O'CONOR V PERPETUAL TRUSTEE COMPANY LTD.

JUDGMENT. KNOX C.J.

This is an appeal from so much of a decretal order of Harvey C.J. in Equity as declared that certain property in Church and George Streets Parramatta was divisible one half to the appellant and the other half to the children of Samuel Barber who survived his widow, including the appellant, and the grandchildren of the said Samuel Barber whose parents predeceased the said widow, such grandchildren to take per stirpes. The question turns upon the construction to be put upon the will of Samuel Barber. The gift of the property now in question is in the words following viz:- "I give and devise unto the said George Thomas Hunt and Henry James Barber or the survivor of them or the heirs executors or administrators of such survivor all that my block of property at the corner of George & Church Sts Paramatta aforesaid upon trust to receive the rents issues and profits thereof and out of such proceeds to pay to my dear wife Margaret Barber the yearly sum of £364 by equal quarterly payments for and during the term of her natural life or so long as she remains my widow but in the event of her intermarrying after my decease then that the annual payment to be made to her shall be forthwith reduced to the sum of £300 and further to pay out of the

Delivered 6.5.1926

said rents issues and profits unto my daughter Icey Britannia Johnston Barber the yearly sum of £150 by equal quarterly payments for and during the term of her natural life or until the decease of her Mother my said wife Margaret Barber and from and immediately after her decease I direct that the said block of land be sold & one half of the proceeds to be invested for or paid over to my dear daughter Icey Britannia Johnson Barber and theother half be equally divided between my children then surviving and I further direct my said trustees after the paying the before mentioned annuities and all rates taxes and repairs to divide the balance of such rents and profits between my daughters Lydia Dale and Ruth Cook until my wife's death as aforesaid."

If this gift stood alone there would be no difficulty, for the appellant being the only child of the testator who survived his widow would clearly be entitled to the whole property. But the will contains another provision the effect of which was in the opinion of the learned Chief Judge to let in the children of such of the testator's children as predeceased his widow. That provision is in the words following viz:-

"I declare that if any of my children herein named shall predecease me leaving issue, or depart this life before distribution of my estate leaving issue such issue shall take (if more than one child in equal shares and proportions and if but one that one alone) the share or shares respectively of their deceased parent or parents but I direct

"xxxxI that the proceeds of the 200 acres of land directed to be sold shall be if any of the parties benefiting thereby depart this life before sale is completed thereof divided between the survivors of the seven persons to whom I have bequeathed the proceeds of such sale."

In an earlier case in which the will of this testator was the subject of a decision of the Supreme Court it was held that this provision applied to the shares of testator's children in the residuary real estate and that the children of a son of the testator who survived the testator but died within a year after his death became entitled to their father's share of the residuary real estate. The ground of that decision must have been that the expression "distribution of my estate" in the clause under discussion should be construed as meaning not the time when the estate was actually distributed, but the time at which in the ordinary course of events it would become distributable viz:- at the expiration of one year from testator's death. The parties to this appeal were represented in the earlier proceedings and cannot now be heard to question that interpretation of the clause. And if the expression "before distri-

tion of my estate" in this will is to be read as indicating one ~~xxin~~ point of time and one only viz:- before the first anniversary of the testator's death, it would seem to follow that the provision in question would be inapplicable to the gift of the Church and George Streets property. For it is impossible to attribute to the testator the intention of letting in the children of such of his children as should predecease him or die within a year after him and ~~at the same time~~ or excluding the children of such of his children as should die more than a year after his death but in the lifetime of his widow.

But Mr.Flannery for the respondents contends that the expression "before distribution of my estate" is to be given an ambulatory meaning denoting different points of time appropriate to the several gifts to which the provision may be held to apply. Thus conceding that in its application to the gift of residuary real estate the expression means "before the expiration of one year from my death"

he suggests that in its application to the gift of the Church and George Streets property it should be read as meaning " before the death of my widow". I am unable to accept this ingenious suggestion. I incline rather to the view that this declaration was intended by the testator to apply only to those gifts in which he had named all his children as beneficiaries viz:- the Dog Trap Road property and the residuary real estate, and the fact that he proceeds expressly to vary the direction with regard to the Dog Trap Road Property is not necessarily inconsistent with this view. On a consideration of the will as a whole I think the appellant is entitled to succeed. The absolute gift to her in the events which have happened is expressed in clear words. The provsion relied on by the respondents as cutting or defeating that absolute gift is at the best of ambiguous and uncertain meaning, and the construction for which they contend involves the necessity of construing words which have already been construed as denoting one point of time as indicating an entirely different point

of time. I can find nothing in the will which requires or justifies the construction of this clause for which the respondents contend. I desire to add that the learned Chief Judge in Equity was (apparently) not informed of the earlier decision on the construction of this will which was brought under our notice.

In my opinion the appeal should be allowed.

O'CONOR v. PERPETUAL TRUSTEE COMPANY LIMITED.

JUDGMENT. RICH J.

As I differ from the judgment of the learned Chief Judge in Equity I shall briefly state my reasons for so doing.

The appeal is concerned in effect with the construction of two clauses contained in the will of Samuel Barber. The relevant clauses are " I give and devise unto the said George Thomas Hunt and "Henry James Barber or the survivor of them or the heirs executors or "administrators of such survivor all that my block of property at the "corner of George and Church Streets Parramatta aforesaid UPON TRUST to "receive the rents issues and profits thereof and out of such proceeds "to pay to my dear wife Margaret Barber the yearly sum of three hundred "and sixty four pounds by equal quarterly payments for and during the "term of her natural life or so long as she remains my widow but in the "event of her intermarrying after my decease then that the annual pay-"ment to be made to her shall be forthwith reduced to the sum of Three "hundred pounds and futther to pay out of the said rents issues and pro-

fits UNTO my daughter Icey Britannia Johnson Barber the yearly sum of one "hundred and fifty pounds by equal quarterly payments for and during the "term of her natural life or until the decease of her mother my said wife "Margaret Barber and from and immediately after her decease I DIRECT that "the said block of land be sold One half of the proceeds to be invested " for or paid over to my dear daughter Icey Britannia Johnson Barber and "the other half be equally divided between my children then surviving".

"I DECLARE that if any of my children herein named shall "predecease me leaving issue, or depart this life before distribution of "my estate leaving issue such issue shall take (if more than one child in "equal shares and proportions and if but one that one alone) the share or "shares respectively of their deceased parent or parents but I direct that "proceeds of the two hundred acres of land directed to be sold shall be "if any of the parties benefitting thereby depart this life before sale is "completed thereof divided between the survivors of the seven persons to "whom I have bequeathed the proceeds of such sale".

The first clause taken alone is clear and definite

enough. Provision is made during the life of testator's widow for the payment out of the rents etc. of certain annuities: a vested remainder is given to Icey Barber (the appellant) and a contingent remainder to testator's children surviving his widow. In the events which have happened the appellant is entitled to the whole of the proceeds of the land in question unless the later clause is applicable to the former clause and operates to divest the interest so clearly and specifically given. The clause in question is in two parts. The first part is somewhat analogous to the lapse clause section 39 of the Wills Probate and Administration Act 1898. The other part with which we are concerned is intended to prevent the lapse of children's shares after the testator's death. If the clause be read literally full effect being given to the actual language used, it is found that it is expressed to be applicable to gifts to named children and in which such children take property in shares. The language of the clause, read literally, has no application except to the case where a child has become entitled to a share, and it operates therefore as a divesting clause. According to its literal meaning it has no application to

the case where a child never becomes entitled to a share at all. If the clause be read in its context in the will it is found to follow the residuary devise, which is immediately preceded by the devise of the Dog Trap Road property. These are the only two dispositions of the will to which the clause in question actually and exactly applies if no word in it be read in any forced or unnatural sense. The express exclusion by the testator of the devise of the Dog Trap Road property from the operation of the clause leaves the residuary devise the only provision of the will to which the clause according to its actual significance applies . Is there, then, anything in the will read as a whole which leads to the conclusion that the language of the clause should be extended beyond its natural meaning so as to give effect to an intention discoverable from the whole will, to bring within its scope a clause under which children have not become entitled to shares of property and under which the children to take are not named? In my opinion there is not. I have already indicated that the contingent gift contained in the devise of the George and Church Streets property is not a gift to children named (the testator could not anticipate which of them would survive his widow)

and no shareis given to children which the issue can be said to take. This opinion seems to be in accordance with a previous decision on this will relating to the residuary devise which was not brought to the attention of the learned Chief Judge in Equity.

For these reasons Iagree that the appeal should be allowed.

JUDGMENT HIGGINS J.

The only question as to which this appeal has been brought is question 5—

"In the events which have happened to whom on the construction of the will of the said Samuel Barber shall the trustee of the said will pay the capital of the property in Church and George streets Parramatta"?

This particular property was devised by the will to Thomas Hunt and H.J.Barber upon trust to pay to the widow of the testator £364 per annum out of the rents(reducible to £300 per annum if she remarried)and to pay to his daughter Icey(now Mrs O'Connor,the appellant) £150 p.a. for her life or until the death of thw ~~widow~~;and the property was directed to be sold immediately after the widow's death and one half of the proceeds was to be invested for or paid over to Icey [at the testator's death she was an infant] and the other half of the proceeds was to be equally divided between the testator's children then surviving;and until the death of the widow the trustees were to divide the balance of the rents between the other daughters Lydia and Ruth.

Mrs O'Connor is the only child of the testator that still remains alive. The widow died on the 16th Oct 1935,and all the other children(five in number)died before her. There is no dispute as to Mrs O'Connor being entitled to the first half of the proceeds;but she claims also the

other half on the ground that she is the only child of the testator surviving at the widow's death.

There is no doubt that this claim would be right but for a substitutionary provision at the end of the will——

[That is, in the will — anywhere in the will]

"I declare that if any of my children herein named shall predecease me leaving issue, or depart this life before distribution of my estate leaving issue, such issue shall take (if more than one child in equal shares and proportions and if but one that one alone) the share or shares respectively of their deceased parent or parents, but I direct that the proceeds of the 200 acres of land directed to be sold shall be if any of the parties benefitting thereby depart this life before sale is completed thereof divided between the survivors of the seven persons to whom I have bequeathed the proceeds of such sale".

The 200 acres here referred to had been in a previous part of the will devised to the trustees upon trust for sale as soon after the testator's death as convenient and the net proceeds arising therefrom were to be divided [necessarily by the trustees] between the widow and the six children (all named) in equal shares and proportions. There is no doubt, therefore, as to the proceeds of the 200 acres, that the testator by this substitutionary clause so altered or qualified his intention as to give the proceeds, not to the seven persons equally, but to those of the

seven who should survive the completion of the sale;and the question is, did he also alter or qualify his intention as to the property now in question so that the children of any child not "then surviving" at the distribution should take by substitution the parent's share.

It is contended for Mrs O'Connor that this substitutionary clause does not apply to the case of the children of the testator who died before the widow;because the words "distribution of my estate" must refer to one event common to all the properties which are given by the will,and the only event to which "distribution of the estate" can refer must be the end of the executor's year——the year within which executors must prima facie make ready to distribute.

It has to be borne in mind,however,that at the death of the testator,12th Nov 1890,the modern law vesting all real estate in the executors was not in force;it did not come into force till 15th Dec 1890 (Probate Act 1890). The real estate vested by law direct in the devisees; and as to the real estate devised to the trustees,vested in the trustees. The executors as such(the widow and the two trustees)had no duty of distribution of the real estate;and the executors' year cannot apply to the executors as to the real estate. Mr Davison,for Mrs O'Connor,refers to such cases as re Arrowsmith's trusts(2 D F & J 474). In that case a fund was bequeathed to nephews and nieces who should be living at the

death of the testator, but there was a direction that in the case of the death of any of them "before receiving their respective shares" the share or shares of those so dying should go to the survivors equally. The fund was not actually distributed until after the widow's death, as it was wrongly supposed that she had a life interest therein.---The widow lived for 16 years after the testator, and during her lifetime one of the nieces died before the executors' year had expired, and 11 of the nephews and nieces had died after the executors' year. Vice-Chancellor Kindersley, and on appeal the Lords Justices (Lord Justice Knight Bruce at all events), held that all the nephews and nieces living at the death took vested interests liable to be divested only on death before the expiration of 12 months from the death of the testator. But this is only one of the numerous instances in which the Courts have leant heavily against a vested interest in personalty, vested at the death of the testator, being treated as divested by the fact that, owing to possible delay or caprice or mistake of the executors the fund may not have been actually distributed as soon as it might have been (Johnson v. Crook 12 Ch D 639; re Collison ib. 634; re Chaston 16 Ch D 318; re Wilkins ib. 634). In such a case, the Courts treat, if possible, the receipt of the share as referring to the time that it was receivable, the time that it ought to have been received; and, in the absence of evidence to the contrary (see in re Collison 12 Ch D 834, 839), the period of twelve months from the death of the testator is

treated as being prima facie the time that it was receivable. But as Kay J. pointed out in Wilks v. Bannister(30 Ch D 512,519),the presumption is inapplicable where the gift is by express words vested,not at the testator's death,but on the death of someone expected to live after him ----as in this case,the widow. What has the period of 12 months after the testator's death to do with a gift to take effect on the widow's death ? What has the period of 12 months to do with real estate that is not vested in the executors at all ? Here the testator having in the first part of the will directed division among his children "then surviving" (at the widow's death)----a gift not vested in any child,but dependent on a contingency----,having excluded those children who might die before the widow,mitigates the exclusion by saying as to those children who may survive the widow that their children(if any)----not the brothers and sisters surviving----shall take the parent's share. The executors' year is not relevant to this real estate.

However,an ounce of attention to the particular will in question is worth a hundred-weight of "authorities" as to other wills. The best way, I think,is to state summarily the provisions of this will.

The three executors are to sell the sheep on the station,and, on the proceeds of half,the testator's debts etc are charged.

All the furniture,moneys,etc are given to the widow.

The gas shares are given to the(infant)daughter Issy.

The residence at Guildford with 75 acres is devised to the widow

for life,then to Icey in fee.

Myrtle cottage is given to Icey.

The station and half the sheep are given to the son H.J.Barber.

The property in question,at the corner of Church and George streets Parramatta,is given to trustees,who are to divide the rents,and on the widow's death to sell the property and divide the proceeds(as already stated).

To the trustees are also devised a two-story house in George St, a house occupied by Ratter,and a house occupied by Ashley,upon trust for grandchildren,the issue of the son Charles(with power to sell).

To the trustees are devised 200 acres of land upon trust for sale after the death of the testator and to divide the proceeds between the widow and the six children(as already stated).

The property in Charles St Parramatta is devised to Lydia.

The residue of the real estate is devised amongst the widow and the six children as tenants in common.No trustees are interposed.

The receipts of the trustees are to be sufficient discharges for all moneys paid to them "on account of my estate". All devises and bequests for females are to be for separate use. Then follows the substitutionary clause which I have stated.

I quite concur with Mr Davidson that the phrase "before distribution

of my estate" would naturally lead us to expect to find some one distribution contemplated by the will;but there is no such one distribution contemplated here for the estate as a whole. The "distribution" referred to cannot mean the the distribution by the will at the death of the testator;for one "distribution" (that of the proceeds of the 300 acres),has to be made at the death(or completion of the sale on the death),and another distribution has to be made of the proceeds of the property now in question at some time subsequent. Now the clause makes a distinction between children "who predecease me leaving issue" ,and children "who depart this life before distribution of my estate leaving issue" ,evidently a distribution subsequent to the death. The question is to what distribution of what property can the phrase refer. It cannot refer to any distribution except to the distribution(a)of the proceeds of the property at the corner of Church St and George St,the property as to which this question is asked,and(b)of the proceeds of the 300 acres;for there is no other distribution ordered by the will among the testator's children ,and the clause ~~necessarily~~ applies to distribution among the children only, and to distribution of the proceeds of real estate only (as there is no personalty to be divided). It is true that there is also a devise of certain houses on certain trusts for grandchildren,children of the testator's son Charles,with a

power to sell;but this substitutionary provision expressly applies to the death of any of the testator's children,and not to the death of any of his grandchildren. For(b)special ~~provision~~ provision is made ~~for survivorship~~ in favour of survivors, whereas the substitutionary provision operates against survivors, in favour of the children of deceased children. and the result is that the substitutionary provision ~~is~~, if it is to be given any effect at all,must apply to (a) the distribution of the proceeds of the property now in question.

I am therefore of opinion that the substitutionary clause applies to this property,and that the capital proceeds thereof should as to one half be paid to Mrs O'Conor,and as to the other half should be distributed between Mrs O'Conor and the grandchildren born to her brothers and sisters and living at their respective deaths,equally per stirpes. This opinion accords with the decision of Harvey J. I may point out in addition that this construction does no violence to any words of the will;that there is no difficulty in implying in the will after the words "before distribution of my estate" words such as "wherever there has to be distribution";and that the will does not speak of "the distribution" ,as if it were some definite single distribution, but speaks of "distribution" in the abstract.

Moreover,in the trustees' receipt clause the testator uses the words "my estate" in the same vague,indefinite manner as in the

substitutionary clause. The whole difficulty would vanish indeed, if the word "my" in the latter clause could be found to be a mistake for "any" in copying; but one cannot act on such a surmise.

At a late stage of this case, we were informed by counsel for the trustee company that in 1893 this very question was raised in a suit in the Supreme Court, Gurney v Barber. It was not then answered, but further consideration and liberty to apply were reserved by the ~~decretal order~~ decree. It was decided that the share of H.J.Barber in the proceeds of sale of the testator's residuary real estate belonged, on that son's death on 11th Nov 1891, to his children in equal shares. We do not know how the residuary real estate came to be sold at all; and we do not know on what grounds the Court acted; or why this present summons became necessary as there was already a ~~decretal order~~ decree. But as the present question was not answered - was left, I presume, for consideration after the widow's death - there is nothing to conclude the rights of the parties to the present summons in respect of the proceeds of this property in Church and George streets.

I am clearly of opinion that this appeal should be dismissed.