Judgment of the Lords of the Judicial Committee of the Privy Council on the four Appeals of King v. *Frost, Underwood and others* v. *Frost, Price and another* v. *Frost, and Plomley and others* v. *Frost, from the Supreme Court of New South Wales; delivered July* 23*rd*, 1890.

Present:

LORD WATSON.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

JAMES UNDERWOOD, who died in 1844, left five sons, all named in his will. To each he gave a specified portion of his real estate, and an equal share of the residue. The effect of the will was that each son took for life with remainder to his children, if more than one, as tenants in common in tail, with cross remainders between them. Then comes this clause which was referred to in the argument for the sake of convenience as "the accruer clause":—

"I do hereby declare that in case any or either of my said five sons shall depart this life without leaving any child or children him or them surviving, then I devise the share or shares of such son or sons unto and equally between the survivors and survivor of them my said sons and their respective heirs as tenants in common in tail."

There is no gift over in the event of all the sons dying without issue; nor is there any expression of an intention on the part of the testator to keep the property settled in the lines

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of descent through his sons, except so far as such an intention may be gathered from the limitations already stated, or found in the circumstance that the whole of the testator's real estate was divided among his five sons with the exception of a gift to a grandson the son of a daughter.

Joseph, the eldest son, died in the year 1850, without issue, leaving his four brothers surviving. Then three of the sons died each leaving children. At the last William, the youngest son, died in 1885 wthout issue. As Joseph and William both died without issue, no question arises as to the meaning of the words "child or children" in the accruer clause.

The question is, what has become of the property devised to William? The Chief Judge in Equity decided that in the events which had happened, William's share was not disposed of by the accruer clause, and that there was an intestacy as to the whole of that share.

The principal contention before his Honour seems to have been the old and familiar contention that the words "survivors and survivor" ought to be read as "others or other."

Before their Lordships that construction, pure and simple, was not advocated by any of the parties to these Appeals.

Two alternative constructions were put forward. In the first place it was contended by the principal Appellant that the word "survivor" meant longest liver, and that William, the longest liver of the five brothers, dying without issue took as tenant in tail the share which had been given to him for life with remainder to his children in tail, and took it on his own death as survivor. That construction has the merit or disadvantage of being ingenious and comparatively novel. The old reports are full of cases on the meaning of the words "survivors or

survivor." But this particular construction does not seem to have been discovered until the year 1876, when it was adopted by Jessel M.R. in Madan *v.* Taylor. It was said that the introductory words of the accruer clause are applicable to the case of the death of the last brother as well as to the deaths of those who predeceased him. That is perfectly true if you stop there. But if the whole sentence is read together it is apparent that the introductory words must be qualified by limiting them to the case of the death of a son leaving one or more of his brothers surviving, or else if the introductory words apply to every case that there is no one to take on the occasion of the death of the last survivor of the five sons without issue.

Then it was argued on behalf of the other Appellants that the survivorship indicated in the accruer clause was either actual survivorship or survivorship in the person of descendants, and that the words "survivors and survivor" were to be read as "others or other" qualified by the condition of real or metaphorical survivorship. That construction may sometimes be required to give effect to a testator's intention, but unless it is required by a clear indication of a scheme of settlement found in the will, it is open to the objection of being at once forced and fanciful.

Unquestionably there are cases in which the Court in construing the words "survivors or survivor" has departed from the ordinary and natural meaning of those words in order to carry out an intention apparent on the face of the will which would otherwise remain unfulfilled. In the present case, however, there is no ground for departing from the obvious ordinary and natural meaning of the word survivor. It would be difficult to imagine a case more free from every circumstance which could justify such a departure.

The survivorship indicated in the accruer clause must be survivorship with reference to the person on whose death the share is to go over. The obvious meaning of the words "survivors and survivor" in that clause is—such of the sons as may be living at the time of the death on which the disposition of the property is altered.

Their Lordships therefore agree with his Honour that William's share was not disposed of by the accruer clause. So far all the Appeals fail.

There is, however, a point to which his Honour's attention does not seem to have been directed.

William's share consisted both of specifically devised real estate and of a share of the residue. So far as it consisted of residue there is an intestacy immediately. But as regards the specifically devised property, the remainder or reversion expectant on William's death without issue was caught by the residuary devise and passed under it.

In this respect the order must be varied.

There must be a declaration that, on the death of William without issue, so much of his share as consisted of the testator's residuary real estate was undisposed of by the will, but that so much thereof as consisted of specifically devised real estate passed by the residuary devise and stood limited upon trust for the five sons of the testator as tenants in common for life with remainders over as in the will mentioned, and that by reason of the death of Joseph Underwood without issue his one-fifth share therein devolved upon his four brothers who survived him as tenants in common in tail, and that in the events which happened William's one-fifth share having already passed as residue was undisposed of by the will.

It must be referred back to the Master in Equity to complete the inquiry directed by the

order of the 19th of February 1886 on the footing of this declaration.

In other respects the order under appeal will stand.

Their Lordships will humbly advise Her Majesty accordingly.

Their Lordships understand that subject to their sanction the parties have arranged that the costs of these Appeals shall be borne in the same manner as the costs have been borne in the Court below.

Their Lordships will make an order to that effect.