[HIGH COURT OF AUSTRALIA.]

EPPLE . . . . . APPELLANT;
DEFENDANT,

AND

STONE AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1906.

MELBOURNE, *March* 22, 23.

Griffith C.J., Barton and O'Connor JJ.

Will—Construction—Gift to two persons of income "in equal shares during their respective lives and the life of the survivor"—Gift over of corpus to their children per stirpes—Tenancy in common.

A testator by his will devised certain land to trustees upon trust to hold the same "during the lives of his two daughters and the survivor of them," and to pay the income thereof to his two daughters "in equal shares during their respective lives and the life of the survivor of them." He further directed that after the death of the survivor the land should be sold and the proceeds divided equally between his grandchildren, being the children of his two daughters, "each of my said daughters' shares going to her own children only."

Held, that the daughters took as tenants in common, and that on the death of one of them, her representatives were entitled to one-half of the income during the life of the surviving daughter.

Decision of *à Beckett* J., (*Stone* v. *Epple* (1906) V.L.R., 82; 27 A.L.T., 136), affirmed.

APPEAL from the Supreme Court of Victoria.

By his last will Robert Balleny, after making certain bequests, devised certain land, which he afterwards referred to as his "trust estate" to the two executors and trustees appointed by the will, "upon trust to hold the same during the lives of my two daughters the said Jessie Jane Epple and Anne Dunlop Russell and the survivor of them and to receive the rents profits and income thereof upon trust to pay the same to my said two daughters in

equal shares during their respective lives and the life of the survivor of them for their own use and benefit respectively free from the debts and control of their respective husbands, and I declare that my said daughters shall not have power to anticipate their respective incomes and so that their receipts alone shall be a sufficient discharge to the trustees for the time being of this my will . . . I direct my trustees so soon as may be after the death of the last surviving of my said daughters to sell and convert into money the whole of my said 'trust estate' . . . and I direct that my trustee shall stand possessed of the proceeds to arise from such sale and conversion upon trust to divide and pay the same equally between all my grandchildren being the children of my said two daughters each of my said daughters' shares going to her own children only."

The testator died in September, 1898, leaving him surviving his two daughters mentioned in the will. Anne Dunlop Russell died on 30th July, 1905, leaving children her surviving.

An originating summons was taken out by Allwyn Stone, the trustee of the testator's estate, seeking the determination of the following question (*inter alia*):—"What person or persons is or are entitled to receive, as from 30th July, 1905, (the date of the death of Anne Dunlop Russell) until the death of the defendant Jessie Jane Epple, the moiety or share of the income of the property described as the 'trust estate' of the testator?"

à Beckett J., before whom the summons was heard, held that the personal representatives of Anne Dunlop Russell were entitled to receive half the net income of such property from the time of the death of Anne Dunlop Russell until the death of Jessie Jane Epple: *Stone* v. *Epple* (1).

From this judgment Jessie Jane Epple appealed to the High Court.

Agg and *Hayes* for the appellant. Where there is a gift by will of the income from certain property to two persons in words which would otherwise create a tenancy in common, and in addition there is a gift over of the property on the death of the survivor of them to their children, then, on the death of one of those

(1) (1906) V.L.R., 82; 27 A.L.T., 136.

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persons, the survivor takes the whole income, there being by implication of law a cross remainder of a tenancy for life to that survivor: *Pearce* v. *Edmeades* (1); *Re Telfair* (2); *Re Buller* (3); *Cranswick* v. *Pearson* (4); *Eales* v. *Cardigan* (5); *Hawkins on Wills*, p. 201; *Armstrong* v. *Eldridge* (6).

[GRIFFITH C.J.—In the last-mentioned case the gift over was to the children of both tenants for life *per capita* and not *per stirpes*, and that is what was held in *Pearce* v. *Edmeades* (1) to be inconsistent with a tenancy in common of the parents.]

Whether the gift over is *per capita* or *per stirpes* is unimportant. What is inconsistent with a tenancy in common is the gift over after the death of the survivor of the two life tenants. In *Bryan* v. *Twigg* (7), where it was held that there was a tenancy in common, the bequest was of an annuity and the difficulty as to the duration of the estate did not arise. The facts that the share of each daughter is for her own use and benefit and free from the debts and control of her husband, and that the receipts of the daughters alone are to be a sufficient discharge to the trustees, are inconsistent with the representatives of a deceased daughter taking the income during the life of the surviving daughter. [They also referred to *Malcolm* v. *Martin* (8); *In re Richerson* (9); *Alt* v. *Gregory* (10); *Hatton* v. *Finch* (11); *Townley* v. *Bolton* (12); 4 *Bacon's Abridgment*, 7th ed., p. 464 (*n*); *Roper on Legacies*, 4th ed., p. 1396; *Doe d. Borwell* v. *Abey* (13); *Theobald on Wills*, 6th ed., p. 496; *Mew's Digest*, vol. XV., col. 1370.]

Weigall and *Mackey* for the respondent Hilda Beatrice de Garis. Where income is directed to be paid to A. and B. for life in equal shares, and on the death of the survivor then over, on the death of A. before B. there is a gap during which there is no express provision as to the share of income which A. had. The Court has said in *Armstrong* v. *Eldridge* (6), that in such a case it will imply a gift to B. of the half share of income which was only

(1) 3 Y. & C. (Ex.), 246.
(2) 86 L.T., 496.
(3) 74 L.T., 406.
(4) 9 L.T.N.S., 275; 31 Beav., 624.
(5) 9 Sim., 384.
(6) 3 Bro. C.C., 215.
(7) L.R. 3 Eq., 433; L.R. 3 Ch., 183.
(8) 3 Bro. C.C., 50.
(9) (1893) 3 Ch., 146.
(10) 8 DeG. M. & G., 221.
(11) 4 Beav., 186.
(12) 1 My. & K., 148.
(13) 1 M. & S., 428.

given to A. during his life. But if the gift is to A. and B. during their lives and the life of the survivor and then over, there is no gap on the death of A. before B., and the representatives of A. take one-half of the income during the life of B. That is the case here, and it was the case in *Bryan* v. *Twigg* (1) and *Jones* v. *Randall* (2). If *Armstrong* v. *Eldridge* (3) is taken to mean that the mere fact that there is a gift over is sufficient to raise the implication of a right of survivorship, then the Court of Appeal in *Bryan* v. *Twigg* (1) dissented from it. The Court there said that, once the testator had fixed the period during which the income was to be divided between A. and B., the gift over could not affect the matter. The provision as to the receipts of the daughters being a sufficient discharge to the trustees, only means that, although a daughter is covert, the receipt shall be as good as if she were sole. [They also referred to *Chatfield* v. *Berchtoldt* (4); *Wills* v. *Wills* (5).]

Hayball for the trustee, respondent.

Hayes in reply.

GRIFFITH C.J. delivered the judgment of the Court. After the full debate this matter has received at the bar, we are not able to entertain any serious doubts as to the construction of this will. It has often been said that a case on one will is of no value for the construction of another will, except so far as the two wills are identical, or so far as the case lays down some principle of construction. In none of the cases cited were the terms of the will exactly the same as those of the will now under consideration, but a principle is laid down in one of them, and I think that principle has been followed in all of them. I for my part cannot find the conflict between those decisions which the writers of text books have found.

In this case the testator devised and bequeathed certain properties to his trustees "upon trust to hold the same during the lives of my two daughters . . . and the survivor of them,"

(1) L.R. 3 Ch., 183.
(2) 1 Jac. & W., 100.
(3) 3 Bro. C.C., 215.
(4) 18 W.R., 887.
(5) L.R. 20 Eq., 344.

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during which period the trustees were "to receive the rents profits and income thereof." The will then goes on to provide for the trusts during that period, viz.:—"Upon trust to pay the same to my said two daughters in equal shares during their respective lives and the life of the survivor of them for their own use and benefit respectively free from the debts and control of their respective husbands."

The principle to be applied in construing a gift of that sort is laid down in *Pearce* v. *Edmeades* (1). The Lord Chief Baron after expressing an opinion, deferred his judgment until the following day, when he laid down this principle:—"It has been settled by a series of decisions, that the words 'respectively, in equal shares,' when not controlled by other words in a will, shall be taken to indicate the nature of an estate or interest bequeathed, and shall constitute a tenancy in common. But when these words are combined with, or followed by others which would make a tenancy in common inconsistent with the manifest design or the subsequent bequest of the testator, they may be taken to indicate not the nature, but the proportion of the interest each party is to take." The subject matter in contest in that case was a gift very much the same as that in the present case. It was a gift of an annuity to be paid to two grandchildren "during their respective natural lives in equal shares," with a gift over after the death of both of them. The Lord Chief Baron, after laying down the above principle, went on to inquire whether the *primâ facie* meaning of the words that constitute a tenancy in common, viz., "during their respective natural lives in equal shares" was controlled by the manifest design of the testator as shown by the rest of his will. He pointed out that "the corpus of the residue is not to be divided or possessed by the legatees till after the decease of both" grandchildren, and then he says:—"It is clear, therefore, that the mass of the property is to be divided amongst the children who might survive both the parents, *per capita* and not *per stirpes*. This would be quite inconsistent with a tenancy in common of the parents." The Lord Chief Baron did not rely upon their being a gift over, but upon the circumstance that the gift over was

(1) 3 Y. & C. (Ex.), 246, at p. 252.

to the children of both who might survive both, *per capita* and not *per stirpes*, which he says is quite inconsistent with a tenancy in common of the parents. The inquiry was whether there was anything inconsistent with a tenancy in common, and he found something quite inconsistent with it. Therefore he held that there was not a tenancy in common, but a joint tenancy with a right of survivorship.

Applying that rule to the present case, we look to see whether there is in the rest of the will anything to control the *primâ facie* construction of the gift as a tenancy in common. First, it is said, there is the declaration that the interests of the two daughters are subject to a restraint upon anticipation, and, secondly, that the receipts alone of the daughters shall be a sufficient discharge to the trustees. I find myself unable to see how those matters can affect the question whether the estate was given to the daughters as tenants in common or not. Then the will goes on: "I direct my trustees so soon as may be after the death of the last surviving of my said daughters to sell and convert into money the whole of my said 'trust estate' . . . and I direct that my trustees shall stand possessed of the proceeds to arise from such sale and conversion upon trust to divide and pay the same equally between all my grandchildren being the children of my said two daughters." Stopping there, it would be exactly like *Pearce* v. *Edmeades* (1). But the will did not stop there; it went on: "Each of my said daughters' shares going to her own children only." That is treating the shares of the daughters as independent halves which they held independently of one another, and providing that the share of each of his daughters is to go to her children only. There is nothing more in the will to control the *primâ facie* meaning of the words. There is, it is true, a gift of residue "unto my two daughters . . . in equal shares and proportions for their own use absolutely free from the debts and control of their respective husbands," with an alternative gift if the daughters or either of them should die before the testator. But that only confirms the view that the testator intended his property to be divided into two halves for all purposes. It however does not throw much light one way or the other.

(1) 3 Y. & C. (Ex.), 246.

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The case of *Pearce* v. *Edmeades* (1) laid down exactly the same principle that had been laid down by Lord *Thurlow* in *Armstrong* v. *Eldridge* (2). But is said that some subsequent cases are inconsistent with this view. All those cases turn upon the particular words of particular wills. The case apparently most against the respondents is *Cranswick* v. *Pearson* (3), decided by the Court of Appeal in Chancery in 1863. But in that case the learned Judges expressly rested their decision upon the particular words of the will, and did not profess to lay down any rule of construction. The last case before the Court of Appeal on the subject is *Bryan* v. *Twigg* (4) before *Sir John Rolt* L.J., a most eminent Judge. In that case the learned Lord Justice dealt with the argument that it is material to see whether there is a gift over in order to determine whether words *primâ facie* importing a tenancy in common must receive a contrary construction. He said (5):—In some cases, where a gift of income to a class has been followed by words referring to survivorship, the Courts have shown an inclination to construe the gift as creating a joint tenancy, or a tenancy in common with benefit of survivorship; but it is important to observe, that in many of the authorities the duration of the annuity was one of the points to be decided, and I think that where the duration of the annuity is not clearly defined a gift over on the death of the survivor is material, but is immaterial where the duration of the annuity has already been distinctly marked out as extending till the death of the survivor."

In the present case the duration of the trust of the income is expressly defined to be "during the lives of my two daughters . . . . and the survivor of them." Then follow the words which *primâ facie*, and if uncontrolled, would give the daughters a tenancy in common. Those words are "to pay the same to my said two daughters in equal shares during their respective lives and the life of the survivor of them." The words "in equal shares" import a tenancy in common, and there is nothing in the other words to cut down that construction. For these reasons we have come to the conclusion that the construction put on the will by the learned Judge of the Supreme Court is consistent

(1) 3 Y. & C. (Ex.), 246.
(2) 3 Bro. C.C., 215.
(3) 9 L.T., 275.
(4) L.R. 3 Ch., 183.
(5) L.R. 3 Ch., 183, at p. 185.

with all the cases, and that the appeal should be dismissed. The case of *Chatfield* v. *Berchtoldt* (1) cited by Mr. Mackey in which *James* V.C. applied the principle of *Bryan* v. *Twigg* (2), appears to be absolutely indistinguishable from the present case.

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As to costs we think that the appellant and respondents should each pay their own costs. Those of the trustees as between solicitor and client should be paid in the same manner and out of the same fund as was directed in the order of the learned Judge of the Supreme Court.

Appeal dismissed.

Solicitors, for appellant, *Major & Armstrong*, Melbourne.

Solicitors, for respondents, *Gibbs, Heales & Davidson*, Melbourne; *Braham & Pirani*, Melbourne.

B. L.

Appx Burns, Re Ex parte National Mutual Life Assoc v Burns (1992) 117 ALR 174

[HIGH COURT OF AUSTRALIA.]

CANNING . . . . . APPELLANT;
PLAINTIFF,

AND

TEMBY AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1905. PERTH, *Oct.* 18, 19, 26. Griffith C.J., Barton and O'Connor JJ.

Contract—Sale of land — Performance — Reasonable time — Breach — Concurrent conditions—Payment on transfer and delivery of title deeds—Waiver.

On 19th August, 1902, the appellant made the following offer:—" . . . I hereby place under offer to J. T. 'Canning Park West' freehold property, title under Land Transfer Act . . . at £10 per acre." This offer was accepted by T., who further stipulated in his acceptance that payment was to be made on delivery of title deeds and transfer. Before the appellant

(1) 18 W.R., 387. (2) L.R. 3 Ch., 183.