H. C. OF A. 1906.

SAVAGE v. UNION BANK OF AUSTRALIA LTD.

WHITELAW v. UNION BANK OF AUSTRALIA LTD.

of Cordelia Whitelaw, costs of all interlocutory proceedings.

Solicitors for appellants, *H. M. Lee*; *W. H. Ford*, Melbourne.
Solicitors for respondents, *Blake & Riggall*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

COUSINS AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

COUSINS AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1906.

SYDNEY, *May* 8, 14.

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

Infants—Salvage—Mortgage of vineyard for re-stocking and repairing—Intention of settlor.

The renovation of a vineyard of established reputation, given by a testator to his descendants with the intention that it should be enjoyed by them as such, is salvage such as will justify the Court of Equity in authorizing a charge upon the inheritance for that purpose.

By his will a testator devised an estate comprising such a vineyard "together with the buildings and working plant thereon and everything connected with and used in the storing and manufacturing of wine" upon trust to permit W. to have the use and enjoyment and receive the rents and profits for his life, and after his death in trust for his children in equal shares as tenants in common. During the tenancy for life the vineyard, owing to careless management, deteriorated to such an extent that, unless money were expended upon it for the renovation of the vines, it would shortly cease to be of any value as a vineyard.

Held, on an application by the infant children, after the death of the tenant for life, that the Court of Equity should sanction a mortgage of the land for the purpose of raising money to restore the estate to a condition in which it might be efficiently worked as a vineyard for the production of wine.

Judgment of the Chief Judge in Equity: *Cousins* v. *Cousins*, (1906) 6 S.R. (N.S.W.), 301, varied, and cause remitted to Supreme Court.

APPEAL from a decision of *A. H. Simpson* C.J. in Equity of the Supreme Court of New South Wales.

This was a friendly suit instituted on behalf of certain infant *cestuis que trustent* against the trustees of a will and the adult *cestuis que trustent* to obtain the sanction of the Court of Equity to the raising of a sum of money by mortgage of the trust estate, to be expended on the estate for its preservation.

A. H. Simpson C.J. in Equity refused the main part of the application, but authorized the raising and repayment of a sum of £50 advanced for the harvesting of the previous year's vintage on the estate: *Cousins* v. *Cousins* (1).

The facts appear in the judgment.

Harvey, for the appellants. This estate is only profitable as a vineyard, and is the sole source of income of the infants. The scheme for which the sanction of the Court is desired is not an embarkation upon a speculative business, but is necessary for the preservation of the estate in the condition in which it was given by the testator. It was given as a vineyard, to be used as such. Necessary repairs and improvements may be sanctioned by the Court: *Theobald on Wills*, 6th ed., p. 411. If the raising of this money is not sanctioned the land must be sold merely as agricultural land. The property of infants absolutely entitled may be mortgaged for repairs: *In re Jackson*; *Jackson* v. *Talbot* (2). Mortgages have been sanctioned by the Court for replacing stock destroyed by drought: *In re Walker*; *Walker* v. *Walker* (3); *In re McIntosh* (4); *Newham, Harvey and Rich, Equity Practice*, p. 407, and cases there cited; *In re Hawker*; *Duff* v. *Hawker* (5). What is asked for is strictly salvage: *In re House-*

(1) (1906) 6 S.R. (N.S.W.), 301.
(2) 21 Ch. D., 786.
(3) (1901) 1 S.R. (N.S.W.) Eq., 237.
(4) (1902) 2 S.R. (N.S.W.) Eq., 247.
(5) 76 L.T., 286; 66 L.J. Ch., 341.

H. C. OF A. 1906.

COUSINS v. COUSINS.

hold; *Household* v. *Household* (1); *In re Montagu*; *Derbishire* v. *Montagu* (2); *Cockayne* v. *Harrison* (3); *In re New*; *In re Leavers*; *In re Morley* (4); *In re Willis*; *Willis* v. *Willis* (5). [GRIFFITH C.J. referred to *Griggs* v. *Gibson* (6).]

There was no appearance for the respondents.

Harvey asked to be allowed to appear for the guardian, so that he might be bound by the order of the Court.

GRIFFITH C.J. I do not know that that can be allowed. He is not a party to the action, and if he desires to be heard he should apply in Chambers. If we decide that the Court has jurisdiction to make the order asked for we will refer the matter to the master to inquire whether the scheme is for the benefit of the infants.

Cur. adv. vult.

May 14.

The judgment of the Court was read by

O'CONNOR J. The main object of this suit, in which the plaintiffs are four infants, being four of six tenants in common of an estate known as Bebeah Vineyard, is to obtain a declaration that for the purposes of effecting a salvage of the interests of the plaintiffs and the other tenants in common a sum of money may be raised by a mortgage of the estate and expended upon it. The defendants are the other tenants in common, who are *sui juris*. The learned Chief Judge considered himself bound by authority to hold that the facts did not establish such a case of salvage as would justify the Court in authorizing a charge upon the inheritance, but added that he would not be sorry if the opinion of a higher Court should be obtained.

The jurisdiction of the Court which is invoked is the jurisdiction to administer the real estate of infants for their benefit. This jurisdiction is not conferred by Statute, but is exercised by the Court as a delegate of the Sovereign in his capacity of *parens patriæ*. Nor is it limited by any Statute. "At one time it was thought," as said by *Chitty* J. in *In re De Teissier's Settled Estates*

(1) 27 Ch. D., 553.
(2) (1897) 2 Ch., 8.
(3) L.R. 13, Eq., 432.
(4) (1901) 2 Ch., 534.
(5) (1902) 1 Ch., 15.
(6) 21 W.R., 818.

(1), "that the Court could order the sale of an infant's estate, because it was for the benefit of the infant. That notion was exploded as long ago as *Calvert* v. *Godfrey*" (2), which was decided by Lord *Langdale* M.R. in 1843. It has been held that the Court cannot charge the real estate of an infant for the purpose of advancement: *Re Swanston* (3). Practically the exercise of the jurisdiction of the Court, so far as regards expenditure upon the estate itself, is by the effect of judicial decision now limited to cases where such exercise is necessary for the preservation of the estate, or, as it is sometimes put, to cases of salvage: *In re Montagu*; *Derbishire* v. *Montagu* (4).

It is, in our opinion, necessary in each case to consider the nature of the property in question. In the present case the Court is asked to exercise its jurisdiction in the case of a vineyard. By the will of the testator this estate "together with the buildings and working plant thereon and everything connected with and used in the storing and manufacturing of wine" was devised to trustees upon trust to permit the plaintiffs' father to have the use and enjoyment and receive the rents and profits for his life, and after his death in trust for his children in equal shares as tenants in common. The vineyard in question had an established reputation, but it is said that, owing to careless management during the tenancy for life, it has fallen into such a condition that unless money is expended upon it for the renovation of the vines it will soon cease to have anything more than what is called in America "prairie value." We think that in the discretionary exercise of this branch of the parental jurisdiction of the Court regard may be had to the intention of the testator: *In re Corkers* (5). And we think that it was the intention of the testator in this case that the infants should take the vineyard as a going concern with all its plant, &c. If, then, this intention cannot be effectuated without raising a sum of money by creating a charge upon the estate, we think that the jurisdiction of the Court may properly be exercised for that purpose. The value of a vineyard, as is well known, often

(1) (1893) 1 Ch., 153, at p. 163.
(2) 6 Beav., 97.
(3) 31 Sol. J., 427.
(4) (1897) 2 Ch., 8.
(5) 3 Jo. & Lat., 377.

H. C. OF A. 1906.

COUSINS v. COUSINS.

depends upon the particular quality of the soil, which may be unique; and when a vineyard has an established reputation, the name and reputation are an essential part of the property. Suppose that in the case of such a vineyard, the soil of which possesses special qualities, the whole of the working plant, and perhaps the vines themselves, should be destroyed by some unforeseen calamity, it would be essential to the continued existence of the property as the testator intended it to be enjoyed that they should be restored. Whether the facts of any particular case bring it within the rule is a matter to be determined on the evidence. In *Griggs* v. *Gibson* (1) the Lords Justices allowed a sum to be raised on the security of the inheritance for the purposes of rebuilding a mansion in which the testator intended his children to reside, and of suitably furnishing it. We think that the renovation of a vineyard of established reputation, given by the testator to his descendants with the evident intention that it should be enjoyed by them as such, falls within the principle of salvage, and that, upon the evidence, this is a case in which the desire of all the parties (including the adult children) may be fulfilled. The application should formally be made by the guardian of the estate of the infants. We think, therefore, that there should be a declaration that it is proper and desirable that such a sum should be raised upon the security of the land as is necessary for the purpose of restoring the estate to a condition in which it may be efficiently worked as a vineyard for the production of wine, and that with this declaration there should be a reference to the Master to inquire what sum or sums is or are necessary to be raised for that purpose, and on what conditions: *Conway* v. *Fenton* (2). The judgment appealed from should be varied accordingly, and further consideration reserved, with liberty to apply. The cause will be remitted to the Supreme Court to do what is right in pursuance of this judgment. The appellants' costs of appeal may be raised out of the estate in the same manner as the costs of suit, as directed by the judgment.

Order of Chief Judge in Equity varied and cause remitted accordingly.

(1) 21 W.R., 818.

(2) 40 Ch. D., 512.

Solicitors, for the appellants, *A. B. Shaw* by *Shaw & Macdonald.*
Solicitor, for the respondents, *R. H. Levien.*

C. A. W.

H. C. OF A. 1906.

COUSINS *v.* COUSINS.

END OF VOL. III.