

(The learned Judge omitted the place of residence given by the testator save when quoted.)

In the event of the death of the adopted daughter unmarried, her \$25,000 was to be divided "among the same persons as my residuary estate is" directed to be divided.

The most important question arose from the fact that Mrs. Gaze and Edith Elliott were two of "the surviving children of the late Robert J. Elliott."

If these words were intended as merely descriptive, they were not apt, because they might as well relate to all those named before—there was no reason why they should be confined to the two last named—and they were also inaccurate, as there were 4 surviving children. The context and punctuation led the learned Judge to the conclusion that it was intended that they should refer to the naming of participants in the fund, and should not be regarded as descriptive of those already named. "The surviving children of the late Mrs. Kirby" was clearly a nomination and not a description, and when the testator intended description he used the words "the last three persons being the children of John Shearing."

There was some mistake, and there was no way of ascertaining what it was. The testator might have forgotten that Mrs. Gaze and Miss Elliott were children of his brother, or he might have meant to name the children of some one else, or he might have started to name his brother's children, and then have concluded to include only those who survived him, and have forgotten to strike out names written. It was idle to speculate. The rule is to include rather than to exclude, for the harm occasioned by inclusion is much less than that resulting from improper exclusion.

The second question was whether this gave the named persons two shares. The learned Judge thought not. The dominant idea was a sharing equally among named persons. The fact that a person was named twice did not shew that the idea of equality was abandoned.

The same reasoning answered the third question—Mrs. Kirby's children each take a share. So do Mr. Shearing's children. The persons to share are to be counted per capita, and a corresponding division is to be made.

The gift of the \$25,000 fund, if and when the time comes for it to be distributed, is to this same class, with a substitutional gift, in case any beneficiary dies before the period of distribution leaving issue, in favour of such issue. If any beneficiary dies without leaving issue, the number of the class sharing in this second distribution (i.e., the division of the \$25,000) is correspondingly reduced.