[HIGH COURT OF AUSTRALIA.]

DUNCAN . . . . . APPELLANT;
DEFENDANT,

AND

EQUITY TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1958.

MELBOURNE, *May* 23, 26; SYDNEY, *Aug.* 14.

Dixon C.J., Fullagar and Taylor JJ.

Will—Construction—Gift of absolute interest to each beneficiary in his share in estate with trusts engrafted on interest—Failure of engrafted trusts—Accruer clause making specific provision on such failure—Whether rule in Lassence v. Tierney excluded—Nature of rule.

The rule in *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551 [41 E.R. 1379] or *Hancock* v. *Watson* (1902) A.C. 14 is no more than a rule of construction, the application of which may always be excluded by the terms of the will or deed in question. There can be no occasion for the application of the rule unless trusts are engrafted upon an antecedent gift absolute in the first instance and there is a failure of these trusts. Where, however, the will or deed provides in terms for what is to happen in the event of a failure of the engrafted trusts the operation of the rule is excluded. Thus the rule cannot prevent an accruer clause from taking effect according to its tenor.

Decision of the Supreme Court of Victoria (*Lowe* J.), reversed.

APPEAL from the Supreme Court of Victoria.

Alison May Duncan appealed to the High Court of Australia from a decision given by *Lowe* J. on 6th March 1958 answering questions raised by an originating summons wherein the Equity Trustees Executors and Agency Company Limited (as the surviving executor of the will of William James Woodmason, dec'd. and as administrator of the estate of Phyllis Ada Bell Woodmason, dec'd.) was plaintiff and Edna Elizabeth Bell Barrow, Winifred Jemima Bell Taylor and the appellant (as representing herself and all the

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children of William James Woodmason, dec'd., other than the other named defendants, and all the grandchildren and remoter issue of the deceased who were or might become entitled to any interest in his residuary estate) were defendants.

The facts and the material provisions of the will in question appear in the judgment below.

F. Maxwell Bradshaw, for the appellant.

L. Voumard Q.C. and *S. Hulme*, for the respondent, the Equity Trustees Executors and Agency Co. Ltd.

C. I. Menhennitt Q.C. and *H. R. Newton*, for the respondents Barrow and Taylor.

Cur. adv. vult.

Aug. 14.

THE COURT delivered the following written judgment:—

This is an appeal from an order made by *Lowe* J. in chambers on an originating summons relating to the construction of the will of William James Woodmason deceased. The will was made on 13th July 1937, and the testator died on 5th July 1940. The testator devised and bequeathed his residuary estate to his trustees upon trust, subject to certain trusts for the maintenance and education of three grandchildren, to pay the income arising therefrom to his wife for life. The question which has arisen relates to those provisions of the will which are to take effect after the death of the wife, who died on 4th April 1957. Three of the twenty-three numbered clauses, into which the will is divided, are material, and it is desirable to set these out in full.

Clause 13 provides:—"I DECLARE that my trustees shall after the death of my said wife divide my trust estate into sixteen equal shares and shall hold such respective shares upon the trusts hereinafter declared concerning the same, that is to say:—(a) As to twelve equal shares in trust for my daughters Ruby Doris Bell Sturgis, Aileen May Bell Allatt, Ilma Claudine Bell Lankaster, Edna Elizabeth Bell Hutchinson, Winifred Jemima Bell Woodmason and Phyllis Ada Bell Woodmason in equal shares as tenants in common. (b) As to another three equal shares in trust for my grandchildren the said William Robson Woodmason and David Ian Woodmason in equal shares as tenants in common and if either of them shall predecease me the share of the one so predeceasing me shall be held in trust for the other of them and as to the remaining one equal

share in trust for my granddaughter the said Alison May Woodmason and if she shall predecease me then to hold her share in trust for the said William Robson Woodmason and David Ian Woodmason in equal shares as tenants in common but if either of them the said William Robson Woodmason and David Ian Woodmason shall predecease me to hold such share for such of them as shall survive me."

Clause 14 provides :—" I DECLARE that my trustees shall retain the share of each of my daughters in my trust estate upon the trusts following that is to say :—UPON TRUST to pay the income thereof to my same daughter for her life and after her death in trust for such child children or remoter issue of my said daughter (such remoter issue being born in her lifetime) in such shares (if more than one) and in such manner as she shall by deed (revocable or irrevocable) or by will or codicil appoint And in default of and subject to such appointment in trust for all the children of such daughter who being sons attain the age of twenty-one years or being daughters attain that age or marry in equal shares and if there shall be only one such child the whole to be in trust for that one child but so that no child who or any of whose issue shall take any share under such appointment shall take any share of the unappointed part of the share of any such daughter without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly unless my said daughter making such appointment shall thereby direct to the contrary AND I DECLARE that if any daughter of mine shall die in my lifetime leaving a child or children who being male attain the age of twenty-one years or being female shall attain that age or marry then and in every such case the last mentioned child or children shall take and if more than one equally between them the share to which his her or their parent would have been entitled in my trust estate if such parent had survived me and attained a vested interest therein including any share or shares which may have accrued to such parent under the trusts or provisions contained in this my Will."

Clause 18 provides :—" I DECLARE that if any share or disposition in or of my trust estate shall fail or lapse or in the event be undisposed of or if any of the trusts hereinbefore declared concerning any share in my trust estate shall fail or determine any such share as well as any share accruing or added thereto by virtue of this clause and the income thereof or so much thereof respectively as shall not have been applied or disposed of under the trusts or powers herein contained or by law vested in my trustees shall go

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and accrue by way of addition to the other share or shares in my trust estate and if more than one in equal shares and proportions and every such accruing share shall be held upon the trusts and subject to the powers and provisions in this my Will declared and contained concerning the original share or shares to which the same shall be added or as near thereto as circumstances will admit."

The testator had one son, William, who died before the date of the will, leaving three children, who are the grandchildren named in cl. 13 (b) of the will. One of these is the appellant, Alison May Duncan. He had six daughters—Ruby, Aileen, Ilma, Edna, Winifred and Phyllis—all of whom survived him. Phyllis died on 27th June 1943, unmarried and intestate. The other five daughters are still living. Ruby, Aileen and Ilma are married, and each of them has children, all of whom have attained the age of twenty-one years. Edna and Winifred have each been married twice, but neither of them has had any children. The question in the case is as to the destination of Phyllis's share on her death. Does it devolve as part of her estate under her intestacy ? Or does it accrue to and among the other shares in the manner provided by cl. 18 of the testator's will ? The testator left a large estate, and to the appellant, Alison May Duncan, the answer to these questions will make a difference of more than the amount which gives an appeal as of right to this Court. The decision of *Lowe* J. was that Phyllis's share devolved as part of her estate under her intestacy. His Honour thought that the will gave to Phyllis in the first place an absolute interest in her share, that trusts were engrafted on that interest which had failed through her death without children, and that what is alternatively called the rule in *Lassence* v. *Tierney* (1) or the rule in *Hancock* v. *Watson* (2) applied, with the result that the original absolute interest stood and devolved as part of her estate on her death. He also held that there had been no failure or determination of a trust within the meaning of cl. 18 of the will. He said :—" The trust has not failed or determined because the principle just referred to " (*sc.* the principle of *Hancock* v. *Watson* (2)) " preserves it ".

It is quite clear that, if cll. 13 and 14 of the will stood alone, the case would be one for the application of *Hancock* v. *Watson* (2). No one has suggested the contrary. If we look at those two clauses alone, the case falls precisely within the well-known statement of the rule by Lord *Davey* in *Hancock* v. *Watson* (3) itself.

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(2) (1902) A.C. 14.
(3) (1902) A.C., at p. 22.

It is, however, equally clear to our minds that in the present case the rule in *Hancock* v. *Watson* (1) is expressly excluded by the plain words of cl. 18 of the will. It seems necessary to quote again the oft-quoted words of Lord *Davey*. His Lordship said :—" For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be (2) ". It is obviously involved in this statement that there can be no occasion for the application of the rule in *Hancock* v. *Watson* (1) unless trusts are engrafted on an antecedent gift to a donee, and there is a failure of those trusts. But this is the very event with which, in the present case, cl. 18 in terms deals. Trusts are engrafted on Phyllis's share in favour of Phyllis's children. When Phyllis died without having any children, there is a failure of those trusts, and cl. 18 provides that her share shall accrue to the other shares. Clause 18 is, as Mr. *Bradshaw* said, really part of the settlement of the shares.

It is to be noted that the learned judge from whom this appeal comes, after observing that the words used in cl. 18 are " fail or determine ", said : " We may put aside the question of ' failure ' of the trust. No one contends that the trust has failed ". He then proceeded to consider whether there had been a " determination " of a trust. Mr. *Bradshaw* assured us that he had not intended to convey to his Honour that he did not contend that there had been a failure of engrafted trusts, and we feel sure that there must have been some misapprehension or misunderstanding. As we have pointed out, the rule in *Hancock* v. *Watson* (1) could not apply if there had not been such a failure, and his Honour had already held that there had been such a failure. In other words, the very same event which, if cll. 13 and 14 had stood alone, would have attracted *Hancock* v. *Watson* (1), attracts, when the whole will is read, cl. 18.

It is, of course, to be remembered that, as *Fullagar* J. pointed out in *Russell* v. *Perpetual Trustee Co. (Ltd.)* (3), the rule in *Hancock* v. *Watson* (1) is no more than a rule of construction. In *Lassence* v. *Tierney* (4), itself Lord *Cottenham* said : " In every case the question must be one of construction " (5). It is always described as a rule of construction. Being no more than a rule of construction, it can always be excluded by a settlor or testator, and one of the ways in

(1) (1902) A.C. 14.
(2) (1902) A.C., at p. 22.
(3) (1956) 95 C.L.R. 389, at p. 402.
(4) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(5) (1849) 1 Mac. & G , at p. 562 [41 E.R., at p. 1383].

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which it can be excluded is by making express provision for what is to happen in the event of the failure of an engrafted trust. This is what the testator has done here. Clause 18, so far as we are here concerned with it, is expressed in the ordinary form of an accruer clause. Its opening words down to the words " in the event be undisposed of " may be thought inartistic, but the general intention of those words seems to be to include in the accruer provisions any share which would otherwise lapse. It is to be noted that at the end of cl. 14, where the testator is providing for the event of a daughter predeceasing him leaving children, he includes in the provision which he makes " any share or shares which may have accrued to such parent under the trusts or provisions contained in this my will ". The rest of cl. 18 is quite clear, and covers the present case. The word " fail " simply means " be incapable of taking effect ", and the words " or determine " add nothing that is material in the present case. The position is simply that the trusts for Phyllis's children have ceased to be capable of taking effect. It could hardly be said that those trusts had " determined ", because they had never begun to operate.

Brief mention should be made of four cases cited in the argument for the appellant. These are *In re Litt*; *Parry* v. *Cooper* (1); *In re Huntington's Settlement Trusts*; *Struthers* v. *Mayne* (2); *In re Burton's Settlement Trusts*; *Public Trustee* v. *Montefiore* (3) and *In re Atkinson's Will Trust* (4). In each of these cases there were gifts which, if there had been nothing else in the will, must, on the failure of engrafted trusts, have been held, in accordance with *Hancock* v. *Watson* (5) to take effect as an absolute gift. But there was also in each case an accruer clause in terms very similar to those of cl. 18 of the will in the present case. The actual decisions in these cases have no bearing on the present case, but what is noteworthy is that no question was ever raised in any of them as to the effectiveness of the accruer clause, in a case to which it in terms applied, to exclude the primary donee from taking an absolute interest. In other words, it was assumed—perfectly correctly, we would think, that the rule in *Hancock* v. *Watson* (5) could not prevent an accruer clause from taking effect according to its tenor. In *In re Atkinson's Will Trust* (4), *Upjohn* J. said:—" There are three matters which are not in controversy. The first is that the original gift to Constance and Emily respectively was absolute in terms, and that the trusts were engrafted on those absolute gifts, and it is,

(1) (1946) Ch. 154.
(2) (1949) Ch. 414.
(3) (1955) Ch. 348.
(4) (1957) Ch. 117.
(5) (1902) A.C. 14.

therefore, a typical *Lassence* v. *Tierney* (1) case. The second matter is that on the death of Emily the accruer clause operated on Emily's share and that Constance became entitled to the income thereof during her life" (2). The learned judge also said:—"There is clearly an original absolute gift to Emily and certain trusts are engrafted on it. In so far as those trusts fail, the original gift remains. Now, after her life interest, the only relevant trust was that the share was to go and accrue by way of addition 'to the other share in the said residuary moneys'" (3). The will in that case was exactly parallel to the will in the present case. The same assumption which was made in the four cases mentioned was made in *Fisher* v. *Wentworth* (4). The question which arose in that case might have arisen under Mr. Woodmason's will if all his daughters had died without having had children.

In cases where an accruer clause applies two questions often arise. The first is whether the accrued share is subject to the same trusts as the share or shares to which it accrues. The second, where, as here, the shares are not given equally among all the beneficiaries, is whether the accrued share accrues to the other shares equally or in the same proportion as the original shares. The testator here has answered both questions in cl. 18. He has made it clear that every accrued share is subject to the same trusts as the share or shares to which it accrues. He has also, we think, made it clear that an accrued share accrues equally among all the other shares. Under cl. 13 the estate is divided into sixteen shares. Phyllis had two of those sixteen shares. Those two shares must, in our opinion, be divided equally among the other fourteen shares. That is to say, her share does not accrue in the proportion of twelve-sixteenths, three-sixteenths and one-sixteenth, but in the proportion of ten-fourteenths (two to each of the surviving daughters) three fourteenths (three twenty-eighths to each of the two named male grandchildren) and one-fourteenth (to Alison May Duncan).

The appeal should be allowed. The order of *Lowe* J. should be discharged. In lieu thereof it should be ordered that the questions asked by the originating summons be answered:—(a) No. (b) The trustees hold the share of Phyllis Ada Bell Woodmason deceased upon trust as to ten-fourteenths thereof upon the same trusts as are declared by cl. 14 of the will with respect to the respective shares of the five surviving daughters of the testator: as to three-

(1) (1849) 1 Mac. & G. 551 [41 E.R. 1379].
(2) (1957) Ch., at pp. 122, 123.
(3) (1957) Ch., at p. 125.
(4) (1925) 36 C.L.R. 310.

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fourteenths thereof for William Robson Woodmason and David Ian Woodmason in equal shares absolutely : and as to the remaining one-fourteenth thereof in trust for Alison May Duncan absolutely.

Appeal allowed. Discharge so much of the order of Lowe J. as deals with Question 1 *in the originating summons and in lieu thereof declare that the said question be answered as follows,—(a) No. (b) The trustees hold the share of Phyllis Ada Bell Woodmason deceased upon trust as to ten-fourteenths thereof upon the same trusts as are declared by cl.* 14 *of the will with respect to the respective shares of the five surviving daughters of the testator : as to three-fourteenths thereof for William Robson Woodmason and David Ian Woodmason in equal shares absolutely : and as to the remaining one-fourteenth thereof in trust for Alison May Duncan absolutely.*

Order that the costs of all parties to the appeal be taxed as between solicitor and client and paid out of the estate of the testator William James Woodmason deceased.

Solicitors for the appellant, *Willan Miller & Co.*

Solicitors for the respondent, The Equity Trustees Executors and Agency Co. Ltd., *Braham & Pirani.*

Solicitors for the respondents Barrow and Taylor, *Pavey, Wilson, Cohen & Carter.*

R. D. B.