1047.
(4) (1817) 2 Mer. 363 [35 E.R. 979].
(5) (1817) 2 Mer., at p. 386 [35 E.R., at p. 988].

died and had left five children under twenty-one him surviving. The class would never grow larger and as soon as one member attained twenty-one his minimum share would be ascertained. If one of them had died under twenty-one leaving a child or children he would, so to speak, become a new *stirps* and by reference to him among the others the minimum shares would be ascertained.

It remains to consider whether it is possible to construe the expression " shall be divided between the issue of such child *per stirpes* " as meaning " shall be divided between the children of such child ". In my opinion there is no sufficient ground for so construing it. To do so would mean the entire rejection of the words " *per stirpes* ", as inappropriate and meaningless ; and in any case some context is necessary to enable one to read " issue " as " children ".

I have already said that in the proviso I treat " issue " as meaning " issue " and the word " parent " as used appropriately in the sense of the immediate parent of the particular issue who takes. In the gift now under consideration, namely that to " the issue of such child *per stirpes* ", the words " *per stirpes* " seem to me appropriate enough. They define the proportionate distribution. A child of a testator's child may have predeceased his parent leaving children ; they will take his share between them on attaining twenty-one. One then may die under that age but leave a child who does attain twenty-one ; this child will then take his parent's share. Illustrations may be multiplied. It may be called a " sliding " application of the notion of a stirpital distribution but it is what the expression means in the context.

The result is that I reject the contention that the will means that the testator's children obtain a half share each in corpus liable to be divested by a substitutional clause. On the contrary I construe the limitation as giving a life interest in a half share of income to each of the testator's children with a remainder expectant upon that child's death in a corresponding share of corpus to a class consisting of such of the issue of that child as attain twenty-one, the interest of each member of the class being contingent on his attaining that age and the distribution among them being stirpital. Such a remainder is necessarily bad for remoteness. It would have been possible under it for a child of the testator's child to survive his parent, fail to attain twenty-one and yet leave a child him or her surviving who did attain twenty-one, doing so of course outside the period required by the rule against perpetuities. The consequence is that there is an intestacy as to the disposition of corpus,

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subject to the life interests in income of the widow and the two children. I think that the appeal should be allowed and an order made in the form proposed in the judgment of *Kitto* J.

FULLAGAR J. This is an appeal from an order made by a judge of the Supreme Court of Victoria (*Martin* J.) sitting in chambers. The order was made on an originating summons, which sought answers to certain questions relating to the construction of the will of John Buick. The will was made on 13th October 1925, and the testator died on 23rd November 1925.

The questions arise out of the dispositions of residue contained in the will, and it is necessary to set these out in full. They are in the following terms :—" I give devise and bequeath all my real estate and the residue of my personal estate to my Trustees upon trust to pay a one-third of the net income arising therefrom to my wife during her life and the balance of the remaining two-thirds of the net income to be divided between my children in equal shares and on the death of my said wife the income shall be paid to my children in equal shares and on the death of any of my children the portion of my real and personal estate to which such deceased child was entitled shall be divided between the issue of such child *per stirpes* on each of such issue attaining the age of twenty-one years provided that if any child of mine shall die in my lifetime leaving issue who shall survive me and who being male shall attain the age of twenty-one years or being female shall attain that age or marry under that age such issue shall take and if more than one equally between them the share which their his or her parent would have taken of and in my residuary estate if such parent had lived to attain a vested interest ".

The testator left him surviving his widow, Daisy Buick, who is still living, and two children, who are also still living. The two children are James William John Buick and Nancy Isabella Hart. James William John Buick is married, but has no children. He is fifty-one years of age, and his wife is of about the same age. Nancy Isabella Hart has two children, Jill Margaret Buick Hart, who is aged about twenty years, and John Stephen Hart, who is aged about eighteen years. A third child died very shortly after birth in 1934. James William John Buick is the sole appellant. The immediate interest of Mrs. Hart is identical with that of the appellant, but her actual position is different in that she has children, and she has not wished to appeal from the order of *Martin* J. She has accordingly been made a respondent to her brother's appeal.

If regard be had only to those words of the will which deal directly with the situation at present existing (which has not changed since the testator's death), it is quite clear that the widow is entitled to receive one-third of the net income of the estate, and the son and daughter of the testator are entitled to receive the remaining two-thirds in equal shares. Mr. *Newton*, however, for the appellant, looks beyond the words which expressly provide for the existing situation, and seeks to put upon the later provisions a construction which would, directly or indirectly, have the effect of giving to the appellant and his sister an immediate interest in corpus. The case was ably argued on each side, and the most convenient course will be first to examine for a moment the general structure of the material part of the will according to its natural reading, and then to state the substance of Mr. *Newton's* argument and consider whether it is valid.

The material provisions of the will may be divided into four parts or clauses. It will make for simplification if I treat the will as dealing with the actual situation, in which the testator left only two children. The first clause deals with a period during which the widow and both children of the testator are assumed to be living. The widow is to have one-third of the net income, and the children two-thirds between them. The language is inelegant, but so far no difficulty arises. The second clause deals with what is to happen on the death of the widow. Its most noteworthy feature at first sight is that it proceeds on the supposition that both children will survive the widow—an event which even to-day may or may not happen. Making that assumption, it provides that on the death of the widow the whole of the income shall be paid to the two children in equal shares. The third clause, making apparently the same assumption, proceeds to provide for what is to happen when each child dies. Although it speaks of the " portion " of the estate to which the child dying " was entitled ", and the child has in terms been given only the income of a portion of the estate, I feel no doubt that this part is intended to make a gift of corpus. The gift, which takes the form of a direction to divide " on " death, is to " the *issue* of such child *per stirpes* on each of such issue attaining the age of twenty-one years ". The most noteworthy feature of this clause at first sight is that it omits to make provision for the events of either or both children dying without having had any issue or without having had issue who attain twenty-one years. The fourth clause is framed as a proviso, and deals with an event which did not happen, and, of course, cannot now happen, viz. the death of a child before the death of the testator ; but it may have a bearing

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on the construction of the will as a whole. It provides that, if a child dies in the testator's lifetime leaving *issue* who survive the testator and attain the age of twenty-one years or (being female) marry, such issue shall take " the share which his or her *parent* would have taken if such parent had lived to attain a vested interest ".

The first step in Mr. *Newton's* argument was taken by saying that the word " issue " in the third clause of the will (which has been called the critical clause) includes not only children but all lineal descendants. It is settled that that is the prima facie meaning of the word. The second step was taken by saying that the gift to issue on attaining the age of twenty-one years was a contingent gift—a gift which could not vest in any person unless and until he or she attained the age of twenty-one years. The third step was taken by saying that it followed that the whole of the third clause of the will—the " critical clause "—was void as infringing the rule against perpetuities. If " issue " meant " children ", the gift must vest within lives in being and twenty-one years. But, if it meant " lineal descendants ", it might vest at a time outside the period. The clause was, therefore, void, and must simply be struck out of the will. The excision of the clause would, it was said, have one of two results. We may read the second clause of the will as giving only a life interest to children, in which case there is an intestacy as to corpus. Or we may read the second part of the will as making an unlimited gift of income, which is equivalent to a gift of corpus. If there is an intestacy, the testator's next of kin are his widow and his two children, who are indefeasibly entitled to the estate. If there is by virtue of the preceding clause a gift of corpus to children, the children are indefeasibly entitled to the estate subject to the widow's right to one-third of the income for her life. In either case an immediate distribution would be possible.

Mr. *Newton* put an alternative argument on the assumption that the third clause of the will was not invalidated by the rule against perpetuities. He submitted that the second part of the will did make an unlimited gift of income, which operated as a gift of corpus, and that the third part (the " critical clause ") made a true substitutional gift, providing only for the event of a child of the testator dying during the lifetime of the widow. On this view, if a child survives the widow, he or she takes an indefeasible interest in corpus. If a child predeceases the widow, his or her interest is divested, and goes to his or her issue " on attaining the age of twenty-one years ".

Martin J. accepted the first of Mr. *Newton's* submissions. Without expressing a concluded opinion as to the meaning of the word "issue" in the fourth clause of the will (the proviso), he held (though with "considerable doubt") that that word in the third part of the will must be given its prima facie meaning of "descendants". It did not, however, follow, in his Honour's opinion, that the third part of the will was avoided by the rule against perpetuities. He thought (although "not very confidently") that the gift to issue was not contingent on the attainment of twenty-one years, and that the intention was that a division should be made at the death of each child, though enjoyment of the gift was postponed until the specified age was reached. On this view, as his Honour said, the class to take would be ascertained at the death of the child, and the rule against perpetuities would have no application.

On the view taken by *Martin* J. there can, of course, be no immediate distribution of the estate or any part of it. The first two questions asked by the originating summons were:—"(a) Are the defendants James William John Buick and Nancy Isabella Hart presently entitled to have paid over to them in equal shares as tenants in common two-thirds or some other and what part of the said capital? (b) Are the defendants James William John Buick and Nancy Isabella Hart together entitled absolutely in remainder to any and what part of the said capital expectant only upon the death of the defendant Daisy Buick?" His Honour answered each of these two questions in the negative. He declined (rightly, I think) to answer certain further questions relating to the destination of corpus, beyond declaring that the children of Mrs. Hart together with any issue of either of them living at her death had an interest in corpus, the extent of which should not be determined at present. He also declared that the widow had no interest in corpus.

If I had been able to accept Mr. *Newton's* primary submission that the word "issue" in the third clause of the will means "descendants", I think I should have agreed with him that the gift to issue was contingent on attaining the age of twenty-one years (see e.g. *Locke* v. *Lamb* (1), where there was a direction to divide "after" a death), that the class would not be certainly ascertainable within the perpetuity period, and that the gift was void for remoteness. I think I should have held that the result was a partial intestacy. I need not, however, consider these matters, because (although I recognise that there is much force in the argument to the contrary)

(1) (1867) L.R. 4 Eq. 372.

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I think that, on the proper construction of this will, the word " issue ", both in the third clause of the will (the " critical clause ") and in the fourth clause (the " proviso ") means " children ". I think, on the whole, that this conclusion is supported both by what I may call formal considerations and by more general considerations.

Looking at the will from a technical point of view, we find the curious position that the word in question—which is said prima facie to mean " descendants ", but has been held in many contexts to mean children—is used in one part of the will in a context which may be thought to support the view that it has its prima facie meaning, and in another part of the will in a context which has often been held to negative that prima facie meaning. In the third clause of the will the expression " *per stirpes* " does, I think, suggest that the word means descendants, while in the proviso the reference to the share of a " parent " would lead one to think that only children were intended by the word. The word should, of course, if it is reasonably possible, be read in the same sense in both parts of the will : cf. *In re Birks* ; *Kenyon* v. *Birks* (1). Here I think that the word *must* be read in the same sense in both parts of the will, and it seems to me that the indication contained in the proviso is more cogent than any indication that can be found in the preceding clause. For the reference to the parent is a strong indication that the meaning of the word is limited to children. This is so, I think, as a matter of commonsense, whatever may have been said about treating Lord *Eldon's* decision in *Sibley* v. *Perry* (2), as laying down a " rule " : see generally *Matthews* v. *Williams* (3). On the other hand, I think that any indication to be found in the words " *per stirpes* " in the preceding clause is an indication on which less reliance can be placed. *Martin* J. observed that, if " issue " be read as meaning children, the words " *per stirpes* " are otiose. This is, of course, true, but it is not clear to me that they are not also otiose if " issue " means descendants. For everything depends on what are the relevant *stirpes*. The testator is dealing distributively with the " share " of each of his children, and I am inclined to think that each child of his was regarded as the only relevant *stirps*. If that is so, the words " *per stirpes* " add nothing of substance even if " issue " has the wider meaning. On the other hand, it may be that a possible succession of *stirpes* is contemplated, in which case the words " *per stirpes* " do add something of substance. This very

(1) (1900) 1 Ch. 417.
(2) (1802) 7 Ves. Jun. 522 [32 E.R. 211].
(3) (1941) 65 C.L.R. 639, at pp. 655, 656.

fact, of course, affords a reason for preferring the latter view, but I am left with a feeling that it attributes too complex an intention to the testator or his draftsman, and that, in the case of such a will as this, less weight should be attached to the use of a highly technical expression than to the commonsense considerations which arise from the use of the word parent.

What I have called the formal considerations are, I think, supported by more general considerations. If we give to " issue " the meaning for which the appellant contends, the critical clause is most probably invalid. At any rate very real questions will arise as to its validity and as to the consequences of its invalidity. If we give to the word the narrower meaning, the clause will be valid, and the will, though its provisions are defective in that they do not exhaust the possibilities, presents in itself no very serious difficulties of construction. It is, in my opinion, perfectly proper to attach weight to these considerations. The well-known statement in the opinion of Lord *Selborne* in *Pearks* v. *Moseley* (1) must be misunderstood if attention is fixed exclusively on the first part of it. His Lordship said :—" You do not import the law of remoteness into the construction of the instrument. . . . You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law " (2). But, as his Lordship added, this does not mean that " in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention " (2). It cannot be said here that the clause in question is free from ambiguity. In *In Re Turney* ; *Turney* v. *Turney* (3) Sir *Francis Jeune* said :— " I agree, especially in the view that, when it is possible so to construe a will as not to render a material part of it void by an application of the rule against perpetuities, it is desirable to do so. Of course, as the Master of the Rolls has said, the Court has no right to misconstrue a will with that object, but, if the language of a will is ambiguous, it is right to lean rather to a construction which will undoubtedly carry out the intention of the testator, in the sense that it will make his will effectual and not render it void by means of a doctrine from which, if he had known of it, he would certainly have desired to steer clear " (4). The same view was expressed by *Cussen* J., after referring to *Pearks* v. *Moseley* (1), in *In re Hobson* ; *Hobson* v. *Sharp* (5) : see also *In re Anderson* (6). The passage in

(1) (1880) 5 App. Cas. 714.
(2) (1880) 5 App. Cas., at p. 719.
(3) (1899) 2 Ch. 739.
(4) (1899) 2 Ch., at p. 747.
(5) (1907) V.L.R. 724, at p. 737.
(6) (1930) S.A.S.R. 441, at p. 448.

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Gray on *Perpetuities*, 4th ed. (1942), par. 633, p. 601, is as follows:— "But there is a legitimate use of the rule against perpetuities in matters of construction. When the expression which a testator uses is really ambiguous, and is fairly capable of two constructions, one of which could produce a legal result, and the other a result that would be bad for remoteness, it is a fair presumption that the testator meant to create a legal rather than an illegal interest."

I do not feel pressed by the fact that both the word "children" and the word "issue" are used several times in the will, because I do not think there is any ground for saying that the testator intended to contrast the two words. When he speaks of children, it is to his own children that he refers. Nor do I feel pressed by the suggestion that the testator would be unlikely to intend to exclude a great-grandchild who might at the material time be the sole survivor of his "*stirps*". It is much more consistent with the assumptions, which, in my opinion, underlie both the second and the third parts of the will, that neither the testator nor his draftsman ever dreamed of such a possibility. It is not, in any case, an inherently probable contingency.

I am not able to accept Mr. *Newton's* argument that the "critical clause" makes a substitutional gift. My view of this will has already been adumbrated in the observations I have made on its general structure. No one would deny that it is a badly drawn will, but I do not agree with *Martin* J. that it is "almost unintelligible". Its gravest sins are sins of omission. The trouble is that it leaves out of account altogether two obvious possibilities, either or both of which may still occur. But, if neither of them occurs, the will seems to me to present no very serious difficulty, if we read "issue" as meaning children, as, in my opinion, we should.

The three clauses which precede the proviso follow in natural sequence. The first deals with the period while the widow and both children are still living. During this period, which is still current, there is no difficulty. The second deals with an assumed period when the widow is dead but both children are still living. Here lies the first error which is made, for either or both of the children may predecease the widow. But the assumption, though *a priori* unjustifiable, may still prove to have been correct, and, if it does, again no difficulty arises. The two children enjoy the income under the second clause in equal shares until one of them dies. When this happens, the third clause becomes applicable. As I have said, I feel no doubt that this clause is intended to effect a gift of corpus. As each child dies, his or her children become entitled to one-half of corpus. But here lies the second error of the

draftsman, for either or both of the children may die without having had children. The underlying assumption that both will have children is perhaps less natural than the assumption that the widow will predecease both children, and it is probably less likely to prove well founded. But this assumption also may still prove to have been correct, and, if it does, again no difficulty arises. The children of each child take one-half of corpus as and when their parent dies.

The answers given by *Martin* J. to the first two questions asked by the originating summons were, in my opinion, correct, though I have not been able to agree with his Honour's reasons for those answers. *Martin* J. was also, I think, right in declining generally to deal with the situation which will arise if either or both of the assumptions, on which the will seems to have been drawn, should prove unfounded. I see no real objection to giving a partial answer to the third question. But it follows from what I have written that I would not answer it as *Martin* J. answered it, and I think, on the whole, that it is preferable not to answer it at all at present. I think also that the order of *Martin* J. should be varied by deleting the declaration that the widow is not entitled to any interest in corpus. In certain events there may be a possibility of a partial intestacy, and it seems to me that this declaration could conceivably prove embarrassing.

The order on the appeal should be :—Vary order of *Martin* J. by substituting for the answer given to question (c) and for the answer given to question (e) the words " This question should not be answered at present." Otherwise appeal dismissed.

KITTO J. By the order under appeal answers were given by the Supreme Court of Victoria (*Martin* J.) to certain questions as to the true construction and effect of the will of John Buick deceased. The will was made shortly before the testator's death in 1925. The testator was survived by his wife and two children.

After appointing an executrix executor and trustees and making some specific bequests, the will created trusts with respect to the testator's real estate and the residue of his personal estate. The trusts are in these terms : " to pay a one-third of the net income arising therefrom to my wife during her life and the balance of the remaining two-thirds of the net income to be divided between my children in equal shares and on the death of my said wife the income shall be paid to my children in equal shares and on the death of any of my children the portion of my real and personal estate to which such deceased child was entitled shall be divided between the issue of such child per stirpes on each of such issue attaining the

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age of twenty-one years provided that if any child of mine shall die in my lifetime leaving issue who shall survive me and who being male shall attain the age of twenty-one years or being female shall attain that age or marry under that age such issue shall take and if more than one equally between them the share which their his or her parent would have taken of and in my residuary estate if such parent had lived to attain a vested interest".

The testator's widow and children are still living. One of the children, a son, has no children, but the other, a daughter, has had three children of whom two are living. These two grandchildren of the testator are approaching full age. The broad question which has arisen is whether the testator's children have any indefeasible interest in the corpus of his residuary estate. It is clear that this question must be answered against the children, as the Supreme Court in fact answered it, if the trust of income "on the death of my said wife" to the children in equal shares is by implication limited to their respective lives, and the next trust, that which is expressed to take effect "on the death of any of my children" in favour of "the issue of such child *per stirpes*", is a gift in remainder and is valid.

The primary submission for the appellant was that, subject to the life interest given to the testator's wife in one-third of the income, the trusts in favour of the children of the remaining two-thirds of the income during the wife's life and of the whole of the income thereafter, unlimited in duration as they are by any express words, suffice to carry the corpus, and that the provision expressed to take effect on the death of any of the children is intended merely to divest the children's interests in corpus in the event of their predeceasing the testator's widow. If the four parts into which the relevant portion of the will is divisible be considered in reverse order, it will be seen that there is not a little to be said for the construction thus offered. The proviso suggests prima facie that by the preceding provisions a child of the testator who survives him has been given an interest in corpus. The provision immediately before the proviso contains an even stronger suggestion to the same effect; for it speaks of the portion of the real and personal estate "to which such deceased child was entitled", the assumption appearing to be made that the child will have survived the testator, and perhaps his wife also. These positive indications, as they are taken to be, of an intention that the preceding provisions, though expressed as trusts of income only, shall give the children shares in corpus are linked in the appellant's argument with the fact that the trusts of income in favour of the children are unlimited in terms—

a characteristic which is thrown into relief by the carefully limited gift of income to the wife during her life. Accordingly strong reliance is placed upon the principle as to the operation of an unlimited gift of income as a gift of corpus: see *Congregational Union of New South Wales* v. *Thistlethwayte* (1). The construction of the gifts of income to the children as carrying corpus is reconciled in the following manner with the gift of corpus to "issue" to take effect "on the death of any of my children". It is said that the introductory words mean "in the event of the death of any of my children", and that, since they treat as a contingency an event which must happen sooner or later, they must be taken to refer to the death of a child in the lifetime of the widow. So, the argument proceeds, the provision which is thus introduced is in truth substitutional, and while therefore it does, if it is valid, make the interests in corpus of the testator's children defeasible in an event which even yet may happen, it must be put aside as invalid because "issue" means descendants of every degree and even the so-called rule of convenience cannot so restrict the class that the interests of its members may not vest at a time beyond the period allowed by the rule against remoteness of vesting.

It is unnecessary at this point, though it will be necessary later, to consider the construction which the appellant thus seeks to place upon the gift of corpus to "issue". It is a sufficient answer to the argument which has been outlined that, notwithstanding the considerations upon which it relies for the conclusion that the gifts of income to the testator's children amount to gifts of corpus, the more natural reading of the will is that which treats those gifts of income as impliedly limited to the respective lives of the children, and treats the provision which begins "on the death of any of my children" as making gifts of corpus in remainder after the children's life interests. The first gift of income to the testator's children is of what is described as the balance remaining after the payment of one-third of the income to the wife during her lifetime. In spite of the order of the words, the intention clearly is that under that gift the children's interest shall be of the same duration as the wife's. Similarly the gift of income on the wife's death is the subject of an implication as to its intended duration, for it is followed immediately by a disposition of corpus on the death of each life tenant. The contrast between corpus and income is drawn very sharply. The two later passages, which seem to treat the testator's children as entitled to shares of corpus, do undoubtedly raise a difficulty. But in the first of them the expression "the portion

(1) (1952) 87 C.L.R. 375.

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of my real and personal estate to which such deceased child was entitled " seems only a condensed and inelegant form of words meaning an aliquot portion of the corpus corresponding to the deceased child's share of the income—the share of the corpus to which the deceased child is thought of as entitled for life. And much the same may be said of the expression in the proviso to " the share which their his or her parent would have taken of and in my residuary estate if such parent had lived to attain a vested interest ". Assuming for the moment that " parent " here means a child of a testator, the expression is nevertheless insufficient to alter the impression one gains from reading the will as a whole. It seems rather to assume that the gift immediately before the proviso will be effectual to carry a share of corpus in favour of the issue of a deceased child of the testator who survives him even though that child predeceases the widow, and that therefore all it need do is to provide for the issue in respect of the same share of corpus in the event of the child of the testator failing to survive him. Accordingly it seems necessary to treat the reference to the child attaining a vested interest as only an instance of regarding a share of income as a share " of and in " the corpus.

The appellant's next contention is that if his first should for these reasons be rejected the purported gift of corpus " on the death of any of my said children " is void for perpetuity, and that in consequence there is an intestacy subject to the three life interests in income. The contention is that " issue " has its prima facie meaning as comprehending all lineal descendants and that no justification can be found for so limiting the class of issue who may take that vesting is ensured within perpetuity limits. In the Supreme Court, *Martin* J. took the appellant's first step with him but thought that the will required a division of a share of the corpus to be made at the time of the death of each child, so that no issue of that child could participate unless then living, and that in the case of those who should then be alive it was enjoyment only that was postponed until the attainment of twenty-one. On this construction the provision was, of course, open to no objection for remoteness of vesting. The same would be true if " issue " means children only. It would even be true though " issue " includes remoter descendants, if the direction to divide on each of the issue attaining twenty-one gives interests vested on the death of the ancestor (the testator's child) with a postponement of enjoyment only, for then the rule of convenience would confine the class of issue to those *in esse* at the death of the ancestor or when the first of the issue should attain twenty-one or would, if he had lived, have attained twenty-one

(whichever should be the later time) : cf. the discussion of *Kevern* v. *Williams* (1) in *Gray* on *Perpetuities*, 4th ed. (1942), par. 638, pp. 605, 606. There are therefore three particular questions to be considered : (1) Does " issue " mean children only, or all lineal descendants ? (2) If the latter, does the expression " on the death of any of my children " specify a point of time for the division of a share of corpus, so that only " issue " then in existence are intended to participate ? (3) If no limit to the class of " issue " who may take is supplied by the answer to either of the foregoing questions, is the class subject to any limit which saves the disposition from infringing the rule against remoteness of vesting ?

(1) The strength of the appellant's contention that the word " issue " should be translated children lies in the fact that in the proviso the word is used in association with " parent ". On the reasoning which supports what is often called the rule in *Sibley* v. *Perry* (2), that circumstance is relied upon as affording sufficient reason for a restricted interpretation of the word in that part of the will ; and then, on the ground that a word which occurs more than once in a document is likely to be used with a constant meaning, it is said that " issue " should be restrained to mean children wherever it is found in the will. But even if " issue " does mean children in the proviso—and if events had turned out differently the point might well have required careful consideration—that is not enough to require a similar meaning to be given to " issue " in the preceding clause. There are compelling reasons against doing so. In the first place, the proviso is not a satisfactory dictionary for the interpretation of the rest of the will, for, if not actually an excrescence, at least it fits uncomfortably into the will, almost as if it had been suggested to the draftsman by an inopportune glance at a book of precedents. Although the attaining of twenty-one has just before been required in respect of all issue without regard to their sex, in the proviso the contingency laid down is attaining twenty-one or if a female marrying under that age. The reference, which has already been discussed, to the share of the residuary estate which the parent would have taken if he had lived to attain a vested interest is so inaptly expressed, whatever meaning one gives to it, that it seems as if the draftsman commenced the proviso with a mind unencumbered by any very vivid recollection of what he had already written. At least it may be said that one simply cannot feel satisfied to allow expressions in the proviso any controlling force over the meaning of expressions elsewhere in the will.

(1) (1832) 5 Sim. 171 [58 E.R. 301]. (2) (1802) 7 Ves. Jun. 522 [32 E.R. 211].

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The present seems a case peculiarly fitted for the application, not of Lord *St. Leonard's* "well-settled rule of construction . . . never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary". *Ridgeway* v. *Munkittrick* (1), but of the "sounder, or at any rate a safer, rule", that before the word "issue" is restrained from "its legal and proper import" one must be satisfied "that the contents of the will demonstrate the testator to have intended to use it in a restricted sense": *Edyvean* v. *Archer*; *In re Brooke* (2). The word, after all, has a clear prima facie meaning as comprehending all lineal descendants, its essence being, as *Cussen* J. said in a passage which has been mentioned in this Court before in *Matthews* v. *Williams* (3), "totality rather than succession": *In re Cust*; *Glasgow* v. *Campbell* (4). Here there is no reliable indication of an intention to use the word in the principal gift of corpus as synonymous with children. But more than that: there are two points to notice about the will, which cannot but influence the reader positively to the opposite conclusion. One is that in this will, which for all its defects is obviously a lawyer-drawn document, the word "children" or "child" is used six times in the space of a few lines, and the word "issue" which we have now to interpret is found embedded in those very lines and in a position in which its contrast with "children" must have been striking, even to a careless draftsman, and one would think even to the testator himself. The other point is that the division which is to be made between the "issue" is to be a division "*per stirpes*". It would be nothing less than nonsensical to speak of a stirpital division between a person's children. If "issue" is here to be translated "children" the result must be, not merely that "*per stirpes*" becomes otiose as has been suggested, but that the division that is directed is denied the character which the words "*per stirpes*" stamp upon it. It must be a division into as many parts as there are stocks, and a distribution of each part among members of one stock must be without regard to the degree of their relationship to the common ancestor of all the stocks.

All these considerations lead to the conclusion that "issue" has its prima facie meaning where it first appears in the will, whatever may be its meaning in the proviso.

(2) No descendant of a child of the testator, then, is disqualified by his remoteness in the line of descent from participating in the division of a portion of the corpus. But the very fact that division

(1) (1841) 1 D. & War. 84.
(2) (1903) A.C. 379, at p. 384.
(3) (1941) 65 C.L.R. 639, at p. 650.
(4) (1919) V.L.R. 221, at p. 254.

is directed imports that some limit is intended to the class of issue to share in the distribution. The language of the will, however, will not support the attempt that has been made to import a limit by an implication that the participants in the distribution shall all be in existence at the death of the child whose life interest has determined. Such expressions as " on the death of my said wife " and " on the death of any of my children " are common form as means of showing that the gift which they introduce is to take effect subject to the determination of a life interest already given. Where, as here, the gift is in a direction to divide, the only effect of the introductory expression is to make clear that the right of " issue " to have a share of the corpus divided amongst them is postponed to the ancestor's right to receive the income during his or her life. There is not enough to justify reading " then living " into the will after the word " issue ". There are a few cases in the books in which such an operation has been performed in contexts which, at first sight at least, seem to provide no greater warrant for it, e.g. *Elliott* v. *Elliott* (1) and *In re Coppard's Estate* (2); but in those cases, as is suggested in *Jarman* on *Wills*, 7th ed. (1930), vol. 1, p. 340, note (*e*), the rules of construction appear to have been strained in order to avoid remoteness: cf. per *Stirling* J. in *In re Wenmoth's Estate*; *Wenmoth* v. *Wenmoth* (3) and see generally *In re Poe* (4). It does not seem possible in principle to support *Elliott* v. *Elliott* (1) and *In re Coppard's Estate* (2) unless on the ground that it was there considered that the interests of the class of takers vested at the death of the testator: see *In re Mervin*; *Mervin* v. *Crossman* (5); *Gray* on *Perpetuities*, 4th ed. (1942), par. 640, pp. 607, 608. It would be true here, too, that if the interest of " issue " in corpus would necessarily be vested at the death of their ancestor (a child of the testator) the class would close when that death occurs: *In re Chartres*; *Farman* v. *Barrett* (6); cf. *In re Davies*; *Davies* v. *Mackintosh* (7). It was in fact suggested in argument that that is the situation, and that the words " on each of such issue attaining the age of twenty-one years " merely postpone the time for payment. But these words clearly go to the substance of the gift and make the participation of any of the issue contingent on attaining the stated age: cf. *Locke* v. *Lamb* (8); *Merry* v. *Hill* (9); *Re Jobson*; *Jobson* v. *Richardson* (10); *In re Gossling*; *Gossling* v. *Elcock* (11).

(1) (1841) 12 Sim. 276 [59 E.R. 1137].
(2) (1887) 35 Ch. D. 350.
(3) (1887) 37 Ch. D. 266, at p. 270.
(4) (1942) I.R. 535.
(5) (1891) 3 Ch. 197, at p. 204.
(6) (1927) 1 Ch. 466, at p. 471.
(7) (1957) 1 W.L.R. 922.
(8) (1867) L.R. 4 Eq. 372.
(9) (1869) L.R. 8 Eq. 619.
(10) (1889) 44 Ch. D. 154.
(11) (1902) 1 Ch. 945.

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(3) There is only one way in which a reconciliation may be effected on sound principles of construction between the intention indicated by describing the objects of the gift as "issue" without limit of degree and the intention shown by the clause as a whole that there shall be a division under which each of the issue on attaining twenty-one shall have his share of the portion of the estate given to the stirps to which he belongs. Such an apparent conflict of intentions often arises, and the method of resolving it is settled. By the so-called rule of convenience, often referred to as the rule in *Andrews* v. *Partington* (1), a construction is adopted "which will make further accession to the class of issue impossible once the conditions have been satisfied giving any (member) a share vested in possession": *Crane* v. *Crane* (2); *In re Chartres*; *Farman* v. *Barrett* (3). This construction does not enable the share of each participant in the division to be completely ascertained at once, for the first to qualify to receive a share cannot be given immediately any more than the share which is presumptively his on the assumption that every other member will qualify in the course of time. Some may die without doing so; and in that event the share of each of those who do qualify will be larger than until then had been allowed for. But the rule closes the class of persons who may qualify to receive a share, and enables each of the persons in the class to be given, as soon as he qualifies for his share in possession, the minimum to which he can be entitled as things then stand.

The application of the rule in the present case, however, does not enable the gift to be upheld. It is obvious that after the death of a child of the testator more than twenty-one years may elapse before any of his issue attains twenty-one and thus qualifies for a vested interest. For example, the first of the child's issue to attain twenty-one may be a grandchild of his whose parent died when the grandchild was only one year old, the parent himself having been only one year old at the death of the testator's child. It may happen, therefore, that no interest under the gift will vest until forty years or more after the last-mentioned event. It needs no discussion to show that such a gift is bad.

For these reasons, the appeal should be allowed. The order of the Supreme Court should be varied by omitting the answers thereby given to questions (a), (b), (c) and (d) in the originating summons, and by substituting therefor the following declarations: (1) that on the true construction of the testator's will each of his children, the defendants James William John Buick and Nancy Isabella

(1) (1791) 3 Bro. C.C. 401 [29 E.R. 610].
(2) (1949) 80 C.L.R. 327, at p. 336.
(3) (1927) 1 Ch. 466, at p. 472.

Hart, is entitled to one-half of the income of the residuary estate during his or her life only, subject to the interest in income of the testator's widow the defendant Daisy Buick; and (2) that subject to the aforesaid interests in income of the testator's widow and children, there is an intestacy as to the residuary estate of the testator.

Vary the order of the Supreme Court by omitting the answers thereby given to questions (a), (b), (c) and (d) in the originating summons and substituting therefor the following declarations: (1) *that on the true construction of the testator's will each of his children, the defendants James William John Buick and Nancy Isabella Hart, is entitled to one-half of the income of the residuary estate during his or her life only, subject to the interest in income of the testator's widow, the defendant Daisy Buick*; *and* (2) *that subject to the aforesaid interests in income of the testator's widow and children, there is an intestacy as to the residuary estate of the testator. Let the costs of the appeal of all parties be taxed as between solicitor and client and paid out of the estate.*

Solicitors for the appellant, *Blake & Riggall.*

Solicitors for the respondent, the Equity Trustees Executors and Agency Co. Ltd., *Henderson & Ball.*

Solicitors for the respondents, Jill Margaret Buick Hart and John Stephen Hart, *Arthur Robinson & Co.*

Solicitors for the respondent Daisy Buick, *Cook & McCallum.*

R. D. B.