IN THE HIGH COURT OF AUSTRALIA

ROTTON

V.

CLIVE & OTHERS

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday 20th December, 1951.

H. E. Daw, Gov. Print., Melb.

C.12280/45

IN THE MATTER OF THE TRUSTS OF THE WILL AND CODICIL OF GILBERT HENRY ROTTON LATE OF MOSMAN IN THE STATE OF NEW SOUTH WALES, GRAZIER DECEASED

ANNIE MAY ROTTON V. PERPETUAL TRUSTEE CO. (LTD.) & ORS.

SHEILA D'ARCY ROTTON V. PERPETUAL TRUSTEE CO.(LTD.)& ORS.

O R D E R

Appeal of Annie May Rotton dismissed. Appeal of Sheila D'Arcy Rotton allowed. Declarations in decretal order under appeal set aside. In lieu thereof declare that upon the true construction of the will and codicil of Gilbert Henry Rotton deceased and in the events which have happened the share in the net capital of the testator's estate corresponding to the share of income which Isobel Lilian Scholes was entitled originally upon her death became divisible in equal shares between Sheila D'Arcy Rotton, Norman Blackdown Clive, Leila Ellie Rotton and Kathleen Clarice Marshall, and that the shares of Sheila D'Arcy Rotton and Norman Blackdown Clive vested in them absolutely and the shares of Isobel Lilian Scholes and Leila Ellie Rotton vested in them subject to the same trusts and limitations as their original shares. Also declare that upon the death of Leila Ellie Rotton the share in the net capital of the testator's estate corresponding to the share of income to which she was entitled originally and also the share which accrued to her upon the death of Isobel Lilian Scholes became divisible in equal shares between Sheila D'Arcy Rotton, Norman Blackdown Clive and Kathleen Clarice Marshall, and that the shares of Sheila D'Arcy Rotton and Norman Blackdown Clive vested in them absolutely and the share of Kathleen Clarice Marshall vested in her subject to the same trusts and limitations as her original share. Order that the costs of all parties of the two appeals as between solicitor and client be paid out of the estate of the testator.

Superseded by order as amended in accordance with directions of Mr Justice Williams

28/4/52

IN THE MATTER OF THE TRUSTS OF THE WILL AND CODICIL OF GILBERT HENRY ROTTON LATE OF MOSMAN IN THE STATE OF NEW SOUTH WALES, GRAZIER DECEASED.

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O R D E R

Appeal of Annie May Rotton dismissed. Appeal of Sheila D'Arcy Rotton allowed. Declarations in decretal order under appeal set aside. In lieu thereof declare that upon the true construction of the will and codicil of Gilbert Henry Rotton deceased and in the events which have happened the share in the net capital of the testator's estate corresponding to the share of income which Isobel Lilian Scholes was entitled originally upon the death of her husband Robert Seddon Scholes deceased became divisible in equal shares between Sheila D'Arcy Rotton, Norman Blackdown Clive, Leila Ellie Rotton and Kathleen Clarice Marshall, and that the shares of Sheila D'Arcy Rotton and Norman Blackdown Clive vested in them absolutely and the shares of Kathleen Clarice Marshall and Leila Ellie Rotton vested in them subject to the same trusts and limitations as their original shares. Also declare that upon the death of Leila Ellie Rotton the share in net capital of the testator's estate corresponding to the share of income to which she was entitled originally and also the share which accrued to her upon the death of Robert Seddon Scholes became divisible in equal shares between Sheila D'Arcy Rotton, Norman Blackdown Clive and Kathleen Clarice Marshall, and that the shares of Sheila D'Arcy Rotton and Norman Blackdown Clive vested in them absolutely and the share of Kathleen Clarice Marshall vested in her subject to the same trusts and limitations as her original share. Order that the costs of all parties of the two appeals as between solicitor and client be paid out of the estate of the testator.

Registry

IN THE MATTER OF THE TRUSTS OF THE WILL AND CODICIL OF GILBERT HENRY ROTTON LATE OF MOSMAN IN THE STATE OF NEW SOUTH WALES, GRAZIER DECEASED

ANNIE MAY ROTTON
V.
PERPETUAL TRUSTEE CO. (LTD.) & ORS.

SHEILA D'ARCY ROTTON
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PERPETUAL TRUSTEE CO. (LTD.) & ORS.

JUDGMENT

DIXON J.
WILLIAMS J.
WEBB J.
FULLAGAR J.

ANNIE MAY ROTTON

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JUDGMENT

DIXON J.
WILLIAMS J.
WEBB J.
FULLAGAR J.

These are two appeals, one by Annie May Rotton the executrix of the will of Gilbert D'Arcy Rotton deceased and the other by his daughter Sheila D'Arcy Rotton from part of a decretal order made by the Supreme Court of New South Wales in Equity (Roper C.J. in Eq.) declaring that upon the true construction of the will and codicil of the testator Gilbert Henry Rotton deceased and in the events which have happened the share in the net capital of the testator's estate corresponding to the share of income to which Isobel Lilian Scholes was entitled originally has vested in Norman Blackdown Clive, Kathleen Clarice Marshall and the late Leila Ellie Rotton absolutely and in equal shares and that the share in the net capital of the testator's estate corresponding to the share of income to which Leila Ellie Rotton was entitled has vested in Norman Blackdown Clive and Kathleen Clarice Marshall absolutely and in equal shares. The first appellant claims that His Honour should have declared that the former share has vested in Norman Blackdown Clive, Kathleen Clarice Marshall, the estate of Gilbert D'Arcy Rotton deceased and Leila Ellie Rotton absolutely and in equal shares and that the latter share has vested in Norman Blackdown Clive, Kathleen Clarice Marshall, and the estate of Gilbert D'Arcy Rotton deceased absolutely and in equal shares. The second appellant

claims that she and not the estate of Gilbert D'Arcy Rotton deceased is entitled to a fourth interest in the former share, and to a one-third interest in the latter share.

The testator Gilbert Henry Rotton died on 14th November 1921. He was survived by his widow Jessie Mary Rotton and five children Isobel Lilian Scholes, Gilbert D'Arcy Rotton, Norman Blackdown Clive, Leila Ellie Rotton and Kathleen Clarice Marshall. No child of the testator predeceased him. Gilbert D'Arcy Rotton died on 18th July 1932. He attained 45 on 19th March 1926 and was survived by his widow, the first appellant Annie May Rotton, the executrix of his will, and his one child Sheila D'Arcy Rotton, the second appellant, who was born on 28th April 1923 and attained 5 years on 28th April 1928. Mrs. Scholes died on 17th August 1944. She was survived by her husband but had no issue. Leila Ellie Rotton died a spinster on 27th September 1948. Norman Blackdown Clive is still alive. He has four daughters, the eldest of whom,Dirleen, was born on 27th May 1923 and attained 5 years on 27th May 1928. Mrs. Marshall is still alive but has no issue.

The codicil of the testator throws no light upon the questions under appeal. They arise under the will. By it the testator, after bequeathing a number of specific legacies, devised all his real estate and his residuary personal estate upon trust for sale and investment of the proceeds and upon further trust to divide the net annual income into two equal parts and pay one half to his wife during widowhood and to pay the other half and from and after death or remarriage the whole to his children in equal shares, "the respective shares of such children to such income to be absolutely vested on my death and if any of my children shall die in my lifetime leaving issue any of whom shall be living at my death such issue (living at my death) shall take equally amongst them if more than one the share both as to capital and income which their respective parents would have taken if living at my death." The testator

directed his trustee to pay the share of income of any of his children during their respective minorities to his widow for their maintenance and education, but should his wife marry then he directed his trustee to make such arrangements for the maintenance and education of any of his children during their minority as it might deem advisable and to accumulate any income in respect of any child under 21 years of age not in the opinion of his trustee required for the maintenance or education of such child.

The clauses which give rise to the questions under appeal follow. This is their text (apart from the numbers which have been inserted for convenience): "Subject to the provisions hereinbefore contained with respect to income (1) I bequeath to each of my children upon he or she attaining the age of forty five years provided such child is then or has been married and at that time has issue living of an age of five years an equal share of the total net capital of my estate (2) I further direct that any child of mine who is unmarried or if married until such child shall have living issue attain an age of five years such child of mine shall receive only the income for his or her life of the respective share of such child of mine and upon death of such child his or her share both of capital and income shall be divided share and share alike between my other surviving children or grandchildren according to the tenor of this will. (3) I further declare that if any child of mine dies married but without issue the husband or wife of such child whilst remaining a widower or widow shall be entitled to the share of the income to which such child was entitled during his or her life such share finally shall then revert to the capital fund or be distributed share and share alike amongst my surviving children or grandchildren according to the tenor of this will. (4) I further direct that if any child of mine shall marry after he or she has attained the age of forty five years and have issue living and after such living issue shall have attained the age of five years such child of mine shall be entitled absolutely to his or her share of capital under this my will."

The testator also specially declared that "if any child or grandchild of mine marries after my death his or her cousin such child or grandchild shall thereupon cease to have any interest under this my will." He directed his trustee, should it carry on his business after his decease, that "any child or grandchild of mine shall have preference so far as regards employment provided such child or grandchild is competent and suitable in the opinion of my trustee to undertake particular duties." He also directed his trustee so far as possible to sell and convert into money all his estate before or as soon as the eldest of his children attained the age of 45 years.

As His Honour said the will is one in which there are a number of difficulties. "There are confusions of thought and grammatical errors which make it doubtful whether anyone can really feel any assurance that the construction to be put upon the will is the correct one." A few things are reasonably clear. It is evident that the testator, subject to providing for his widow, intended his estate to be divided into as many shares as there were children who survived him and children who predeceased him leaving issue living at his death, such issue to take equally between them the share both as to capital and income which their respective parents would have taken if living at his death. His Honour thought that by the initial gifts of income, the income being income of residue, and the gifts being unlimited in point of time, the testator intended to give his children who survived him immediate vested interests in corpus. For this conclusion His Honour also relied on the facts that in the substitutional gift to the issue of children who predeceased him the testator referred to a share in both capital and income which the parent would have taken if living at his death and that in the four subsequent clauses relating to the children's shares the testator used language, particularly in the second clause and also to some extent in the third, which indicated that he regarded his children as having already vested in them a share of capital.

The second clause does, as His Honour said, direct that whilst a child is unmarried or if married until that child has issue who lives to attain 5 years, such child shall receive only the income "for his or her life of the respective share of such child of mine", and this clause and clause 3 contain gifts over of the shares both of capital and income of children who die unmarried or without issue who attain 5 years. Upon this construction of the will each child of the testator upon his death acquired an immediate vested interest in the capital of his estate and the four clauses which follow are trusts engrafted upon those interests of such a nature that, to the extent to which they fail, the previously vested interests take effect, Hancock v. Watson 1902 A.C. 14 at p. 22, and many other cases. We do not find it necessary to express an opinion whether this is the true construction of the will. It will only assume importance if the trusts contained in the four clauses are insufficient to cover the events which happen, and it is with those four clauses and particularly clauses 2 and 3 that we are concerned on these appeals. [The trusts contained in these four clauses have got somewhat out of order. The first portion of clause 2 should come first. It confines the interest of each child in his share whilst unmarried or if married until such child shall have issue who attains the age of 5 years to the income of that share. If a child dies unmarried or married but without issue who attains 5 years, the share of that child both of capital and income goes over as provided in the clause. But it appears from the clauses as a whole that a child must not only marry and have such issue but must also attain 45 before becoming absolutely entitled to the capital of his or her share, and that there would be a gift over of the share of a child who married and had issue who lived to attain 5 years if that child died under 45. Under clause 1 a child becomes entitled to the capital of his or her share on attaining 45 provided he or she has then been married and then has a child

alive 5 years of age or over. Clause 4 is not easy to construe. Read literally it seems to provide that a child also becomes entitled to such capital after attaining 45 if he or she marries after that age and has a child who lives to attain 5 years of age. The clause would not then include a child who marries, then attains 45 and has a child who subsequently attains 5. This happened in the case of Gilbert D'Arcy Rotton and Norman Blackdown Clive. It is apparent from the contents of the four clauses as a whole that the testator intended that his children should become entitled to the capital of their shares on attaining 45 if they then had a child of 5 alive; and that if they had not, they should become entitled upon a child subsequently attaining 5. It does little violence to the literal reading of clause 4 to insert a comma after the word "marry" and construe the clause as referring to the marriage before or after 45 of a child who on attaining 45 did not then have a child alive who had attained 5 but had a child born before or after he or she attained 45 who subsequently attained 5. But whether that course is taken or the necessary intendment of the clause is relied on, it is obvious, we think, that that is its true meaning. The interpretation is justified by the remark of Lord Maugham in Parkes v. Parkes, 1936 3 A.E.R. 653 at p. 669, that where no technical words are in question and the intention of the testator can be collected with reasonable certainty from the entire will that intention "must have effect given to it, beyond and even against, the literal sense of particular expressions". Consequently Gilbert, when his daughter Sheila attained 5 on 28th April 1928, and Norman, when his daughter Dirleen attained 5 on 27th August 1928, became absolutely entitled to their original shares. His Honour has made declarations to that effect and from those declarations there is no appeal. We have only discussed this question because, in the case of Norman Blackdown Clive, as it will appear, it is necessary to define his rights in his original share in order to dispose of the questions at issue on the appeals.

Clauses 2 and 3 contain the gifts which give rise to these questions. Clause 2 relates to the case of

Leila Ellie Rotton who died on 27th September 1948/ a spinster. It provides that upon her death "her share both of capital and income shall be divided share and share alike between my other surviving children or grandchildren according to the tenor of this will". Clause 3 relates to the case of Mrs. Scholes who died on 17th August 1944 married but without issue. She was survived by her husband who died on 20th June 1948. As her widower he was entitled to the income of her share until his death. Upon his death clause 3 provides that her share "finally shall then revert to the capital fund or be distributed share and share alike amongst my surviving children or grandchildren according to the tenor of this will". It will be seen that there are differences in the wording of the two gifts over. That in clause 2 refers to other surviving children, whereas that in clause 3 refers to surviving children. That in clause 2 refers to an accruing share being divided share and share alike. That in clause 3 refers to an accruing share reverting to the capital fund or being distributed share and share alike.

The appellants contend that either the estate of Gilbert D'Arcy Rotton or his daughter Sheila is entitled to participate in the gifts over of the shares of Mrs. Scholes and Leila upon their respective deaths. As Gilbert D'Arcy Rotton predeceased them both, his estate could not participate unless "surviving" means, as his executrix contends, "surviving the testator" and not "surviving the child who died". She also contends that,in the alternative gift, grandchildren are confined to the children of a child who predeceased the testator living at his death. If this be right, as there was no such child but only children who survived the testator, the estate was originally divisible into five shares and upon the death of a child under 45 or without issue who lived to attain 5 years, the share of that child, subject to the provision for his or her widow or widower,would be divisible amongst the

other four children or their estates. His Honour rejected this meaning of "surviving". He held that "surviving" meant "surviving the child who died". With this we agree. It was regarded as well settled by Sir John Leach in Cripps v. Wolcott 4 Mad. 11, decided in 1819, that if there be no special intent to be found in the will, survivorship is to be referred to the period of division. "If a previous life estate be given, then the period of division is the death of the tenant for life and the survivors at such death will take the whole legacy". In King v. Frost 15 A.C. 548 at p. 554, Lord Macnaghten, delivering the judgment of the Privy Council, said of the word "survivors", "The survivorship indicated in the accruer clause must be survivorship with reference to the person on whose death the share is to go over". Roper C.J. in Eq. then wrestled with the meaning of the strange expression "according to the tenor of this will". He said "I think that the grandchildren referred to in the gift over are only those grandchildren who took an original interest under the terms of the will, if any - in the circumstances of this case, none. I think that this is what the testator meant when he added the words 'according to the tenor of this will'. I put it in this way, that when he was dealing with the disposition of the share which was being given over, he intended to have it divided between such of his children as were then living and also those grandchildren who, according to the tenor of his will, took an original interest; that is, those grandchildren who, according to the terms of his will, took an original interest. I think he recalled that originally had a child died in his lifetime leaving children, those children would have taken, and he intended to bring them into share". We cannot accept this meaning. We can find no warrant in the will for confining grandchildren to the children of a child who predeceased the testator. The gift over is to the surviving children or grandchildren which prima facie embraces all grandchildren in esse at the period of distribution. The

words "according to the tenor of this will" are not at all apt to confine grandchildren to the issue of children of the testator who predeceased him. The natural meaning of according to the tenor of a document is according to its drift or general sense or purport or meaning. The gift is to surviving children or grandchildren who are to take according to the tenor of the will so that the expression applies both to children and grandchildren. Surviving grandchildren would be all the grandchildren of the testator who survived the propositus, that is the child whose share is to go over, and not merely the children of a child who predeceased the testator. In the prohibition against marrying a cousin the testator refers to "any grandchild of mine", and he must therefore have contemplated that any grandchild of his and not merely the children of a child who predeceased him could benefit under his will. He again refers to his grandchildren generally in his direction to his trustee to employ them in his business if suitable. The gift is to surviving children or grandchildren. The word "or" is the apt word to introduce a substitutional gift. If the gift was simply to surviving children or grandchildren it might, standing alone, signify a gift to the surviving children if there were any and, if there were not, a gift to the surviving grandchildren: In re Coley 1901 1 Ch. 40. In that case at p. 44 Byrne J. said "Of course, the tendency of the decisions has been, wherever the text allows it, to substitute for a parent a child or children, and that becomes a comparatively easy matter when there are words denoting an intention to divide the property into shares; but I have no such words here. I have simply a gift in words which create a joint tenancy amongst those who do take. I cannot predicate of any child that that child takes a share." In the present case the testator does not expressly state that grandchildren are to take their parents share. But there are words denoting an

intention to divide the property into shares and it is not difficult to imply an intention that grandchildren should be substituted for their parents and that members of both classes should take concurrently, Jarman 7th Edit, p. 1307, Theobald 10th Edit. p. 474. Help comes from the provision that surviving children or grandchildren are to take "according to the tenor of this will". There is in the will the initial division of the residuary estate into the shares already mentioned on the death of the testator and in that division the children then living of any child who predeceased the testator were given a share. There is later the gifts over of the shares of individual children between the surviving children or grandchildren. These shares are to be divided between them according to the tenor of this will. This appears to mean that they are to be divided in the same way as the original division of the estate, that is between the children of the testator then alive and the children then alive of children of the testator then dead, such children to take the share their parent would have taken if then alive. It would seem that the testator intended to make a kind of sub-will of each accruing share and to make it subject to all the incidents attached to the original division of residue. Surviving children would take their accruing shares subject to the trusts contained in clauses 1 to 4 of the will and only grandchildren who survived the propositus would participate. This appears to us to give effect to the expression under discussion. In this way accruing shares will be disposed of according to the general purport of the will. It gives a meaning to the words of the gift over in clause 4 "shall then revert to the capital fund or be distributed share and share alike". That part of the share which accrued to beneficiaries with limited interests would revert to the capital fund whilst that part which accrued to beneficiaries absolutely entitled would be distributed amongst them.

We have not discussed the effect of the declaration in the will that a child or grandchild who marries a cousin shall cease to have an interest. No argument was addressed to us on this matter. Suffice it to say that, since there is no gift over of the interest on breach of the declaration, it appears to be purely in terrorem and therefore void.

For these reasons we are of opinion that the first appeal should be dismissed and the second appeal allowed. The order is appeal of Annie May Rotton dismissed. Appeal of Sheila D'Arcy Rotton allowed. Declarations in decretal order under appeal set aside. In lieu thereof declare that upon the true construction of the will and codicil of Gilbert Henry Rotton deceased and in the events which have happened the share in the net capital of the testator's estate corresponding to the share of income which Isobel Lilian Scholes was entitled originally upon her death became divisible in equal shares between Sheila D'Arcy Rotton, Norman Blackdown Clive, Leila Ellie Rotton and Kathleen Clarice Marshall, and that the shares of Sheila D'Arcy Rotton and Norman Blackdown Clive vested in them absolutely and the shares of Isobel Lilian Scholes and Leila Ellie Rotton vested in them subject to the same trusts and limitations as their original shares. Also declare that upon the death of Leila Ellie Rotton the share in the net capital of the testator's estate corresponding to the share of income to which she was entitled originally and also the share which accrued to her upon the death of Isobel Lilian Scholes became divisible in equal shares between Sheila D'Arcy Rotton, Norman Blackdown Clive and Kathleen Clarice Marshall, and that the shares of Sheila D'Arcy Rotton and Norman Blackdown Clive vested in them absolutely and the share of Kathleen Clarice Marshall vested in her subject to the same trusts and limitations as her original share. Order that the costs of all parties of the two appeals as between solicitor and client be paid out of the estate of the testator.

ROTTON & ORS.

V.

CLIVE & ORS.

JUDGMENT

MCTIERNAN J.

ROTTON & ORS.

V.

CLIVE & ORS.

JUDGMENT MCTIERNAN J.

I am of opinion the appeals should be dismissed.

The appeals are brought from a decretal order determining many questions arising under an unusual and obscure will. The only part of the order from which the appeals are brought is that whereby Questions 3 and 6 of the Originating Summons are answered. These answers construe the directions in the will which, in the events which have happened, govern the destination of the respective interests of the testator's daughters Isobel and Leila respectively in the corpus of residue. The events are that the former died married and without issue and the latter died unmarried. The consequence was that in the case of each of these two daughters, the conditions which the testator attached to the gift to each of his children of a share of the residuary corpus was not fulfilled. Those conditions were fulfilled in the case of his two sons Gilbert D'Arcy, deceased, and Norman B. Clive. The only other surviving child, Kathleen, has not fulfilled those conditions.

In the events which have happened the words which govern the destination of Isobel's share are "such share finally shall then revert to the capital fund or (sic) be distributed share and share alike amongst my surviving children or grandchildren according to the tenor of this will": in the case of Leila's share, the words are: "his or her share both of capital and income shall be divided share and share alike between my other surviving children or grandchildren according to the tenor of this will". The answer to the question in each case depends upon the construction of the words "surviving children or grand-

children according to the tenor of this will". It is not argued that the words have a different construction in each direction.

In the case of Isobel's share, the answer given by the decretal order is that it vested in Norman B, Leila, and Kathleen in equal shares; and, in the case of Leila's share, that it vested in Norman B. and Kathleen in equal shares. The principle upon which it was held there was a vesting in the persons mentioned in the former case is that they survived Isobel, and, in the latter case, that they survived Leila. Gilbert D'Arcy is excluded because he did not survive either Isobel or Leila. He survived the testator; and for that reason it is argued for the appellant, Annie May Rotton, that it is contrary to the intention of the will to exclude his estate from the gift over of either Isobel's or Leila's share.

Another view is advanced for the appellant, Sheila D'Arcy Rotton. She is the daughter of Gilbert D'Arcy and the appellant Annie May, his executrix. The view is that, when the shares of Isobel and Leila respectively went over, they vested in the testator's children then living and the children of any child who predeceased Isobel or Leila, as the case may be.

In the direction which applies to Leila's share, the testator has used the words "my other surviving children or grandchildren according to the tenor of this will". If the testator had left out the word "surviving", all his children living and deceased, except of course Leila, would have been entitled to shares under the gift over of her interest. The word "surviving" limits or explains the word "other": if the word "surviving" were read to mean surviving the testator, it would add nothing to the description of the class intended to share under the gift over. In my opinion the word "surviving" means surviving the child whose share goes over: in this case the testator's children who survived Leila or were living when her share went over. In the case of Isobel's share, the word "other"

is not used in the direction which applies to that share: but the word "surviving" is used, and I think it refers to the same class of children as that indicated by the word in the other direction: consequently Isobel's share vested in the testator's children who survived her. No part of her share or of Leila's share vested in Gilbert D'Arcy because he predeceased both of them: and no part of it could have been transmitted by his will to his executrix, the appellant Annie May Rotton or their daughter, the appellant Sheila D'Arcy.

The gifts to the grandchildren are by way of substitution, but the operation of each direction constituting the gift over to children or grandchildren is expressed to be "according to the tenor of this will". As regards the testator's grandchildren, the direction which immediately follows the trusts of income is a gift by way of substitution applying to capital and income to grandchildren whose parent dies in the testator's lifetime. Under the gift, the grandchildren take per stirpes. There is no intention exhibited by the will to divide any share which goes over from children to grandchildren per capita. In order to apply the directions given by the testator to divide the share which went over from either Isobel or Leila among the testator's children, who survived either of them, "or" (that is by way of substitution, not succession) among his grandchildren, "according to the tenor of the will", it would be necessary, in my opinion, to give a stirpital construction to the part of the gift over by way of substitution, if it were to operate. Gilbert D'Arcy did not fall within the class of children intended to share in the interest that went over from Isobel or Leila. His daughter, Sheila D'Arcy is not entitled, although a grandchild of the testator, to share in either interest. The words of the will are not capable of a construction under which she would be entitled to participate in the division of either of her aunts' shares. The answers given by Roper C.J. in Eq. to

Questions 3 and 6 are, in my opinion, right. The will is so obscure and unusual that it is right to give the appellant and all parties their costs out of the estate, those of the Trustee as between solicitor and client: it was reasonable for such appeal to be brought.