PRIVY COUNCIL. 1930. SHELL CO. OF AUSTRALIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Courts created by the Parliament under sec. 71 of the Constitution, with other than a life tenure of their office.

It is not necessary to consider the various other points which emerged during argument. Counsel for the appellants, at the Bar, finally accepted the position that if the Board of Review was validly constituted, or, in other words, if it is an executive as distinguished from a judicial tribunal, the judgment of the High Court of Australia must stand. Their Lordships have arrived at the conclusion that the Board of Review is an administrative as distinguished from a judicial tribunal, and in these circumstances will humbly advise His Majesty to dismiss this appeal, with costs.

Foll *Collins* v *Equity Trustees Executors & Agency Co Ltd* [1997] 2 VR 166

Appl *Bassett* v *Bassett* (2003) 58 NSWLR 258

[HIGH COURT OF AUSTRALIA.]

TOMPKINS . . . . . APPELLANT;

RESPONDENT,

AND

SIMMONS AND OTHERS . . . . . RESPONDENTS.

APPLICANTS AND RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1931. HOBART, *Feb.* 9. SYDNEY, *April* 1. Gavan Duffy C.J., Starke, Dixon, Evatt, and McTiernan JJ.

Will—Construction—Class or individual gifts—Revocation by codicil—Acceleration of future interests—Intestacy.

A testator by his will directed that the proceeds of his residuary personal and real estate should form a trust fund the income of which he bequeathed to his wife for life. He directed that after his wife's death his trustees should "stand possessed of my trust fund and any accumulations thereof and pay and divide the income thereof equally to and among all my children of whom there are six" (Margaret, Edward, Mary, Henry, Emily and Hilda); but he further directed his trustees to hold such income upon trust to pay the whole or a portion of it to "the said child or children" or retain and expend the whole or portion of it for the maintenance and support of "such child or

children." And immediately after the decease of any one or more of his sons or daughters the testator directed his trustees to stand possessed of "the one sixth part or parts" of the trust fund together with "the sixth part or parts" of the unapplied income thereof upon trust to pay and divide the same equally among such child's children who should attain the age of twenty-one years or being daughters marry. And if any of the testator's children should die without leaving children, then, he directed that "the share of the trust fund of that son or daughter shall revert to and become again part of my trust fund and be utilized for and by the survivors as previously directed." By a codicil the testator revoked the interest in the income bequeathed by the will to his daughter Margaret, but, as decided by *Crisp* J., did not revoke the limitation in favour of her children.

Held, by *Gavan Duffy* C.J., *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that the effect of the material provisions of the will was to create six undivided shares in the trust fund, and to limit each of them to one of the respective named children of the testator for life and after his or her death to his or her children who should attain twenty-one or being daughters marry, with an accruer in default of such children; and that there was no intestacy of the revoked share of income, but the gift of corpus to Margaret's children was accelerated, and, subject to such children attaining twenty-one or being daughters marrying, took effect immediately upon the death of the testator's widow.

Decision of the Supreme Court of Tasmania (*Crisp* J.) reversed.

By his will dated 21st September 1895 Edward Michael Fisher devised all his real estate and bequeathed all his personal estate unto trustees upon trust to permit his wife Emily Jane Fisher to use certain household goods and stock during her life and after her death to divide the same equally among his children. The testator directed his trustees to collect and get in his personal estate and invest the proceeds of such collection as therein mentioned and stand possessed of the investments and the income thereof upon trust as part of his trust fund. He also directed that after the death of his wife his real estate should be sold, and the proceeds of such sale should sink into and form part of his trust fund. The testator bequeathed the income of his trust fund to his wife for life. Clauses 15 and 16 of the will were as follows:—"15. Immediately after the decease of my said wife I direct my trustees shall stand possessed of my trust fund and any accumulations thereof and pay and divide the income thereof equally to and among all my children of whom there are six (Margaret Charlotte wife of W. T. Bray;

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Edward Robinson Fisher; Mary Helena Burton Fisher; Henry Robinson Fisher; Emily Mabel Fisher and Hilda Arnott Fisher) but with reference to the income directed to be paid by my said trustees to my child or children I direct my said trustees to hold the said income upon trust in their absolute and sole discretion to pay the whole of such income or a portion thereof only to the said child or children or to retain the whole of such income and expend it in their discretion for the maintenance and support of such child or children. 16. And immediately after the decease of any one or more of my sons or daughters I direct my said trustees to stand possessed of the one sixth part or parts of my trust fund (as the case may be) together with the sixth part or parts of the 'unapplied income' thereof (if any) upon trust to pay and divide the same equally among the children of any such one or more of my deceased sons or daughters who shall live to attain the age of twenty-one years or being daughters marry before that age as and when such children shall respectively attain that age or being daughters marry before that age And if any one or more of my sons or daughters should die unmarried or being married die without leaving children then the share of the trust fund of that son or daughter shall revert to and become again part of my trust fund and be utilized for and by the survivors as previously directed." On 2nd April 1902 the testator made the following codicil to his will:—"I revoke that portion of my will which directs that my daughter Margaret Charlotte (wife of W. T. Bray) is to share equally with my other children as named in such will and instead thereof I direct my trustees to release the indebtedness to me of the said Margaret Charlotte Bray as shown in my ledger at the time of my death not exceeding five hundred pounds in all Also that my trustees shall continue to hold the policies on her husband's life (which are now in my possession and upon which I am paying and have paid the premiums for some years past) for the benefit of the said Margaret Charlotte Bray and further to continue the payment of the premiums on the life policies out of the income of my estate deducting same when the policy or policies fall in. I make this stipulation that the benefit Margaret Charlotte Bray is to derive from this codicil is to be of no effect if she causes trouble to my executors or trustees

in the administration of my estate ; I wish to make it clear that Margaret Charlotte Bray takes no interest under my will except as expressed in this codicil and that my will shall be read and construed as altered by this codicil and the first codicil thereto but in all other respects I confirm the same."

The testator died on 7th September 1902 leaving him surviving his six children above named, Margaret Charlotte Bray, Edward Robinson Fisher, Mary Helena Burton Fisher, Henry Robinson Fisher, Emily Mabel Fisher and Hilda Arnott Fisher, and his wife Emily Jane Fisher. Mary Helena Burton Fisher died on 8th May 1903 without having married. Emily Jane Fisher, the testator's widow, died on 20th October 1929.

The trustees applied to the Supreme Court of Tasmania by way of originating summons for the determination of the following questions :—

(1) Under the trusts of the will and codicils, into how many shares is the trust fund divisible, and what persons are entitled to each share and in what proportions respectively ?

(2) If the children of Margaret Charlotte Bray are entitled to a share of the trust fund, what person or persons are entitled to the income of such share during the life of the said Margaret Charlotte Bray ?

Crisp J. decided that the gift of the income to the testator's six children was a gift to them as individuals and not as a class ; that the limitation in favour of Mrs. Bray's children after her death was not revoked by the codicil, and that under that Mrs. Bray's children's interests did not fall into possession until her death and were not accelerated, but that in the meantime the income of Mrs. Bray's revoked share was undisposed of and went to the next-of-kin as on an intestacy. His Honor made an order declaring " that upon the true construction of the will and codicils as above mentioned Mary Helena Burton Fisher having died unmarried the trust fund under the said will and codicils of the said Edward Michael Fisher deceased has become and is (subject nevertheless to the happening at any future time of any such contingency as is last mentioned in paragraph 16 of the said will) divisible into five shares And that to one of such shares subject as aforesaid the children of the said

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Margaret Charlotte Bray who have hitherto attained the age of twenty-one years or being daughters married and such of the said children as shall hereafter attain that age or being daughters marry are entitled as tenants in common in equal shares in remainder expectant on the death of the said Margaret Charlotte Bray And that during the life of the said Margaret Charlotte Bray there is an intestacy as to the income derived from the said one fifth share."

From so much of that order as declared that during the lifetime of Margaret Charlotte Bray there was an intestacy as to the income of that one fifth share, the appellant Tompkins now appealed to the High Court.

R. C. Wright, for the appellant. It is basic to my contention that the interests of the Bray children are vested on attaining twenty-one or previous marriage. "Without leaving children" means without having had children who attained a vested interest (*In re Cobbold* (1); *Hawkins* on *Wills*, 2nd ed., pp. 260-261). The interests of the Bray children by the will limited to take effect in possession on the death of Margaret Charlotte Bray were accelerated by the revocation by the codicil of the interest of the life tenant Margaret Charlotte Bray. The interests of the testator's children in the income are separate interests.

[EVATT J. The testator referred to "*the* one sixth part" in clause 16.]

[Counsel referred to *Jarman* on *Wills*, 6th ed., pp. 718 *et seq.*; *Theobold* on *Wills*, 8th ed., p. 885; *Halsbury's Laws of England*, vol. XXVIII., p. 605; *Lainson* v. *Lainson* (2); *Eavestaff* v. *Austin* (3); *In re Love*; *Green* v. *Tribe* (4); *Re Johnson*; *Danily* v. *Johnson* (5); *In re Whitehorne*; *Whitehorne* v. *Best* (6); *In re Conyngham*; *Conyngham* v. *Conyngham* (7); *In re Brooke*; *Brooke* v. *Dickson* (8); *Jull* v. *Jacobs* (9); *Burke* v. *Burke* (10).]

(1) (1903) 2 Ch. 299.
(2) (1853) 18 Beav. 1; 52 E.R. 1; on app. (1854) 5 DeG. M. & G. 754; 43 E.R. 1063.
(3) (1854) 19 Beav. 591; 52 E.R. 480.
(4) (1878) 47 L.J. Ch. 783.
(5) (1893) 68 L.T. 20.
(6) (1906) 2 Ch. 121.
(7) (1921) 1 Ch. 491.
(8) (1923) 2 Ch. 265.
(9) (1876) 3 Ch. D. 703.
(10) (1899) 18 N.Z.L.R. 216.

L. L. Dobson, for the respondent Margaret Charlotte Bray. Acceleration is not in accordance with the testator's intention. None of the cases cited refer to a gift of residue. [Counsel referred to *Ramsay* v. *Shelmerdine* (1).]

[DIXON J. referred to *In re Dunster*: *Brown* v. *Heywood* (2).]

A. N. Lewis, for the respondents Henry Robinson Fisher, Henry Clement Fisher and Cyril John Fisher did not argue.

W. F. Hinman, for the trustees of the will.

R. C. Wright, in reply. Clause 15 of the will primarily directs a division of the income, and the latter part of that clause deals with equal one sixth shares so divided. This is apparent from the use of the singular "child" in clause 15, from clause 16 of the will, where the testator refers to "*the* one sixth part of the trust fund" and from the accruer clause, which uses the expression "*the* share of the trust fund of that son or daughter." [Counsel also referred to *In re Crothers' Trusts* (3).]

Cur. adv. vult.

April 1.

The following written judgments were delivered :—

GAVAN DUFFY C.J. In this case I think that the appeal should be allowed, and I concur in the form of order proposed by my brother *Dixon*.

STARKE J. The declaration of *Crisp* J. that, during the life of Margaret Charlotte Bray there is an intestacy as to the income from one fifth share of the trust fund mentioned in the will of the testator, cannot be supported. In my opinion that income goes to the children of the testator other than Margaret Charlotte Bray entitled to income from the trust fund pursuant to clause 15 of the will.

"When there is a gift to a class, the revocation of the gift to one of the members of the class does not cause a lapse, but the whole goes to the other members of the class" (*Theobald* on *Wills*, 8th ed., p. 882). And "when there is a gift to a number of persons who

(1) (1865) L.R. 1 Eq. 129.
(2) (1909) 1 Ch. 103.
(3) (1915) 1 Ir. 53.

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are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, and so you can see that he intended that if one or more of that body died in his lifetime the survivors should take the gift between them, there is nothing to prevent your giving effect to the wishes of the testator" (*Kingsbury* v. *Walter* (1)). Taken by itself, clause 15 of the will answers to this test. The gift is "to and among all my children," and then is added: "of whom there are six" (naming them). Further, a discretionary trust follows, which, in my opinion, enables the trustees to apply the income of the aggregate fund for the maintenance and support of the children as a body and not as individuals. But it is said that these plain provisions are overridden by clause 16. That clause, however, provides for the separation of the trust fund upon the death of any one or more of testator's children. It does not speak of the share or shares of the child or children in the trust fund, but of "one sixth part or parts of my trust fund" and of "the 'unapplied income' thereof." Consequently, in my opinion, there is, in the present case, a gift to a class, and the revocation of the gift to one member of that class does not cause a lapse.

If the gift be not to a class, but to a number of persons *nominatim* as tenants in common, the mere revocation by codicil of a share of one of those persons would no doubt cause a lapse. Yet slight indications are sufficient to show that this is not the intention (*Creswell* v. *Cheslyn* (2); *Sykes* v. *Sykes* (3); *In re Donaldson*; *Watson* v. *Donaldson* (4); *In re Whiting*; *Ormond* v. *De Launay* (5); *Wilkins* v. *Wilkins* (6); *In the Will of Gibson* (7); *In re Bayer* (8); *Jarman* on *Wills*, 7th ed., vol. II., p. 1019).*

In the case now before us, the testator created a trust fund consisting in the main of his residuary real and personal estate.

(1) (1901) A.C. 187, at p. 191.
(2) (1762) 2 Ed. 123; 3 Br. P.C. 246; 24 E.R. 843.
(3) (1867) L.R. 4 Eq. 200; L.R. 3 Ch. 301.
(4) (1915) 1 Ir. 63.
(5) (1913) 2 Ch. 1.
(6) (1920) 2 Ch. 63.
(7) (1922) V.L.R. 165; 44 A.L.T. 63.
(8) (1928) S.A.S.R. 87.

*See also *In re Forrest*; *Carr* v. *Forrest*, (1931) 1 Ch. 162; 100 L.J. Ch. 122, and *In re Woods*; *Woods* v. *Creagh*, (1931) 2 Ch. 138.—*Ed. C.L.R.*

Clause 15 directs that immediately after the death of his wife his trustees "shall stand possessed of the trust fund . . . and pay and divide the income thereof equally to and among all my children of whom there are six" (Margaret Charlotte Bray, E. R. Fisher, M. H. B. Fisher, H. R. Fisher, E. M. Fisher, and H. A. Fisher). But by a second codicil to his will the testator makes the following provision:—"I revoke that portion of my will which directs that my daughter Margaret Charlotte (wife of W. T. Bray) is to share equally with my other children as named in such will, and instead thereof I direct my trustees to release the indebtedness to me of the said Margaret Charlotte Bray as shown in my ledger at the time of my death not exceeding five hundred pounds in all. Also that my trustees shall continue to hold the policies on her husband's life (which are now in my possession and upon which I am paying and have paid the premiums for some years past) for the benefit of the said Margaret Charlotte Bray and further to continue the payment of the premiums on the life policies out of the income of my estate deducting same when the policy or policies fall in. I make this stipulation that the benefit Margaret Charlotte Bray is to derive from this codicil is to be of no effect if she causes trouble to my executors or trustees in the administration of my estate; I wish to make it clear that Margaret Charlotte Bray takes no interest under my will except as expressed in this codicil and that my will shall be read and construed as altered by this codicil and the first codicil thereto but in all other respects I confirm the same."

Clearly, the testator intended to exclude Margaret Charlotte Bray from participation in the income from the trust fund and to give her other benefits in its place. And it is equally clear, I think, that the result of this exclusion was not to leave the share of the income which Margaret Charlotte Bray would, but for the codicil, have taken, undisposed of. To whom, then, did the testator intend this income to go? That intention can only be gathered from the words of the will and codicil and the surrounding circumstances. Was the income of which Margaret Charlotte Bray was deprived to go over to her children? That would be a strange result, and, in my opinion, the words of the codicil afford strong indications of a contrary intention. Margaret Charlotte's name was, in effect,

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taken out of the list of beneficiaries under the will, and she was given other benefits "instead thereof." But the gift in the will was to stand excluding only her name from the beneficiaries taking under that gift. Consequently, in this view also, the income in question goes to the children of the testator other than Margaret Charlotte Bray entitled to the income from the trust fund pursuant to clause 15 of the will.

DIXON J. By his will the testator blended in a trust fund the proceeds of his residuary real estate and of his residuary and certain other personal property, and after his widow's death limited the trust fund in succession, first to his children and afterwards to his grandchildren. These limitations are inartistically expressed and were, no doubt, imperfectly conceived. The general intention which they disclose is, (i.) to give to each of the testator's six children an equal share of the income of the trust fund during the child's life, subject to a discretionary power which the testator sought to give his trustees to withhold the whole or part of each share of income or to expend it in maintenance; and (ii.) after the death of each child to give a proportionate part of the trust fund to such of the deceased child's children as should attain twenty-one or, being a daughter, marry under that age as tenants in common in equal shares; and (iii.) in default of such children to direct an accrual of the deceased child's share. But it is left uncertain whether the testator intended that the undivided shares of his trust fund should be limited, respectively, to each of his six children for life and after a child's death to his or her children, or that the income of the whole trust fund should be divided among or applied for the benefit of all six children during their lives with an executory limitation upon the death of each child of a proportionate part of the corpus to the children of that child.

In the first alternative, each undivided share would be a separate interest limited to tenant for life and remainderman. In the second alternative separate interests in the corpus would only arise as and when each of the testator's children died, and in the meantime the whole income of the trust fund would be paid to, or applied for the benefit of, all the children as a class.

The testator made a codicil the provisions of which make it necessary to decide between these alternatives but do nothing to aid the decision. These provisions are expressed to revoke that portion of his will which directed that a married daughter named Margaret Charlotte Bray was to share equally with his other children. Mrs. Bray, who is living, has children who have attained twenty-one, and upon the death of the testator's widow, which lately occurred, it became desirable to ascertain whether the revocation of the share in the trust fund given by the will to Mrs. Bray extended to the limitation in favour of her children. If it did not so extend, questions would arise whether the interest so limited to them took effect in possession immediately upon the death of the testator's widow, or must await the dropping of Mrs. Bray's life; and, if this interest did not take effect in possession during the life of Mrs. Bray, whether in the meantime the income of the revoked share should be distributed among the testator's other children, or is undisposed of, and should be distributed among his next-of-kin as on an intestacy. The trustees issued an originating summons which came before *Crisp* J., who decided that the limitation in favour of Mrs. Bray's children after her death was not revoked by the provision in the codicil, that under that limitation her children's interest did not fall into possession until her death and was not accelerated and that in the meantime the income of Mrs. Bray's revoked share was not distributable among the testator's other children, but was undisposed of and went to the next-of-kin. The present appeal is brought from so much of this order as determines that the interest of Mrs. Bray's children did not take effect in possession upon the death of the testator's widow but that until Mrs. Bray's death there is an intestacy as to the income. There is no cross-appeal from so much of the order as determines that the limitations in favour of Mrs. Bray's children are unrevoked.

This determination is, therefore, not open for reconsideration in this Court, but must be accepted as a matter established by judicial decision. Doubtless the grounds upon which it was reached are those stated in and exemplified by *Alt* v. *Gregory* (1); *In re Whitehorne* (2). It depends primarily upon the interpretation placed upon the

(1) (1856) 8 DeG. M. & G. 221; 44 E.R. 375. (2) (1906) 2 Ch., at p. 126.

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codicil, and, although it is true that the revocation provision of that instrument cannot be applied to the will unless some view is formed as to the nature of the gifts contained in the will, yet the conclusion that Mrs. Bray's share of income alone is revoked involves no decision as to the meaning or effect of so much of the will as must govern the question raised by this appeal, namely, whether the limitation in favour of Mrs. Bray's children took effect in possession upon the death of the testator's widow, or must await the death of Mrs. Bray. This question the order of *Crisp* J. answers by describing the interest to which it declares the children of Mrs. Bray to be entitled as a share "in remainder expectant on the death of Margaret Charlotte Bray" and declaring "that during the life of the said Margaret Charlotte Bray there is an intestacy as to the income derived from the said . . . share." The appeal from this part of the order, in my opinion, requires this Court to decide whether the interest of Mrs. Bray's children is so expectant or took effect upon the death of the testator's widow, and in deciding that question the Court is not limited to the choice between the partial intestacy which *Crisp* J. has declared and the acceleration which the appellant claims for the grandchildren's interest.

There is a third view which remains open, namely, that the income of the trust fund was given to the testator's children as a class which was simply reduced in number by the revocation of Mrs. Bray's share with the result that the remaining members take the whole. Some of the language of the material provisions of the will supports this view. The trustees are directed to pay and divide the income of the trust fund equally to and among all the testator's children. If no more appeared, this would constitute a gift to the children of the testator by description, which upon the ordinary rule of construction means the children in existence at the testator's death. In the case of a gift to a class which answers a description express or implied upon some specified event or at a stated time, the exclusion of one member from the class operates merely to diminish the number who take the whole whether that exclusion arises from death, incapacity to take, or the revocation of the interest given (*Leigh* v. *Leigh* (1); *Fell* v. *Biddolph* (2)). The will proceeds

(1) (1854) 17 Beav. 605; 51 E.R. 1170.

(2) (1875) L.R. 10 C.P. 701, at pp. 707-709.

to describe the children as being six in number and to mention their names. A direct reference to specific individuals ordinarily suggests that they are to take as particular persons and not because they answer a description (*Bain* v. *Lescher* (1); *Burrell* v. *Baskerfield* (2); *Re Bentley*; *Podmore* v. *Smith* (3): compare *Kingsbury* v. *Walter* (4)). But in this case the number and names of the children are given in a relative clause, which might be treated as merely explaining what children there were when the will was made. Moreover, the attempt to confer a power upon the trustees to withhold income and to apply it for the maintenance and support of children irrespective of their minority, and the power to apply income for the maintenance and education and support of children during infancy, are each expressed in terms which fail to distinguish between the shares of the individuals who take. If the will contained no indications of a contrary intention these are considerations which might suffice to establish that the children took the income as a class. But, in my opinion, these considerations are overridden by particular references to the gift of income which appear to evince an intention to create undivided shares in the trust fund, and, in effect, to treat each such share as settled upon separate limitations. The will provides that immediately after the decease of any one or more of the testator's sons or daughters, the trustees are to stand possessed of the one sixth part or parts of the trust fund (as the case may be) together with the sixth part or parts of the unapplied income thereof (if any) upon trust to pay and divide the same equally among the children of any such one or more deceased sons or daughters who shall attain twenty-one or being daughters marry before that age. The reference to one sixth part or parts of the trust fund assumes that the earlier provisions of the will operate to create undivided parts of the trust fund and to allocate one to each of the testator's children. The reference to the unapplied income thereof indicates that the income which the trustees may withhold shall be the income of a particular share and not of a trust fund the shares in which are undefined and undiscriminated. In the accruer clause which is to take effect upon the death of any one or more of the testator's sons

(1) (1840) 11 Sim. 397; 59 E.R. 926.
(2) (1849) 11 Beav. 525; 50 E.R. 920.
(3) (1914) 110 L.T. 623.
(4) (1901) A.C., at pp. 192-194.

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or daughters unmarried, or being married without leaving children, the interest which in that event shall accrue to the surviving children is described as "the share of the trust fund of that son or daughter," and the will directs that it shall revert to and become again part of the trust fund and be utilized for and by the survivors as previously directed. The direction to divide the income of the trust fund is the dominant disposition, and that requires that it should be divided equally. The discretionary power to withhold the income and to apply income in maintenance are subordinate and naturally would be read subject to the paramount direction to divide the income equally. So read, these powers have a distributive application and relate to each share of income and not indiscriminately to the income of the whole trust fund. For these reasons, I think the effect of the material provisions of the will is to create six undivided shares in the trust fund, and to limit each of them to one of the respective named children of the testator for life and after his or her death to his or her children who should attain twenty-one or being daughters marry, with an accruer in default of such children. Upon such a disposition the revocation of the interest for life of one child of the testator cannot operate to increase the amount of the undivided shares of the others. In other words, it does not operate simply to diminish the membership of a class who share the whole. On the contrary, it destroys an interest for life in a separate although undivided share of the whole. But the destruction of such an interest for life does not cause an intestacy in respect of the interest, unless it is clear that the interest limited in succession to the life interest was to take effect only upon the specified event of the death of the life tenant and was not to fall into possession on the sooner determination of the life interest. In a limitation to a donee for life and after his death upon trust for his children, or some other donee, the reference to his death whether expressed by the words "upon," or "after his death," or "from and after his decease," or otherwise, may have one of two imports. It may mean that the second donee shall take nothing until the death of the first, or it may merely show the order of the limitations through which the estate or interest is to pass. It is well established that, prima

facie, these words are to be understood as denoting the order of succession of limitations. (See per *Turner* L.J., *Lainson* v. *Lainson* (1).)

In this case the limitation of the corpus of the trust fund is introduced by the words " and immediately after the decease of any one or more of my sons or daughters." There is nothing to rebut the prima facie rule that these words simply mark out the order of succession, and create an interest expectant upon the determination of the prior interest by whatever means that determination may be brought about. In such a case if the prior interest fail from the incapacity of the donee to take, as, for instance, if he attests the will, or if it be revoked, or for some other reason be abolished or abridged, the succeeding interest in the same property is accelerated and takes immediate effect in possession. The interpretation which I have adopted of the provisions of this will brings within the operation of the rule the undivided sixth interest the income of which is given by the will to Mrs. Bray for life and the corpus of which after her death is given to her children. In my opinion there is no intestacy as to the income of her revoked share, but the gift of corpus to her children is accelerated and subject to such children attaining twenty-one or being daughters marrying took effect immediately upon the death of the testator's widow.

I think the appeal should be allowed, and the order of *Crisp* J. should be varied by striking out the words " expectant on the death of the said Margaret Charlotte Bray and that during the life of the said Margaret Charlotte Bray there is an intestacy as to the income derived from the said one fifth share," and by substituting therefor the following: " expectant upon the interest in the income of the said trust fund limited by the will to the said Margaret Charlotte Bray for her life and that by reason of the revocation of such interest by the second codicil the share of such children was accelerated and took effect upon the death of the testator's widow Emily Jane Fisher." The costs of all parties of this appeal should be paid out of the fund, those of the trustees as between solicitor and client.

EVATT J. By his will the late Edward Michael Fisher directed the creation of a trust fund consisting in the main of his residuary

(1) (1854) 5 DeG. M. & G., at p. 756; 43 E.R., at p. 1064.

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personal estate and proceeds from the sale of his real estate, and made due provision for his widow during her life. He then provided as follows :—

15. Immediately after the decease of my said wife I direct my trustees shall stand possessed of my trust fund and any accumulations thereof and pay and divide the income thereof equally to and among all my children of whom there are six (Margaret Charlotte wife of W. T. Bray; Edward Robinson Fisher; Mary Helena Burton Fisher; Henry Robinson Fisher; Emily Mabel Fisher and Hilda Arnott Fisher) but with reference to the income directed to be paid by my said trustees to my child or children I direct my said trustees to hold the said income upon trust in their absolute and sole discretion to pay the whole of such income or a portion thereof only to the said child or children or to retain the whole of such income and expend it in their discretion for the maintenance and support of such child or children.

16. And immediately after the decease of any one or more of my sons or daughters I direct my said trustees to stand possessed of the one sixth part or parts of my trust fund (as the case may be) together with the sixth part or parts of the "unapplied income" thereof (if any) upon trust to pay and divide the same equally among the children of any such one or more of my deceased sons or daughters who shall live to attain the age of twenty-one years or being daughters marry before that age as and when such children shall respectively attain that age or being daughters marry before that age And if any one or more of my sons or daughters should die unmarried or being married die without leaving children then the share of the trust fund of that son or daughter shall revert to and become again part of my trust fund and be utilized for and by the survivors as previously directed.

In a codicil to his will the testator said :—

I revoke that portion of my will which directs that my daughter Margaret Charlotte (wife of W. T. Bray) is to share equally with my other children as named in such will and instead thereof I direct my trustees to release the indebtedness to me of the said Margaret Charlotte Bray as shown in my ledger at the time of my death not exceeding five hundred pounds in all.

The Supreme Court of Tasmania (*Crisp* J.) held

(1) That the gift to the testator's children was a gift to them as individuals and not as a class;

(2) That the revocation in the codicil relating to the testator's daughter Margaret Charlotte Bray affected her share of the income of the trust fund and was not intended to alter in any way the interest in the fund given to her children; and

(3) That there was an intestacy as to Mrs. Bray's share of the income of the fund, the interest of her children not taking any effect until her death.

I have reached the conclusion that the testator's object, as expressed in clauses 15 and 16 set out above, was to secure a segregation of the trust fund into six equal portions and, subject to the accrual clause in the last part of clause 16, to settle each segregated portion on each child for life with remainder to the children of each child respectively.

The alternative view is that the income of the trust fund was given to the testator's children as a class gift, and that, Mrs. Bray having been removed from the class by the codicil (other benefits having been given to her by way of compensation), her share of the income goes over to the other children of the testator making up the class.

The specific enumeration in clause 15 of the six children of the testator as the persons who are to take the income of the fund is not in itself inconsistent with the gift to the children as a class, and, undoubtedly, the discretion conferred upon the trustees in the latter portion of clause 15 is indicative of a class bequest. During argument I formed a tentative opinion that clause 16 resolves the difficulty, and after further consideration I am still of that opinion. That clause treats the trust fund as having been appropriated or converted to the use of each child during the lifetime of that child; the testator seems to regard six portions of the fund as being already in existence before the death of any of his children, each portion being devoted to a child and the family of that child. If the discretion of the trustees is exercised, and any child of the testator is not paid the full income appertaining to his or her share of the fund, this "unapplied income" is to be added to the corpus on the death of the child. Moreover, the last portion of clause 16 assumes that it is only upon the decease of a child of the testator that the one sixth portion of the fund intended for that child and its family is caught up and returned back into the fund. Unless and until any one of the sons or daughters of the testator dies unmarried, or, being married, dies without leaving

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children, the share is treated as already appropriated to that child for life and, after his or her death, to his or her family.

For these reasons I am of opinion that a class gift of the income of the trust fund was not the testator's scheme, and that the judgment of *Crisp* J. is correct in this respect.

But the result is not an intestacy as to the income of the Bray's family share of the fund during Mrs. Bray's lifetime. The share is to be treated as a settled share, and, unless there is something more to be inferred from the codicil than a mere revocation of the mother's share, the proper inference to draw is that the particular interest of the mother has merely been terminated by the codicil. As the interest of the Bray children in the Bray share of the fund is vested and not contingent, words such as those at the commencement of clause 16—" immediately after the decease of any one or more of my sons or daughters "—merely denote the order in which the successive limitations of the interest are to take effect (*In re Conyngham* (1)). And this result follows, whatever was the motive for the revocation, and in spite of the fact that the codicil substituted something else for Mrs. Bray's revoked interest.

In my opinion, therefore, there has been an acceleration of the interest of the Bray children, a declaration should be made to this effect, and the appeal allowed.

McTIERNAN J. I have read the judgment of my brother *Dixon*, and agree with his reasons, and the conclusion at which he has arrived. In my opinion the appeal should be allowed.

Appeal allowed. Order of Crisp J. varied by striking out the words " expectant on the death of the said Margaret Charlotte Bray, and that during the life of the said Margaret Charlotte Bray there is an intestacy as to income derived from the said one fifth share," and by substituting therefor the following: " expectant upon the determination of the interest in the income of the said trust fund limited by the will to the said Margaret Charlotte Bray for her life, and that by reason of the revocation of such interest by the second codicil to such

1) (1921) 1 Ch., at p. 498.

will the share of such children was accelerated, and upon the death of the testator's widow Emily Jane Fisher took effect as an interest in possession." The costs of all parties of this appeal to be paid out of the trust fund, the costs of the trustees to be taxed as between solicitor and client.

Solicitors for the appellant, *Tinning, Propsting & Masters*, for *A. Glen Roberts & Dawson*, Melbourne.

Solicitors for the respondents, *Dobson, Mitchell & Allport*; *Lewis, Hudspeth, Perkins & Dear*; *Simmons, Wolfhagen, Simmons & Walch.*

R. C. W.