[HIGH COURT OF AUSTRALIA.]

LUCAS . . . . . APPELLANT;
DEFENDANT,

AND

HAWKES AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 24.

Knox C.J., Isaacs and Rich JJ.

Will—Construction—Gift of income of fund to children until death of last survivor—Substitution of children of deceased child—Limitation of interest of such children.

A testator by his will gave a fund to his trustees upon trust to divide the income among all his children in equal shares, and in the case of any child (not being the last surviving child) who should die leaving issue his trustees were to hold the respective share of the income to which such child would have been entitled, if living, in trust for the maintenance and education or otherwise in the discretion of the trustees to be appropriated for the benefit of his grandchildren issue of such child so dying as tenants in common. He further declared that as soon as all his children should be dead his trustees should realize the fund and hold it upon trust for the issue then living of his children who being sons had attained or should attain the age of twenty-one years or being a daughter had attained or should attain that age or had married or should marry under that age as tenants in common, in a course of distribution according to stocks and not to the number of individual objects. There was a gift over in the case of there being no issue living at the period of distribution.

Held, that on the death of a child of the testator and until the death of the last surviving child of the testator the children of such first-mentioned child took a life interest only in the income of the fund, and that on the death of one of the children of a deceased child of the testator the share of the income that would have been payable to him or her became payable to the personal representative of his or her parent.

Decision of the Supreme Court of South Australia (*Murray* C.J.) affirmed.

APPEAL from the Supreme Court of South Australia.

Thomas Matthews, who died on 2nd September 1867, by his will dated 17th October 1865, after making certain bequests to six of his seven children, gave, devised and bequeathed to his trustees all his real and personal estate. He directed that until all his children should be dead his real estate should be leased, and the rents and profits be held upon the trusts declared concerning the income of that part of his estate designated by the name of his "trust fund." His "trust fund" was constituted of his personal estate, and he directed that it should be invested until all his children were dead, and that the trustees should stand possessed of the interest to arise therefrom "upon trust to divide the said interest among all my children in equal shares but subject to the trusts following namely As to the yearly income of each child of mine being a son accruing due in his lifetime upon trust to pay to him so much of the same yearly income as would not although the same were payable to him be by his act or default or by operation of law so disposed of as to prevent his personal enjoyment thereof and to apply so much thereof as would if the same were payable to him be disposed of as last aforesaid for the benefit of his wife children or other issue for the time being in existence or some one or more of the persons who would be his next of kin in such proportions at such times and in such manner as my said trustees shall in their discretion think fit And as to the yearly income of each child of mine being a daughter accruing due in her lifetime upon trust for such daughter during her life and during any and every coverture of my said daughter to pay the same yearly income as and when the same shall become due and not by way of anticipation into her own hands for her separate use independently of her husband and for which yearly income her receipts shall be discharges to my trustees I declare that when and so soon as any or either of my children shall die leaving lawful issue (such not being the last surviving child of mine) that my said trustees shall hold the respective share or shares of such rents and interest as aforesaid to which such child or children of mine would have been entitled if living in trust for the maintenance and education or otherwise in the discretion of my said trustees to be appropriated for the

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benefit of my respective grandchildren issue of such child or children so dying as aforesaid as tenants in common." The testator then directed that when and as soon as all of his children should be dead the trustees should call in the investments and sell so much of his trust estate as should be saleable and should hold the proceeds "upon trust for such of the issue then living of any child or children of mine who being a son or sons have attained or who shall attain the age of twenty-one years or being a daughter or daughters have attained or shall attain that age or have been or shall be married as tenants in common in a course of distribution according to the stocks and not to the number of individual objects the issue of deceased children taking by substitution as tenants in common the respective shares only which their deceased parent would if living have taken." There then followed a gift over in the event of there being no child or children issue of any or either of the testator's children living at the period of distribution.

The testator left him surviving seven children, all of whom married and had children. Four of them subsequently died, including Lady Harriet Morgan and Mrs. Joan Kernot. Lady Morgan had nine children, of whom one died before the testator; two survived him and died during the lifetime of their mother; one, born after the testator's death, died before his mother; one, Alice Stilling Morgan, survived both the testator and her mother and then died; one, Mary Harriet Fowler, born after the death of the testator, died after her mother's death; and the remaining three, Laura Emily Waterhouse, Edward Ranembe Morgan and Alexander Matheson Morgan, born after the testator's death, were still living. Mrs. Kernot had six children—one, Herbert Charles, survived the testator and died in the lifetime of his mother; another, Rhoda Harriet Hawkes, survived both the testator and her mother and then died; the remaining four, Lavinia Mary Matthews and Hurd Matthews Kernot, who were born before the testator's death, and Thomas John James Kernot and Ellis Edwin Kernot, who were born after his death, were still living.

An originating summons was taken out by Herbert Lancelot Hawkes and Hurd Matthews Kernot, the trustees of the estate, for the determination of the questions in what manner the shares

of Lady Morgan and Mrs. Kernot in the rents and interest derived from the testator's trust estate during the life of the last survivor of his children became distributable on the respective deaths of Lady Morgan and Mrs. Kernot, and particularly what became of the shares of Alice Stilling Morgan, Mary Harriet Fowler and Rhoda Harriet Hawkes upon their respective deaths.

The summons was heard by *Murray* C.J., who held that the gift to each of the children of the testator was absolute, except so far as it was cut down by the gift to the children of that child, and extended to the whole of the share of the rents and interest until the last surviving child of the testator should be dead; and that the gift to each grandchild of the testator, being for the maintenance and education or otherwise in the discretion of the trustees for the benefit of such grandchild, was a gift for life only. He therefore declared (1) that upon the respective deaths of Mrs. Kernot and Lady Morgan and during the remainder of the life of the last survivor of the children of the testator the respective one-seventh shares in the annual rents and interests derived from the trust estate of the testator and previously payable under his will to the said Mrs. Kernot and Lady Morgan respectively became applicable for the benefit of their respective children then living during their respective lives in equal shares as tenants in common; and (2) that on the deaths of Rhoda Harriet Hawkes, Alice Stilling Morgan and Mary Harriet Fowler their respective shares in such annual rents and interests remained to the personal representatives of their respective mothers.

From that decision Bessie Elaine Lucas, who was a daughter of Rhoda Harriet Hawkes and who represented the grandchildren of the testator, now appealed to the High Court.

O'Halloran, for the appellant. The gift to the children of the testator, although absolute in form, is cut down by the words of the gift to his grandchildren to a gift for life, and on the death of a child of the testator his children would take a share of the income until the death of the last surviving child of the testator. Where therefore a child of a deceased child of the testator died, his share of the income would go to his personal representatives. Alternatively, his share would be divided among his brothers and sisters equally.

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The word " grandchildren " in the will should be construed as meaning " issue." [Counsel referred to *Lassence* v. *Tierney* (1) ; *Mitchison* v. *Buckton* (2) ; *Wyth* v. *Blackman* (3) ; *Earl of Orford* v. *Churchill* (4) ; *Scawin* v. *Watson* (5) ; *Williams on Executors*, 10th ed., p. 859.]

[KNOX C.J. referred to *Frazer* v. *Frazer* (6) ; *Kellett* v. *Kellett* (7).

[ISAACS J. referred to *In re Hancock* ; *Watson* v. *Watson* (8).

[RICH J. referred to *In re Harrison* ; *Hunter* v. *Bush* (9).]

Von Doussa, for the respondent trustees, submitted to any order the Court might make.

The judgment of the COURT, which was delivered by KNOX C.J., was as follows :—

After hearing the arguments in this case, in which Mr. *O'Halloran* has put before us everything that can be said, we are all of opinion that the judgment of *Murray* C.J. was correct, for the reasons which he gave. We think, therefore, that the appeal should be dismissed. In view of the fact that the appeal is a friendly one and by arrangement, we order that the costs of all parties as between solicitor and client be paid out of the estate.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitor for the appellant, *T. S. O'Halloran*.

Solicitor for the respondents, *L. von Doussa*.

B. L.

(1) 1 Mac. & G., 551.
(2) 32 L.T., 11.
(3) 1 Ves. Sen., 196.
(4) 3 V. & B., 59, at p. 68.
(5) 10 Beav., 200.
(6) 1 S.R. (N.S.W.) (Eq.), 247.
(7) L.R. 3 H.L., 160.
(8) (1901) 1 Ch., 482, at p. 498 ; (1902) A.C., 14, at p. 22.
(9) (1918) 2 Ch., 59.