[HIGH COURT OF AUSTRALIA.]

ELIZA BROWN . . . . . APPELLANT:
PLAINTIFF,

AND

DAVID ABBOTT AND OTHERS . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 16, 17, 23.

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

Will—Settlement—Annuity—Charge, whether on corpus or income—Order of Court—Transfer of Land Statute 1866 (*Vict.*) (*No.* 301), *sec.* 86.

By a marriage settlement made in 1887 the settlor, the intended husband, gave a term of 99 years in certain land to his trustees who were directed "out of the rents and profits" thereof to raise the annual sum of £500 and pay it to the intended wife during her life. The settlor subsequently by his will devised the land to certain beneficiaries subject to the charge created by the settlement. After the settlor's death, viz., in 1882, by order of the Supreme Court, an instrument of charge under the *Transfer of Land Statute* 1866 (Vict.) to secure the annuity was executed, which had the effect of rendering the corpus as well as the income of the land liable to satisfy the accruing payments of the annuity. The land was subsequently sold pursuant to an order of Court and the proceeds of sale were invested. An order of Court was afterwards made directing the trustees of the settlor's will to set aside a certain sum to answer the "rent charge" on the land and to pay the residue of the proceeds of sale to the beneficiaries entitled thereto. This order was never carried into effect, as the income from the investments representing the proceeds of sale had become insufficient to pay the annuity, which fell into arrear.

Held that, whether under the settlement the annuity was or was not a charge upon the corpus as well as the income of the land, it became so by virtue of the instrument of charge under the *Transfer of Land Statute* 1866; that it was too late to have that charge corrected, if it had been inadvertently made; that that charge equally attached to the proceeds of the sale of the land;

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that nothing which had subsequently happened diminished the extent of that charge; and therefore that the annuitant was entitled to an order for payment of arrears of the annuity out of the corpus of the investments representing the proceeds of the sale of the land.

Judgment of *Hood* J. affirmed.

APPEAL from the Supreme Court of Victoria.

On 3rd November 1880 a bill in equity was filed in which Eliza Brown, who sued on behalf of herself and all other the residuary devisees under the will of Edwin Trenerry, deceased, was plaintiff, and the defendants were David Abbott, and Frederick Trenerry Brown, trustees of the will of Edwin Trenerry; Joseph Trenerry and his eldest son William Trenerry, Thomas Trenerry and his eldest son William Trenerry, and William Martyn Trenerry and his eldest son William Martyn Trenerry the younger, specific devisees under the will of Edwin Trenerry; and Louisa Trenerry (now Louisa Wilkinson) widow of Edwin Trenerry. The Equity Trustees Executors and Agency Co. Ltd., who had subsequently been appointed to act in place of the trustees of the will, were afterwards added as defendants, and Thomas Trenerry and William Martyn Trenerry the elder had since died.

The facts, the nature of the suit, and the various proceedings and orders in it are sufficiently stated in the judgment hereunder.

On 25th April 1907 a motion was made in the suit on behalf of the defendant Louisa Wilkinson "that so much of the principal moneys and securities representing the proceeds of the sale of Tregothnan Estate in the hands or under the control of the defendants the Equity Trustees Executors and Agency Co. Ltd. as may be necessary may be applied or sold or otherwise realized and appropriated to provide for the payment of the arrears of annuity now due to the applicant and to provide for the due payment in future of the full amount of the annuity payable to her. And that all necessary directions for the immediate payment of the said arrears and for the future payments of the said annuity be given. And that the costs of this application be then dealt with."

The motion was heard by *Hood* J. who made an order declaring that Louisa Wilkinson was entitled to a charge upon the

principal moneys and securities representing the proceeds of the sale of Tregothnan Estate to secure the annuity of £500 payable to her, and that the sum of £550 and upwards was then due in respect of arrears of such annuity, and further ordering the Equity Trustees and Agency Co. Ltd. to sell a certain piece of land, being one of the securities before mentioned, and out of the proceeds to pay £250 in part satisfaction of the arrears of the annuity, and to pay the balance into Court to be invested and the income applied in accordance with prior orders of the Court.

From this order the plaintiff now appealed to the High Court.

Arguments were adduced by counsel for the appellant upon the question whether under the deed of settlement the annuity was a charge upon the corpus as well as upon the income of Tregothnan Estate, but in the view the High Court took this question became immaterial, and the question was not argued by counsel for the respondents. Therefore only the authorities cited on this question are set out in this report.

Irvine K.C. (with him *H. I. Cohen*), for the appellant. Although when the instrument of charge under the *Transfer of Land Statute* 1866 was executed the annuitant had the rights of a mortgagee and might have the land sold to pay arrears of the annuity and to satisfy accruing payments of the annuity, yet, when under the subsequent order of the Court the land was sold and that instrument of charge was discharged, the original settlement revived, and any subsequent orders of Court dealing with the proceeds of that sale dealt with them strictly in accordance with the settlement.

[As to the question of the nature of the charge created by the settlement, the following authorities were referred to:—*Birch* v. *Sherratt* (1); *Stelfox* v. *Sugden* (2); *In re Boden*; *Boden* v. *Boden* (3); *Wormald* v. *Muzeen* (4); *In re Moore's Estate* (5); *In re Bigge*; *Granville* v. *Moore* (6); *Baker* v. *Baker* (7); *In re West's Estate* (8); *In re Tyndall* (9); *Booth* v. *Coulton* (10); *Theobald on Wills*, 5th ed., p. 451.]

(1) L.R. 2 Ch., 644.
(2) John., 234.
(3) (1907) 1 Ch., 132.
(4) 17 Ch. D., 167; 50 L.J. Ch., 482.
(5) 19 L.R. Ir., 365.
(6) (1907) 1 Ch., 714.
(7) 6 H.L.C., 616.
(8) (1898) 1 I.R., 75.
(9) 7 Ir. Ch. R., 181.
(10) L.R. 5 Ch., 684.

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Miller, for the respondents, William Trenerry, son of Joseph Trenerry, and William Martyn Trenerry the younger, adopted the arguments on behalf of the appellant.

Weigall K.C. (with him *Richardson*), for the respondent Louisa Wilkinson. When the instrument of charge under the *Transfer of Land Statute* 1866 was executed, Mrs. Wilkinson had the rights of a mortgagee over the land.

[GRIFFITH C.J.—If the decree had been drawn up so as to make it appear that something was decided which never was decided, the Court could amend the decree: *Ivanhoe Gold Corporation Ltd.* v. *Symonds* (1); *In re Swire*; *Mellor* v. *Swire* (2).]

A further stage was reached, for the annuitant became in effect mortgagee of the land. When that land was sold with the approval of Mrs. Wilkinson and of everyone concerned, she was entitled to the same security over the proceeds as she had over the land itself. There is nothing in any order of the Court which is inconsistent with that view, and much in those orders recognizes that view. One of the objects of the original suit was to have the rights of Mrs. Wilkinson defined, and they were defined as being such that she was entitled to have a legal charge upon the corpus as well as the income, and that it would be proper to give her an instrument of charge: *Brown* v. *Abbott* (3). That having been obtained, the settlement was to that extent gone, and the instrument of charge was substituted for it. Under the order of 2nd May 1891, if the £15,000 had been set aside the annuitant would undoubtedly have been entitled to resort to the corpus of the fund set apart: *Harbin* v. *Masterman* (4).

[ISAACS J. referred to *Carmichael* v. *Gee* (5).]

And as that fund was not set aside the annuitant is in no worse position than if the order had never been made.

[He also referred to *Phillips* v. *Gutteridge* (6).]

Vasey, for the respondents the Equity Trustees Executors and Agency Co. Ltd.

(1) 4 C.L.R., 642.
(2) 30 Ch. D., 239.
(3) 7 V.L.R. (E.), 121; 3 A.L.T., 47.
(4) (1896) 1 Ch., 351.
(5) 5 App. Cas., 588.
(6) 3 D. J. & S., 332.

Irvine K.C. in reply.

Cur. adv. vult.

GRIFFITH C.J. delivered the judgment of the Court.

This is an appeal from an order made by *Hood* J. in the course of a suit instituted in November 1880. The circumstances which gave rise to the suit and the present inquiry may be stated briefly. On 26th September 1877 a marriage settlement was executed upon the marriage of Edwin Trenerry and Louisa Rich, now Louisa Richardson, which purported to convey a certain property in Victoria called Tregothnan to trustees for the benefit of, amongst others, the intended wife. The only trust to which I need refer is a trust for the term of 99 years, during which the trustees were, during the life of the wife, out of the rents and profits of the land to raise the annual sum of £500, and pay it to the wife during her life; and subject to the said annual sum the trustees were to permit the rents and profits of the land to be received by the persons entitled under the settlement to the land in reversion immediately expectant upon the term of 99 years. Then, following the term of 99 years, and subject to the trusts thereof and to the annual sum of £500 thereby secured, was a term of 1,000 years for the purpose of raising portions for the children of the marriage. The land comprised in the settlement was held under the *Transfer of Land Statute* 1866, but the settlement, which was executed in England, was not in the form required by that Statute, and therefore did not operate to convey the legal estate to the trustees. The annual income from the land was at that time between £800 and £900, and there was no reason to suppose that the income would fall short of the £500 intended to be secured to the wife.

In November 1887 Edwin Trenerry made his will, by which he specifically devised the property called Tregothnan, subject to the charges created by the settlement. He also made a specific devise of certain other lands, known as Doctor's Creek and the Ballarat property, to certain other devisees, and he made a residuary devise to the persons represented by the present appellant. Edwin Trenerry died on 21st April 1880.

In the interval between the execution of the settlement and

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the death of the settlor he had deposited the deeds of the three properties specifically devised with the Commercial Bank of Australia Ltd. to secure an overdraft, and at the time of his death he was indebted to the Bank in the sum of about £10,000, which was secured by the equitable mortgages over those three properties. The trustees after his death sold the residuary real estate and out of the proceeds paid off the Bank. The appellant in her representative capacity then claimed to be entitled to have the debt secured by the equitable mortgages paid out of the properties mortgaged, and that, at any rate, she and the other devisees represented by her were entitled to have a charge upon those properties until they were recouped. Thereupon this suit was instituted by the appellant on 3rd November 1880. The main object of the suit was that the residuary devisees might have recouped to them out of the specifically devised properties the amount of the mortgages which had been discharged by the trustees out of the proceeds of the residuary estate. The bill being framed in that view, for the purpose of apportioning the payments it was necessary to ascertain the values of Tregothnan, Doctor's Creek, and the Ballarat property. The appellant alleged in the bill that the testator was the registered proprietor of Tregothnan under the provisions of the *Transfer of Land Statute* 1866, and that the indenture of settlement was not registered and could not be registered as an instrument under the *Transfer of Land Statute* 1866, and therefore was not a valid legal disposition under that Statute, but that "the plaintiff and all other parties hereto admit that the same was and is operative in equity as a valid charge of £500 a year for the life of the said Louisa Trenerry upon Tregothnan and that" the trustees of the will "should at the request of the trustees of the indenture execute any instrument under the *Transfer of Land Statute* which may be required for the purpose of making the said annuity a valid first charge upon Tregothnan in accordance with the trusts of the said indenture."

The defendants practically accepted that view of the case. What was the precise meaning of the terms of the indenture does not appear to have been the subject of contention, as the income from Tregothnan was much more than sufficient to pay the

annuity of £500, and the construction of the settlement does not appear to have been debated in the course of the suit.

By the decree, which was made on 20th October 1881, it was referred to the Master in Equity to inquire and report as to the value of Tregothnan "subject to the charge which subsisted thereon at the testator's death under the indenture of settlement."

Those words are repeated afterwards, and then came this declaration:—"This Court doth declare that the said indenture of settlement dated 26th September 1877 was operative in equity as a valid first charge of £500 a year for the life of the said Louisa Trenerry And this Court doth order that the" trustees of the will "and all other necessary parties do execute an instrument under the *Transfer of Land Statute* for the purpose of making the said annuity a valid first charge upon Tregothnan aforesaid in such manner and form and with such trustee or trustees whether named in the said indenture of settlement or not as the" trustees of the will "and the defendant Louisa Trenerry may agree upon And doth order that the said Master do settle such instrument and appoint a trustee or trustees in case the said parties differ about the same." In accordance with that decree—which seems to have been made in the presence and with the concurrence of all parties, and, again, without special regard to the meaning of the settlement—an instrument of charge was drawn up which was registered on 5th July 1882. By that instrument the land was charged for the benefit of the trustees appointed by the widow with an annuity of £500 during and throughout the life of the widow, with all the rights and remedies given to an annuitant by the *Transfer of Land Statute*.

I turn to the *Transfer of Land Statute* 1866 to see what those rights were. In the event of default in payment of the annuity charged upon the land, the annuitant, or in this case the trustees for the annuitant, might sell the land and apply the purchase money:—"first in payment of the expenses of and incidental to such sale and consequent on such default; then in payment of the moneys which may be due or owing to the annuitant or his transferrees; and the residue shall be deposited . . . at interest in the savings bank or in some other bank in Melbourne in the joint names of the annuitant or his transferrees and of the

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registrar, to satisfy the accruing payments of the charge, and subject thereto for the benefit of the parties who may be or become entitled to the residue of the deposited money" (sec. 86). As soon, therefore, as the charge was registered the annuitant became entitled to those rights. That is to say, that if any default in payment of the annuity occurred, the property could be sold, the proceeds applied in payment of the moneys due and owing to the annuitant, and the corpus as well as the income would be liable to satisfy the accruing payments of the annuity.

After this a favourable opportunity for the sale of Tregothnan occurred, and it was sold under an order of Court in the present suit. It could not, of course, be sold so as to give a clear title without the consent of the widow. She was not formally a party to the proceedings on that occasion, but with her tacit, if not express, consent the property was sold and the purchase money was ordered to be paid into Court. Now it is clear that, when property subject to a charge is sold by the Court, the charge attaches just as much to the proceeds of the sale as it attached to the land, and the Court will give effect to the charge, and will not diminish the right of the person entitled to the charge unless the other facts warrant such a diminution.

So matters continued for many years. Then, by reason of the depreciation in the value of real estate, the income from Tregothnan fell short of £500, and after some time application was made to the Court for an order to make up to the annuitant the arrears of the annuity.

In the meantime, on 2nd May 1891, after the order for the sale of Tregothnan had been made, the Court ordered that the defendants, the trustees of the will, should, out of the proceeds of the sale, set aside and keep invested the sum of £15,000 to answer the "rent charge" on Tregothnan; and, with the consent of the widow, the Court further ordered that the residue of the proceeds of sale should be paid to the residuary devisees, in part recoupment of the charge upon Tregothnan to which they were entitled for principal and interest in respect of the payment out of the residuary estate of the debt secured by the mortgages to the Bank. The Court went on to order "that the income to arise from the investment of the said sum of £15,000 be applied

first in payment of the said 'rent charge' and then in or towards payment of such principal and interest as aforesaid."

The appellant contends that the original charge, or what was called a charge, upon Tregothnan was only a charge upon the income, and not upon the corpus of the estate. She further contends that, that being the true construction of the deed of settlement, the construction of the deed has never been investigated or disputed, and that none of the orders since made has prevented the Court from now inquiring and giving effect to the deed. On the other hand, it is said that that is not the true effect of the deed, that it did create a charge upon the corpus, and that, even if it did not, yet under the subsequent orders of Court, the widow became entitled to a charge upon the corpus which has never been taken away from her.

The appellant further contends that the order of the Court of 2nd May 1891 had the effect of taking away from the widow any right of recourse to the corpus which she might have had accidentally acquired by the charge under the *Transfer of Land Statute* 1866.

The first question, as to the construction of the deed of settlement, is a matter of very great difficulty, and there is a great deal to be said on both sides. *Hood* J. was of opinion that the case fell within the principle of *Birch* v. *Sherratt* (1), and not that of *Stelfox* v. *Sugden* (2). In the view we take of the case it is not necessary to determine that question, for we are of opinion that, whatever the rights of the parties might have been under the original deed of settlement, they passed into *res judicata* by the decree in the suit and what was subsequently done under it, when the instrument of charge was executed and the widow became in point of law entitled under it to a charge on the estate. If the order for the execution of an instrument of charge was made inadvertently, an application might have been made to have the charge corrected. But, considering that more than twenty-five years have elapsed since the instrument was executed, it is now too late to make such an application. The widow having acquired the right and having enjoyed it for so many years, the charge which attached to the fund paid into

(1) L.R. 2 Ch., 644. (2) John, 234

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Court continued at the time when the order of 2nd May 1891 was made. When that order was made the condition of things was that a fund was supposed to be in Court to the whole of which, corpus as well as income, the widow was entitled to have recourse for the payment of her annuity. The Court ordered £15,000 to be set aside, which was supposed to be sufficient to give effect to her rights, and the rest of the fund was available for the residuary devisees. Is there anything upon the face of this order to show that the Court intended to deprive the widow of any right she had at law? We can find nothing. The charge is described as a "rent charge," but that is merely an error of description. What was meant by it was the charge the widow had on Tregothnan, whatever that was, by reason of the instrument of charge under the *Transfer of Land Statute* 1866. It was intended to diminish her right to the extent indicated, but it would require very plain words to show that the Court intended to deprive her of her rights to any greater extent. The Court, in ordering £15,000 to be set aside, and the balance to be applied for the benefit of the residuary devisees, intended to diminish her rights to that extent. Whether that sum was actually set aside or not, we think, makes no difference. The Court clearly did not intend to diminish the widow's rights in respect of the £15,000, and, as these rights would have extended to the corpus as well as the income, the widow's rights to the fund were not affected.

We therefore think that the order made by *Hood* J. is right, and that the appeal should be dismissed. As no objection is offered, the costs of all parties may be paid out of the fund.

Appeal dismissed.

Solicitors, for the appellant, *Lamrick, Brown & Hall.*

Solicitors, for the respondents, *Moule, Hamilton & Kiddle*; *Eales.*

B. L.