No. 63 of 1949 (9

IN THE HIGH COURT OF AUSTRALIA

BALLARAT TRUSTEES EXECUTORS & AGENCY CO. LTD.

V.

THE PUBLIC TRUSTEE AND OTHERS.

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on MONDAY, 21st AUGUST, 1950

H. E. Daw, Gov. Print., Melb.
C.12280/45

THE BALLARAT TRUSTEES & EXECUTORS AGENCY CO. LTD.

v.

PUBLIC TRUSTEE & ORS.

ORDER.

Appeal dismissed. Costs of all parties of the appeal as between solicitor and client to be paid out of the estate of the deceased other than the share of the estate to the income of which Mrs. Surman is entitled.

JSR.

THE BALLARAT TRUSTEES & EXECUTORS AGENCY LTD.

v.

PUBLIC TRUSTEE & ORS.

REASONS FOR JUDGMENT

LATHAM C.J.

CO.

THE BALLARAT TRUSTEES & EXECUTORS AGENCY/LTD.

V.

PUBLIC TRUSTEE & ORS.

REASONS FOR JUDGMENT — LATHAM C.J.

This is an appeal from a judgment of the Full Court of the Supreme Court of Victoria affirming an order of Lowe J. made upon an originating summons raising questions as to the construction of the will of the late Thomas William Cowley. The testator made his will on 5th June 1914 and died on 26th November 1914. The date of the will is important because it contained provisions for benefits to grandchildren and the testator declared that the expression "grandchild" or "grandchildren" should be deemed to include only such as should be living at the date of the execution of the will and that only such grandchildren should be entitled to share in the distribution of income of corpus. At the time when he made his will the testator and his widow were 74 years of age. They then had four children, all of whom survived the widow, who died on 20th September 1921. The eldest was 52 years of age and the youngest 43 (it was therefore probable that some or all of the children would survive the widow). Some of the testator's children had predeceased his wife but they left no children. Three of the children named in the will died after the widow leaving children. One child, the respondent Margaret Catherine Surman, is still living. Nineteen of the grandchildren were living at the time of the execution of the will. Some have since died.

The first question asked in the originating summons was "On the death of a child of the testator, to whom is the share in the income of the estate bequeathed to such child to be paid?" The answer given to this question by Lowe J. was "To those who by law take on the intestacy of the testator".

The provisions of the will relating to the disposition of income contained an express provision for the benfit of the testator's grandchildren (living at the date of the execution of the will) whose parent predeceased his widow. The question is whether the will conferred any benefit in respect of income upon grandchildren whose parent did not predecease the widow. The decision of Lowe J., which was approved by a majority of the Supreme Court (Macfarlan and Gavan Duffy JJ., O'Bryan J. dissenting) was that no interest in income was given to grandchildren of the testator being children of any of the testator's children which latter persons survived the widow. It is argued for the appellant that those last mentioned grandchildren became entitled after the death of their parent to take between them the share of that parent. In other words it is contended that the issue of children who survived the widow are in the same position in relation to income as the issue of children who predeceased the widow. As already stated none of the children named in the will predeceased the widow and the result of the decision of Lowe J. therefore is that, after the death of a child of the testator, there is no disposition of the income which was payable to that child (who survived the testator but who has since died) and that that income goes as upon an intestacy.

The will provides in respect of income that, after providing for the expense of collection thereof, it should be applied in the following manner: (1) to pay to the testator's wife £2 per week during the term of her natural life; (2) to divide the balance of income remaining into twelfths and to pay and apply those twelfths in specified proportions between the son Thomas William Cowley, the still living daughter Mrs. Surman, one of the respondents to this appeal, a daughter Sarah Jane Knowles, and another daughter Mary Ann Keast, for and during their respective lives: (3) the will provided that if any one or more of my "said children hereinbefore named predecease my said wife leaving lawful issue him her or them surviving then I direct my said Executors and Trustees to pay and apply to.....and if more than one in equal shares or

proportions or if only one then to or for such issue absolutely the parts shares or proportion of income or annual produce of my estate which his her or their parent or respective parents so dying as aforesaid would have been entitled to receive if living". It is clear that under this provision the beneficiaries were the widow, the four named children and the issue of children who predeceased the widow.

This clause in the will is followed by the following provision: "And I further direct that such income or annual produce of my estate shall be so collected and received and disbursed and applied in the manner and for the benefit of the persons aforesaid until the death of my said wife and thereafter until the decease of the last survivor of my said children hereinbefore mentioned and until my youngest grandchild living at the time of the execution of this my Will shall have attained the full age of twenty-one years or alternatively in the event of the youngest of my grandchildren predeceasing the events aforesaid then until the next youngest grandchild living at the time of the execution of this my Will and surviving such events aforesaid shall have attained the full age of twenty one years and so on in like manner in case of other deaths".

This is a provision which fixes a time by reference to the latest of three events: (1) the death of the testator's wife; (2) the death of the last survivor of the said four children: (3) the attainment by the youngest grandchild living at the time of execution of the will of the age 21 years. When all these events have happened, it is subsequently provided that the corpus is to be distributed amongst grandchildren, "being the issue of my before-mentioned children who shall then be actually living".

This further direction provides that the income shall be collected and applied "in the manner and for the benefit of the persons aforesaid" until all of the three events mentioned shall have happened. Thus this direction fixes a period during which the prior provisions are to operate. This direction is not in itself a gift to any persons. It merely fixes a point of time as

the termination of the period during which the income is to be applied for the benefit of the widow (if still living), of the four children (if still living) and such issue of such children as is included within "persons aforesaid". The last named persons are the children of children who predeceased the widow and no other persons. The prior provision had already limited the benefit in respect of income in the case of the widow to her life and in the case of the children to their respective lives. The further direction limits the benefit in the case of grandchildren to a period ending with the latest of the three events specified in that direction. When that event happens, all interests in income are determined and the corpus is to be distributed. The further direction does not make any new gift - it simply prescribes (with some repetition) the period of continuance of prior gifts of income.

But it is contended that other provisions in the will show that the testator thought that he had provided for a larger class of grandchildren than the small class who would, upon the construction adopted by the Supreme Court, be entitled to benefit by receiving a share in the income, and that the will should be construed so as to give effect to the intention which, it is said, so appears. These other provisions, however, are provisions which deal with the interests of children or grandchildren, such as they are, which are given under the will. They are not themselves words of gift to children or grandchildren. For example, there is a provision that "in the event of the failure of all the objects of any stock either through any child of mine dying without issue or all the issue of such deceased child or children of mine dying without issue then I direct that the proportion of income and corpus of such objects so failing as aforesaid shall fall into the totality of my said income and corpus respectively and shall be divisible as between the survivors in degrees corresponding to the proportions directed by this my Will....." This provision does not constitute a gift to the issue of any child. It is a provision only that if the issue of any child, <u>which issue in fact has an interest</u>, should fail, a

certain result shall follow, but it does not make any gift to such issue. So also there is a provision as to corpus (not as to income) substituting the issue of a deceased child for their parent by reference to the share which their parent took in the income. But this provision merely refers the reader of the will to other provisions of the will to find out what the share was which the parent took in the income. It does not itself constitute a gift of income to the issue of a deceased child.

It has been argued that the provision that if a child should predecease the wife the issue of that child should take its parent's share is really equivalent to providing that if, during what has been called in the argument "the trust period" (which is for the purposes of the argument identified with the life of the wife) a child should die, then the issue of that child shall be entitled to take the parent's share. It is then argued that the "further direction" should be regarded as providing for an "extended" "trust period", so that the issue of a child who dies during that period should take the parent's share. But it is not permissible to substitute a provision with respect to "the trust period" for the precise provision in the will referring to children predeceasing the widow, and then to interpret the substituted expression.

In my opinion the decision of Lowe J. was right and the appeal from the Order of the Full Court should therefore be dismissed.

All the parties are agreed that, particularly in view of the representative character of the parties, they should have their costs out of the estate as between solicitor and client. This is a resonable order in all the circumstances except that Mrs. Surman's share of income should not be diminished by reason of litigation in which she has succeeded. The order as to costs should therefore be that the costs of all parties to the appeal should be paid as between solicitor and client out of the testator's estate but that Mrs. Surman should be entitled to receive the same amount on account of her interest in income as she would be entitled to receive if the said costs had not been ordered to be so paid.

As the members of the Court are equally divided in opinion the decision of the Supreme Court must be affirmed and the appeal dismissed.

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JUDGMENT

MCTIERNAN J.

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JUDGMENT MCTIERNAN J.

The question to be decided relates to the share of the income of residue which the testator bequeathed by his will to each of the four children whose names are mentioned in the will. They are Thomas William, Margaret Catherine, Sarah Jane and Mary Ann. All of these children, except Margaret Catherine died since the death of the testator. The question is who upon the true construction of the will and codicil are the persons entitled after the death of each of them to his or her share of the income. The children who are dead left issue; and there are children of Margaret Catherine who are living.

The testator directed his trustees during his wife's lifetime to pay to her a weekly sum and, subject thereto, to pay a specified proportion of the income to each of the four children whose names have been mentioned. The testator added a direction which, omitting words that are not now material, is as follows: "And should any one or more of my said children herein-before named predecease my said wife leaving lawful issue him her or them surviving, then I direct my said executors and trustees to pay and apply to ..... such issue ..... the proportion of income..... which his her or their parent or respective parents so dying as aforesaid would have been entitled to receive if living".

The provision made by the testator in favour of the issue of these four children is immediately followed by another direction, which omitting words that are not now material, is as follows: "And I further direct that such income..... shall be..... applied in the manner and for the benefit of the persons aforesaid until the death of my said wife and thereafter until the decease of

the last survivor of my said children hereinbefore mentioned and until my youngest grandchild living at the time of the execution of this my will shall have attained the full age of 21 years".

The fact which raises the question for decision is that the testator's wife predeceased the three children who have died since his death.

The direction which the testator gave for the payment of shares of the income during his wife's lifetime to the issue of his four children was subject to the condition, which has been mentioned, of death prior to her death.

It is necessary therefore to go to the direction which the testator made for the payment of the income of the residue after his wife's death. The persons to whom he directed his trustees to pay the income thenceforth are not directly mentioned. There is a gift by description. The testator used the referential expression "the persons aforesaid" to describe the objects of his bounty during the period extending from the death of his wife until the youngest grandchild, as described, became of age. It is clear from the testator's language that he contemplated that the period would extend beyond the death of the last survivor of his four children. When his wife and that child were dead there would be no objects of his bounty living to whom the words "the persons aforesaid" could refer except issue of his deceased children.

The question is whether the testator intended that the members of that class should not be entitled to any share in the income, unless they were the issue of a child who predeceased his wife. This question depends on the meaning of the words "the persons aforesaid". There is nothing else in the will and codicil which could possibly support the contention that the testator intended to distinguish between the issue of children who might predecease his wife and the issue of children who survived her, to the disadvantage of the latter issue.

The words "the persons aforesaid" are elliptical. They refer to the four children whom the testator named, to lawful

issue left by them, and perhaps to the testator's wife. It does not seem necessary that the words should be read as referring to her in order to complete the bequest made to her of the weekly sum. The words "the persons aforesaid" need to be expanded by construction to make them refer to the four children and the survivors and survivors of them, and the persons who, as issue of a deceased child named by the testator in his will, would come within the terms of the direction given by the testator for the payment of the income after his wife's death. The problem is to determine the meaning of the words "the persons aforesaid" in so far as the testator used them to identify the last mentioned class of persons. They obviously refer to persons and not to events.

The testator previously directed the payment of the share of income bequeathed to each of his four children to his or her issue, as described, should the child predecease the testator's wife. Prima facie the words "the persons aforesaid", which the testator thereafter used, refer to the persons belonging to the class characterised as the issue left by any of the four children. The words "the persons aforesaid" are capable of referring to the persons who from time to time would constitute that class without drawing into the description of the class the condition as to death prior to the death of the widow. The words "the persons aforesaid" do not necessarily refer only to persons who are the issue of children who predeceased the testator's wife. They are not sufficient to control the main intention of the testator which can be gathered from the whole of the will and codicil. See Towns v. Wentworth 11 Moo. P.C. 526 at 543; 14 E.R. 794 at 800.

The question whether the testator intended the words "the persons aforesaid" to identify such issue only or the persons answering the description of the surviving issue of the four children depends upon which construction would carry into effect the general scheme of the will and codicil. Their provisions are described in the reasons for judgment given by the Justices of the Supreme Court.

Reading the will as a whole and taking into consideration its general scheme, in my opinion the words "the persons aforesaid" were intended by the testator to refer to the lawful issue, as described, of each of his four children whom he named. It would be contrary to the intention manifested by the will, to confine the words to issue who would be identified by reference to such a contingency as death before the testator's wife. The words "the persons aforesaid" do not refer so clearly only to the issue of any children who predeceased the testator's wife that it is necessary to say, notwithstanding the main purpose and intention of the testator, that he limited the bounty intended for the issue of his four children to the issue of any child who should predecease his wife.

The first question in the originating summons was: "On the death of a child of the testator, to whom is the share in the income of the estate bequeathed to such child to be paid?" In my opinion the answer should be: The lawful issue who survived the child. This answer would make it necessary to answer the second question if the parties had not asked the Court to confine its consideration to the first question and remit the matter to the Supreme Court, if it disagreed with the answer given there to the first question.

In my opinion the appeal should be allowed and the first question answered as hereinbefore mentioned.

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The testator directed that should any one of his four named children predecease his widow leaving lawful issue the latter should take the income which earlier in the will he had given to their parents; and he then further directed that the income should be applied for the benefit of "the persons aforesaid" until his widow's death and thereafter for a specified period. It is submitted by Mr. O'Driscoll of Counsel for the appellant company that in order to give effect to the intention of the testator as shown by the provisions of the will and a codicil the words "mutatis mutandis" should be read into the will after the words "the persons aforesaid", so as to widen the class of grandchildren to include those whose parents died after the widow. I understood it to be conceded that the words "the persons aforesaid", standing alone, excluded grandchildren whose parents survived the widow. From the other provisions of the will and codicil relied upon by Mr. O'Driscoll and the counsel supporting or adopting his argument in this respect, I am satisfied that the testator revealed "a paramount intention to benefit his widow, the four named children, and his grandchildren who were alive at the time the will was made and whose parents die and who survive their parents" as stated by O'Bryan J. But as regards the income after his widow's death, I am not satisfied that this larger class of grandchildren should take their parents' shares, and that the testator did not, either deliberately or inadvertently, keep restricted the class of grandchildren so entitled. If he made a mistake we cannot correct it. It is not submitted there was evidence that it was a draftsman's mistake in failing to carry out the testator's instructions; or that any pattern would be spoiled if the words "mutatis mutandis" were not added; I think that if we added words to

the will as submitted we would not carry out the testator's real intention in using the expression "the persons aforesaid" but would change his will. I suspect that he had the intention to benefit the wider class of grandchildren as regards the income but that, through inadvertence, he failed to use words that gave effect to it. Nowhere in the will or codicil does the testator provide anything like a definition of "the persons aforesaid" as including the wider class of grandchildren.

I would dismiss the appeal with costs as proposed by the Chief Justice.

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JUDGMENT KITTO J.

Two questions as to the true construction of the will of Thomas William Cowley deceased came before Lowe J. for determination on originating summons. His Honour's answer to the first question was, in effect, that after the death of a child of the testator there was an intestacy as to the share in the income of the residuary estate bequeathed to that child for his or her life. This answer made it unnecessary for His Honour to consider the second question.

An appeal to the Full Court was dismissed by a majority consisting of Macfarlan and Gavan Duffy JJ., O'Bryan J. dissenting. The present appeal is brought from the order of the Full Court.

The testator made his will on 5th June 1914, and on 26th June 1914 he made a codicil which altered the will in one particular and confirmed it in all other respects. He died on 26th November 1914.

By the income provisions of his will the testator first disposed of the income arising during the life of his wife, and then, as the distribution of corpus was to be postponed until the death of his wife, the death of the last survivor of his four children and the attainment of 21 by the youngest of his grandchildren living at the date of his will who should attain that age, he made a further provision disposing of the income until the death of his wife and thereafter until the happening of the other two of the events mentioned. The question for consideration in these proceedings depends upon the true construction of the second income provision.

The first income provision, applying, as I have said, to the income arising during the life of the testator's wife, provides for the payment of certain expenses, and thereafter for the payment of

£2 per week to the wife during her life. Then it provides that after and subject to the foregoing payments the balance is to be divided into twelve equal parts, of which three are to be paid to a son Thomas William Cowley, three and one-half are to be paid to a daughter Mrs. Surman, three are to be paid to a daughter Mrs. Knowles, and the remaining two and one-half are to be paid to a daughter Mrs. Keast, for and during their respective lives. Then it provides that:-

> "... should any one or more of my said children herein-beforenamed predecease my said wife leaving lawful issue him her or them surviving then I direct my said Executors and Trustees to pay and apply to ..... such issue and if more than one in equal shares and proportions or if only one then to or for such issue absolutely the parts shares or proportion of income which his her or their parent or respective parents so dying as aforesaid would have been entitled to receive if living."

The second income provision follows immediately and is in these terms:-

> "And I further direct that such income or annual produce of my estate shall be so collected and received and disbursed and applied in the manner and for the benefit of the persons aforesaid until the death of my said wife and thereafter until the decease of the last survivor of my said children hereinbefore mentioned and until my youngest grandchild living at the time of the execution of this my will shall have attained the full age of twenty-one years or alternatively in the event of the youngest of my grandchildren predeceasing the events aforesaid then until the next youngest grandchild living at the time of the execution of this my Will and surviving such events aforesaid shall have attained the full age of twenty one years and so on in like manner in case of other deaths."

At the date of the will the testator's wife was 74 years of age. The four children were then aged 43, 48, 51 and 52 respectively, and each of them had children living. The wife died in 1921, and each of the four children survived her. Thus, the portion of the first income provision by which the share of income given to a child was to become payable to his or her issue who survived him or her should he or she predecease the testator's wife never took effect. But after the wife's death and before corpus had become distributable, three of the four children died leaving

children of their own who were born before the date of the will. Each of these three children died more than twenty-one years after the death of the testator, so that, unless the second income provision had the effect of giving their respective shares of income to their children, there was an intestacy as to income by reason of the operation of the Thelluson Act legislation of Victoria (Property Law Act 1928, sec. 164) in forbidding the accumulation of income in the circumstances of this case.

The question then is whether the second income provision should be so construed that the gift to the issue surviving any of the four named children in succession to their parent is limited, as it is in the first income provision, to the case where the parent predeceases the testator's wife. This in turn depends upon the meaning of the words "in the manner and for the benefit of the persons aforesaid". These words refer back to the first income provision, which therefore must be examined for the purpose of ascertaining who are the persons mentioned therein and what is the manner in which they are to take thereunder.

The persons mentioned in the first income provision are the testator's wife, his four named children, and certain issue of those children. (The word "issue" in this context is obviously limited to children, but it will be convenient to adhere to the word used). The only words describing the class of issue referred to are "lawful issue him her or them surviving". The antecedent of "him her or them" is "any one or more of my said children". Thus, unless this antecedent is to be treated as qualified by implication from the context, the issue mentioned in the first income provision must be taken to be the lawful issue surviving any one or more of the four children. Lowe J. and the majority of the Full Court considered that the issue mentioned were the lawful issue surviving any one or more of such of the four children as should predecease the testator's wife; and two features of the context are apparently relied upon for this conclusion.

One feature is that the gift to issue is expressed as conditional upon their parent predeceasing the testator's wife. But

it is a sound principle in the construction of wills that the statement of a contingency upon which a class of persons is to take should prima facie not be treated as importing by implication a qualification into the description of the class: In re Lodwig, (1916) 2 Ch. 26; Permanent Trustee Co. v. Stuart, 37 S.R. (N.S.W.) 32. In the present case, the words "should any one or more of my said children herein-beforenamed predecease my said wife" serve no purpose beyond pointing out that, as it is only the income during the wife's lifetime that is being disposed of in the first income provision, the issue described therein cannot take their parents' share of that income unless the wife is still living after their respective parents have died. The words quoted are not part of the description of the issue who are to take in that event.

The other feature relied upon is that the shares of income which the issue surviving any of the testator's children are to take are described as being the shares which the parents "so dying as aforesaid" would have been entitled to receive if living. The words "so dying as aforesaid" obviously mean predeceasing the testator's wife. Their use acknowledges and emphasises the fact that in this portion of the will each share of income being dealt with is a share of the income arising during the wife's lifetime and is therefore a share which a parent would have been receiving if he or she had not predeceased the wife. The words form part of the description of the shares of income which will pass in the stated event, but they form no part of the description of the persons who are to take those shares in that event.

I can see no reason for thinking that when the persons to whom income is given by the second income provision for a period which may extend beyond the wife's death are described as "the persons aforesaid", the testator meant to refer to a class ascertained by adding to the words describing persons in the first income provision a qualification based upon an implication from the terms in which the testator has defined the event upon which the income arising during his wife's lifetime is given to those persons and the shares of that income which are given to them respectively in that

event. The fallacy which I think underlies the view adopted in the Supreme Court consists in treating the words "the persons aforesaid" as equivalent to "the persons entitled under the preceding gift to take the shares of income with which that gift is concerned". If the latter words (or words having the same effect) had been used, it would be necessary to look both to the words of the first income provision which describe issue, and to the words of that provision which relate to the conditions which must be satisfied if the issue described are to take their parents' shares of income arising during the wife's lifetime. But the testator has chosen to use the words "the persons aforesaid", which, if construed literally, carry into the second income provision no more than the words in the first income provision which describe persons as possible beneficiaries; and there is no justification, in my opinion, for adopting any other than the literal construction. Indeed, the considerations with which I shall deal in discussing the effect of the words "in the manner aforesaid" provide strong reasons for adhering to the literal construction.

I am therefore of opinion that "the persons aforesaid" are the testator's wife, his four named children, and the lawful issue surviving any one or more of those children. It remains to consider whether the words "in the manner aforesaid" introduce into the second income provision the requirement that a child must predecease the testator's wife if the issue who survive him or her are to succeed to his or her share of income under that provision.

So far as the testator's wife and his four children are concerned, the effect of the words "in the manner aforesaid" is clear. By virtue of those words, the wife's interest in income is limited to £2 per week during her life, and the children's interest in income is limited to their stated proportions of the balance during their respective lives. As regards the issue who survive any of the children, there are, I think, two possible views. One view is that the words "in the manner aforesaid" have the effect of incorporating into the second income provision the precise terms of the gifts in favour of the persons mentioned in the first

income provision, so that the issue of a child are not to take after the death of this parent unless the parent predeceases the testator's wife. The other possible view is that the word "manner" refers to the nature and extent of the gifts, rather than to the phraseology in which they are expressed in a provision which relates to the income arising during the wife's lifetime only. The gift in favour of issue is in truth nothing more than an unconditional gift of a remainder, inartificially expressed. It is introduced by words of condition, but those words do no more than stipulate that the preceding life estate shall fall in during the period the income of which is being dealt with, and that there shall be surviving issue to take. The parents are referred to as "so dying as aforesaid"; but, as I have already mentioned, these words appear only in the description of shares of income arising during the wife's lifetime. When the second income provision comes to deal with the income of a different period, the words "in the manner aforesaid" may well mean, in relation to the testator's children and their issue who survive them, that each of the children is to take a life interest in his or her stated share of that income, with remainder in that share to the issue who survive him or her, equally if more than one and absolutely if only one.

A choice must be made between these two views. "Where there is an absolute gift coupled with referential expressions such as "in the same manner", such expressions, in general, determine not who shall take a legacy, but how the legatee shall take. For instance where a legacy is given to such of a class as are living at the death of the testator, equally as tenants in common, and then follows a gift to the children of A."in the same manner", all the children of A. take, whether living at that time or born afterwards": Jarman on Wills 7th Ed., p. 664. This general proposition tends to support the second of the two possible views I have mentioned; but it is necessary to consider the whole will and codicil, and to read them in the light of the circumstances that the testator's wife was 74 when the will and codicil were executed and that the ages of the children at that time ranged from 43 to 52.

The second view would seem the more likely to accord with the testator's intention. It must have been obvious to him that the period between his death and the death of his wife would in all probability be shorter than the period between his wife's death and the time for distribution of corpus; and indeed he showed, by using the words "I further direct" and "thereafter" in the second income provision, that he recognised this probability. It is hardly to be supposed that the testator, while providing for the issue of a child if that child should die during the former period, intended not to provide for the issue of the same child if he or she should die during the latter period. And it is even less probable that the testator intended to provide that issue should succeed to their parents' shares of income in an event which well might not occur in respect of any of the parents, and yet that he intended to make no similar provision in an event which must occur in respect of at least three of them.

Further reasons for thinking the second view the more probable are to be found by a consideration of the direction in the will that the corpus shall be distributed "amongst my grandchildren being the issue of my beforementioned children who shall then be actually living the issue of each deceased child of mine taking by representation per stirpes the same part share or proportion of the corpus of my estate which his her or their parent or such grandchild or grandchildren by representation per stirpes took in the income and annual produce of my estate".

In this provision the word "took" is ambiguous. If it means "were taking immediately before the event upon which corpus becomes distributable", the issue of a child who dies in the interval between the wife's death and the time for distribution of corpus are excluded from participation in corpus unless they are entitled under the second income provision to succeed to their parents' share of income. Their exclusion would repeat in respect of corpus the result already mentioned in respect of income, namely that the testator's bounty would be extended to his grandchildren where parents die in the probably short period of their aged mother's lifetime, but not if their parents die, as three of them must, in the probably

longer period between their mother's death and the distribution of corpus. Such a result appears to me to be capricious. Moreover, it would be a curious method of producing this result (if it were intended) to nominate all the grandchildren living at the distribution of corpus as the persons to share in that distribution and then to exclude those whose parents survived the testator's wife by means of the description of the shares they are to take. On the other hand, if the word "took" means "took at any time", the provision quoted above entitles the issue of a child of the testator to participate in corpus whether or not the child predeceases the testator's wife. This would avoid the capricious result above referred to, so far as corpus is concerned, but on the view adopted in the Supreme Court it would produce the equally capricious result that issue who, during the period of postponement of the distribution of corpus, qualify for participation in corpus are nevertheless excluded from participation in intermediate income. There are, in my opinion, strong reasons against the adoption of this construction of the word "took". The first reason is that, if it be correct, the presence of the words "or such grandchild or grandchildren by representation per stirpes" cannot be accounted for unless it be supposed that the testator was envisaging the possible case of a child dying, leaving issue, between the date of the will and the testator's death. This seems to me an improbable and unsatisfying explanation. The second reason is that the codicil, after modifying a provision out of income which is described as having been made by the will "for my grandchildren by representation per stirpes of their his or her deceased parent (being my children)", adds that this modification shall not be deemed to affect the distribution of corpus. The language of the codicil cannot be satisfactorily explained, I think, except on the footing that (1) the provision of the will as to the distribution of corpus is intended to mean that corpus is to go in the shares in which income was being enjoyed immediately before corpus becomes distributable, and (2) the second income provision of the will is intended to mean, as regards grandchildren, that they shall be enjoying income, until the distribution of corpus, in succession to their parents

(being children of the testator) whenever their parents may have died.

Thus I should conclude that "took" means "were taking immediately before corpus became distributable"; and on the basis of this construction two observations may be made. One is that the provision I have quoted as to the distribution of corpus presupposes that when corpus becomes distributable grandchildren may be found participating in income in succession to their parents, simply because their parents have died; there are no words to suggest that the parents must have predeceased the testator's wife. If so, the views I have expressed as to the meaning of "the persons aforesaid", and the second of the possible views as to the meaning of the words "in the manner aforesaid", must be correct. The other observation relates to the qualification which appears in the will immediately after the provision for distribution of corpus. This qualification provides that, if living, the testator's grandson Thomas Surman shall take five equal ninth parts and his sister four equal ninth parts as between themselves of their total share or proportion of the corpus. Thus a share of corpus is spoken of as theirs in the event of their being alive at the distribution of corpus. This seems clearly to contradict any suggestion that no share of corpus will be theirs unless their mother predeceases the testator's wife, and therefore it contradicts any suggestion that, if their mother survives the testator's wife but dies before corpus becomes distributable, they will not be entitled to her share of income.

Reference should also be made to the provision in the will for the substitution of the issue of grandchildren in respect of the share of their deceased parent or parents "should any one or more such beforementioned grandchildren die before the happening of the latest of the events on which the corpus of my estate shall become divisible amongst such grandchildren". As the "beforementioned grandchildren" are "my grandchildren being the issue of my beforementioned children", this provision is noteworthy for the absence of any words to suggest that a grandchild has no share of corpus in

respect of which the substitution can take effect unless his or her parent predeceases the testator's wife.

Then, too, the will provides that:-

> "... in the event of the failure of all the objects of any stock either through any child of mine dying without issue or all the issue of such deceased child or children of mine dying without issue then I direct that the proportion of income and corpus of such objects so failing as aforesaid shall fall into the totality of my said income and corpus respectively and shall be divisible as between the survivors in degrees corresponding to the proportions directed by this my Will the total shares or parts into which my said income and corpus is divisible being diminished in number corresponding to the shares or parts originally taken or intended to be taken by the objects failing as aforesaid whilst the number of shares or parts taken by the survivors remain constant."

This provision appears to contemplate that the issue of a deceased child may be participating in income, and will become entitled to participate in corpus, if they survive the period of distribution, whether or not their parent predeceased the testator's wife. Moreover, it would be strange if, in the event of a child predeceasing the testator's wife and leaving children who themselves die leaving issue, that child's share of income were given to such issue by way of substitution for their parents, and yet, in the event of a child surviving the testator's wife and dying leaving issue, that child's issue were not to take their parents' share of income and that share were left undisposed of.

In the next place it is necessary, in my opinion, to give great weight to the codicil, which was executed only three weeks after the will. It provides that it shall be taken as part of the will and read in conjunction therewith, and it confirms the will in all respects other than that in which it specifically alters it. Thus the will and the codicil were not only practically contemporaneous, but were made by the most emphatic words one testamentary instrument. "A will and codicil being one instrument, the language of the will may be interpreted by that of the codicil": Darley v. Martin 13 C.B. 683.

The codicil commences by reciting that by the will provision is made out of income for "my grandchildren by representation per stirpes of their his or her deceased parent

(being my children)". If the construction of the second income provision of the will which was adopted in the Supreme Court is right, this recital is wrong; it should have had the words "who predecease my said wife" added to it. The recital should not be disregarded as incorrect unless the will shows clearly that it is. It is true that a recital in a codicil, if obviously erroneous, cannot alter the construction of the will; but if the recital is not obviously erroneous it may be used to clear up an ambiguity or obscurity in the will: In re Venn, (1904) 2 Ch. 52 at 55; Jenkins v. Stewart, 3 C.L.R. 683. In my opinion the recital in the present case affords great assistance in resolving the difficulty of construction with which this appeal is concerned. Indeed I think it would suffice, even without other indications of the testator's intention, to show that the second of the possible constructions of the words "in the manner aforesaid" is the correct one.

But the codicil contains two other indications to the same effect. I have already referred to one of them, namely that which is found in the provision that the codicil shall not be deemed to affect the distribution of corpus. The other is to be found in the main operative provision of the codicil. This provision is clearly so framed as to apply in respect of each stock; and it provides for the operation of "the general provisions of the will" when all the grandchildren or all the grandchildren of any stock surviving for the time being shall be over the age of twenty-one years. This language appears to me to be inconsistent with the existence of any idea in the testator's mind that there can be no participation in income by any stock whose parent outlived the testator's wife.

The codicil as a whole shows plainly, in my opinion, that the testator thought he had made provision out of income for his grandchildren in succession to their respective parents, whether the latter predeceased or survived the wife. What the testator shows that he thought he had done is by no means irrelevent. "It is a very good mode of construing an instrument, to take a man's words when the meaning appears doubtful..... I think it is a very good

mode of getting at his meaning, to see what he himself thought he had done": per Lord Brougham, in Williamson v. Advocate General, 10 Cl. & F. 1 at 17; Ormond Investment Co. v. Betts, (1927) 2 K.B. 326 at 351; Cock v. Aitken, 13 C.L.R. 461 at 471.

Finally, it is to be observed that, on the construction of the second income provision of the will which was adopted in the Supreme Court, there is an intestacy as to a share of income whenever a child of the testator survives the wife and dies before the period of distribution of corpus. And, if the true construction of the corpus provision is as I have suggested, there is an intestacy in such a case as to a share of corpus also. If all four of the children survive the wife and die before the period of distribution of corpus, there is an intestacy both as regards the whole of the income arising after the death of the last survivor of the four children and also as regards the whole of the corpus. In my opinion, this is a case in which the Court should lean in favour of a construction which avoids intestacy, because, although the scheme of the will has its peculiarities, it is worked out with considerable attention to detail and obviously with legal assistance, and it appears to me to exhibit an intention on the part of the testator to die wholly testate.

All these considerations lead me to the conclusion that the expression "in the manner aforesaid", in relation to the issue of the testator's children, means that the issue of each child who were alive at the date of the will and survived him or her are to take, in remainder after their parent's death, if more than one in equal shares and proportions and if only one then absolutely, the share of income in which their parent enjoyed a life interest.

For these reasons I am of opinion that the appeal should be allowed, and that the first question asked in the originating summons should be answered by declaring that on the death of a child of the testator the share of income bequeathed to that child for his or her life is divisible in equal shares amongst those of his or her children living at the date of the will who survived him or her.