[PRIVY COUNCIL.]

SMITH AND OTHERS . . . APPELLANTS;

AND

COCK AND OTHERS . . . . . RESPONDENTS,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1911. Feb. 11.

Trustee—Discretionary trust—Exercise of discretion—Maintenance of one person under two wills—Equitable contribution—Trust estate entitled to interest in another trust estate—Right of action of beneficiary of first estate against trustees of second estate.

J. M. S., who died in 1898, by his will devised and bequeathed all his real and personal property to his trustees upon trust for sale and getting in with power indefinitely to postpone such sale and getting in. After setting out three specific devises the will continued :—"And as to £800 a year during the life of my daughter A. S. upon trust from time to time to apply the same or such part as my trustees may think fit for the personal maintenance and support or otherwise for the personal benefit of the said A. S. or to pay the same or such part as they shall think fit to her or to any other person to be so applied without liability on the trustees' part to inquire into the application thereof or at the option of my trustees to pay the whole or such part to my executors to be applied as part of the residue and ultimate surplus hereinafter mentioned." Then followed a trust of an annuity of £500 for the benefit of another daughter, and a legacy of £3,000, succeeded by the words "and as to all the residue and ultimate surplus upon trust for," his son V. S. and his daughter L. S. "in equal shares absolutely." The testator appointed his son V. S., his daughter L. S. and W. A., his executors and trustees. L. S., who died in 1903, by her will, after making a specific bequest to her sister A. S., devised and bequeathed all her real, and the rest of her personal, estate to her brother V. S. and W. A., whom she appointed her executors and trustees, upon trust for conversion, but directed that her trustees should not sell a certain house during the life of A. S., except with her consent, and that in the meantime they should permit A. S. to live there. Subject to these trusts she

*Present—Lord Macnaghten, Lord Atkinson, Lord Shaw, Lord Mersey, and Lord Robson.

directed that her trustees should stand possessed of the proceeds upon trust for investment, and should stand possessed of the residuary moneys and the investments representing them "upon trust after payment thereout of such sum or sums as they shall from time to time in their absolute and uncontrolled discretion think fit to apply in or towards the upkeep of" the house before mentioned "and the rates, taxes, insurance and other outgoings in respect thereof and in or towards the maintenance and personal support of my said sister during her life . . . . to pay the residue of the income of the said trust premises to my nephew C. during his life, and after his death shall stand possessed of the said trust premises and the income thereof subject to such payments aforesaid in trust for all the children of my said nephew who being sons," &c. During the lifetime of L. S. the trustees of J. M. S. applied £400 a year out of the £800 to the maintenance of A. S., who during that time resided with L. S. at the before-mentioned house, all the household expenses being defrayed by L. S. After the death of L. S. the trustees of J. M. S. reduced the amount paid by them to £100, and the trustees of L. S. applied £700 a year out of the income of the trust estate of L. S. towards the maintenance of A. S. The residuary estate of J. M. S. remained unconverted. An action was brought in the Supreme Court of Victoria by C. against the trustees of the estates of J. M. S. and L. S., alleging that the reduction from £400 to £100 a year was improper and unreasonable, and an unfair exercise of the powers or discretion of the trustees of J. M. S., and that the payments made by the trustees of J. M. S. in respect of the annuity of £800 had been made out of income and not out of capital, whereby his interest in the estate of L. S. had been diminished, and asking for consequential relief. At the close of the case judgment was given for the defendant.

Held, on the evidence, that the discretion vested in the trustees of J. M. S. had been exercised, and that its exercise was honest, that the doctrine of equitable contribution did not apply, inasmuch as there was no common obligation upon the trustees of J. M. S. and those of L. S. to contribute to the maintenance of A. S., and, therefore, that judgment was properly given for the defendants.

Decision of the High Court: *Cock* v. *Smith*, 9 C.L.R., 773, reversed, and decision of the Supreme Court of Victoria restored.

APPEAL to His Majesty in Council from the decision of the High Court: *Cock* v. *Smith* (1).

The judgment of the Court was read by

LORD MERSEY. The real question in this case is whether the appellants, John Matthew Vincent Smith, Harry Emmerton and William Aitken, who are the trustees under the will of John Matthew Smith, deceased, have lawfully exercised the discretion

(1) 9 C.L.R., 773.

PRIVY COUNCIL. 1911. SMITH v. COCK.

reposed in them by the terms of the will in relation to a trust for the maintenance of one of the testator's daughters. The facts are as follows: On the 21st April 1898 John Matthew Smith died, having made his will, dated the 11th March 1896, by which he left all his property to the appellants upon trust to sell and get in the same and to dispose of the proceeds in manner therein set out. Dealing with the disposal of the proceeds the will provides as follows:—

"And as to eight hundred pounds a year during the life of my daughter Alice Smith upon trust from time to time to apply the same or such part as my trustees may think fit for the personal maintenance and support or otherwise for the personal benefit of the said Alice Smith or to pay the same or such part as they shall think fit to her or to any other person to be so applied without liability on the trustees' part to inquire into the application thereof or at the option of my trustees to pay the whole or any part to my executors to be applied as part of the residue and ultimate surplus hereinafter mentioned."

It will be observed that this trust enables the trustees to apply the whole or any portion of the £800 to Alice's maintenance, or to allow the whole to fall into residue. The will then provides that the "residue and ultimate surplus" shall be held in trust for the testator's son and daughter, John Matthew Vincent Smith (one of the appellants) and Lucy Smith, in equal shares and absolutely. The estate was sworn for probate at £240,000, and the residue was of the value of £110,000. The daughter, Alice Smith, was an invalid, and on the death of her father she went to reside with her sister Lucy. From this time onwards and until the death of Lucy, the appellants acting under this trust paid to Lucy Smith the sum of £400 in each year for the maintenance of Alice Smith. Lucy Smith died on the 12th November 1903, leaving a will which was dated the 6th April 1900. By this will she devised and bequeathed her real and personal estate to the appellants, John Matthew Vincent Smith and William Aitken, upon trust to convert the same into money, but with a proviso that her house "Castlefield" should not be sold during her sister Alice's lifetime, but should be maintained by the trustees as a residence for Alice.

The will then directed that the trustees should stand possessed of the trust moneys—

"Upon trust after payment thereout of such sum or sums as they shall from time to time in their absolute and uncontrolled discretion think fit to pay or apply in or towards the upkeep of my said Castlefield house and property and the rates taxes insurances and other outgoings in respect thereof and in and towards the maintenance and personal support of my said sister during her life . . . to pay the residue of the income of the said trust premises to my nephew Charles Matthew Germain Cock."

After the death of Charles Cock the *corpus* was to go in equal shares to his children. The gentleman here named—Charles Matthew Germain Cock—is the first respondent on the record in the present appeal, and he was the original plaintiff in the action. He is a grandson of John Matthew Smith. Since action commenced he has become insolvent, and the trustee of his estate (John McAlister Howden) has been added as a co-plaintiff.

Lucy Smith left real and personal estate valued at about £92,500, a large part of which was derived from her father's estate. John Matthew Vincent Smith renounced probate of Lucy Smith's will, and probate was granted to the appellant, William Aitken alone. Subsequently, namely on the 10th November 1904, the respondent Alfred John Noall was appointed a trustee of Lucy's will to act jointly with William Aitken; and they are the trustees of her will at the present time.

Since Lucy Smith's death Alice Smith has continued to reside at Castlefield, and the trustees of Lucy's will have paid from £700 to £800 a year in the upkeep of the house and in and towards Alice Smith's maintenance. Meanwhile the appellants (the trustees under the will of John Matthew Smith) have reduced the allowance made by them in respect of Alice Smith's maintenance from £400 to £100 a year. To this state of things Mr. Cock objects. The effect of the payment out of Lucy Smith's estate of £700 or £800 a year is of course, *pro tanto*, to lessen the amount of Mr. Cock's annual income from the estate; and he apparently thinks that if the trustees under the father's will can be compelled or induced to pay more than £100 a year towards

PRIVY COUNCIL. 1911.

SMITH v. COCK.

Alice's maintenance, the trustees under Lucy's will will pay less, and so his income will be greater than it now is. Alice Smith, the beneficiary, has made no complaint against either set of trustees, nor has the one set of trustees made any complaint against the other; the complaint is by Mr. Cock alone and by the trustee of his insolvent estate. For some time Mr. Cock tried by expostulation to induce the appellants to increase the allowance from John Matthew Smith's estate, but without success, and on the 17th October 1907 he issued his writ in this action to compel them to do so. He made the trustees of the will of John Matthew Smith, the first defendants, adding also the trustees of the will of Lucy Smith, Alice Smith (the beneficiary), and lastly his own infant children. It is unnecessary to set out his cause of action, as disclosed in his pleadings in the action. His complaint is summarized with sufficient accuracy, and in sufficient detail, in the sixth paragraph of his case filed in answer to the present appeal, which is in the following words:—

"The deduction in the allowance out of the estate of John Matthew Smith to Alice Smith was made by John Matthew Vincent Smith and Henry Emmerton, two of the trustees of his will, not in the *bonâ fide* exercise of the discretion conferred on them by the will, but with the object of throwing, in the interests of John Matthew Vincent Smith, a greater burthen on the estate of Lucy Smith in relief of the burthen on the estate of John Matthew Smith . . . and the third trustee, William Aitken, did not exercise his discretion at all in the matter."

He claimed a declaration that the three trustees, or alternatively that the first two of them, had improperly, unfairly, and unreasonably, and in breach of their duties as trustees, exercised or purported to exercise the powers and discretion given by the will, and he asked for an order that the amounts necessary for the proper maintenance and support of the defendant Alice Smith should be provided out of the said two separate funds either in proportion to the respective amounts of such funds or by allotting £400 a year out of the income of John Matthew Smith's estate and the balance out of the income of Lucy's estate, or otherwise as the Court should think just.

These being the facts, the case came on for trial before Mr.

Justice *Hood* in December 1908. All the parties were represented with the exception of Alice Smith, who did not appear. The plaintiff gave evidence himself and called William Aitken, one of the appellants, to support his case. The defendants called no evidence. After argument the learned Judge on the 8th February 1909 dismissed the action, holding that the plaintiff had made out no case, and holding further that the appellants owed no duty to the plaintiff in connection with the trust created by the will of John Matthew Smith. From this judgment there was an appeal to the High Court of Australia. That Court, which consisted of four Judges, allowed the appeal; two Judges, one of whom was the Chief Justice, taking the view that the plaintiff was entitled to judgment, and the other two taking the view that the present appellants were entitled to judgment. The Chief Justice gave his casting vote in favour of the appeal (1).

The questions of fact litigated before the Judge of first instance were two. The first was whether the discretion vested in the trustees of the will of John Matthew Smith had been exercised at all. The second was whether, if so, it had been honestly exercised. As to the first of these two questions it was said that the discretion required by the will was to be a joint discretion of all three trustees, and that one of them, William Aitken, had never consented to the reduction to £100 a year. It was in order to prove this allegation that William Aitken was called as a witness. The learned trial Judge heard and saw this witness and came to the conclusion that he had consented to the reduction. A careful examination of the Judge's notes of the evidence satisfies their Lordships that this was a right conclusion. The effect of the evidence is clear. It is that up to Lucy Smith's death the allowance in respect of Alice out of J. M. Smith's estate had been at the rate of £400 a year. After Lucy Smith's death the question as to what the allowance should be in the future was discussed. Emmerton thought it ought to be discontinued altogether, but he was willing that it should be continued at the reduced rate of £100 a year. Smith thought it ought to be fixed at £200 a year. Aitken thought the existing allowance of £400 a year should not be disturbed. In these circumstances

(1) 9 C.L.R., 773.

PRIVY COUNCIL. 1911.

SMITH v. COCK.

counsel's opinion was taken, but with no result, for the views of the three remained unchanged. This was in or about February 1904. Then Smith had an interview with Aitken at which he pointed out that both he and Aitken were interested in the matter (he as being entitled to one-half of the residue of J. M. Smith's estate, and Aitken as being one of the executors and trustees of Lucy Smith's will), whereas Emmerton was "neutral." Smith then, according to Aitken, suggested that it would be right to adopt Emmerton's view. Aitken, after giving this account of the interview, adds in his evidence, "I thought this a feasible way to look at it and so gave way." From this time onwards the allowance from J. M. Smith's estate was paid at the rate of £100 a year, Aitken himself drawing out the cheques and the trustees signing them. In the face of this evidence it is impossible to say that Aitken did not consent to the reduction. He thought it wise to adopt the view of the "neutral" Emmerton. He withdrew his own opinion, and thenceforward he concurred in payment at the rate of £100 a year. It may be that he still thought it would have been better to continue the payment at £400 a year, but there can be no doubt that he consented to and approved of the payment at the lower rate. Regard cannot be had to any secret reservations that may or may not have been in the minds of any of the three men; the question of whether they arrived at a common understanding must be judged of solely by what they did.

But then it was said that the exercise of the discretion was not honest. This point was not very seriously insisted upon by the respondents' counsel, nor, indeed, could it be. It rested, so far as J. M. V. Smith was concerned, upon the mere fact that in reducing the payment he was benefitting himself. No doubt he was benefitting himself, for by reducing the payment he was increasing the residue of the testator's estate in which residue he was personally interested to the extent of one half. But this fact standing alone proves nothing. If it were connected with other circumstances tending to show that J. M. V. Smith was influenced by a desire to benefit himself at the expense of his *cestui que trust* it would be worthy of consideration, but it is not. Moreover, when the testator created the trust, and gave to the trustees

a discretion to pay to Alice less than £800 a year, he must have foreseen that the very result might happen which is now relied upon as proof of some sinister motive on J. M. V. Smith's part. The Judge of first instance held that no dishonest motive had been brought home to J. M. V. Smith. Their Lordships are of opinion that this finding was also right, and that there is no ground for the suggestion that Smith had acted otherwise than quite honestly.

Allegations of bad faith were made before the Judge of first instance against Emmerton and Aitken, but they were so frivolous as to be unworthy of notice. They were not insisted upon by the counsel who appeared to support this appeal, and in their Lordships' opinion they ought never to have been made. There is, however, one point in the case which appears to have commended itself to the Chief Justice, and which it is desirable to deal with. It was said that there being two trust estates from which payments towards the maintenance of one and the same *cestui que trust* were to be drawn, the doctrine of equitable contribution ought to be applied by apportioning the payments between the two estates. Without attempting to give a comprehensive definition of the expression "equitable contribution," it is clear that the present case does not fall within it. Before there can be any question of contribution there must be a common obligation upon those who are required to contribute. Here there is none. The trusts are not only different in their terms, but each trust requires a separate and independent exercise of the discretion of the trustees of the particular estate as to the sum to be paid by that estate to Alice. When that discretion has been exercised it may be said that a consequent obligation arises to pay the amount, but it is a separate obligation which has no connection with the obligation upon the trustees of the other estate, and cannot therefore afford any ground for a claim to contribution. The order appealed from seems to require the two sets of trustees to meet together and fix the amount to be paid to Alice and then to apportion the amount between the two estates. This would cause the sum payable by each estate to depend upon the joint discretion of two sets of trustees, a state of things never intended either by John Matthew Smith or by Lucy

PRIVY COUNCIL. 1911.

SMITH v. COCK.

Smith. It would be to defeat instead of to carry out the intention expressed in the wills which create the trusts.

The terms of the trust in J. M. Smith's will require the appellants to exercise their own joint discretion in fixing the sum to be paid for Alice Smith's maintenance, and, of course, to do it honestly. This they have done. Their duties are, therefore, discharged, and no action lies against them.

For these reasons their Lordships are of opinion that this appeal should be allowed, and they will humbly advise His Majesty accordingly.

The order of the Court below is in two parts, the first relating to the method by which income and corpus should be distinguished in the accounts kept by Lucy Smith's trustees for the purpose of regulating the rights of Mr. Cock and his children *inter se*; the second relating to the method of discharging the trusts of J. M. Smith's will. It was suggested at the end of the argument before their Lordships that, in the event of the appeal being allowed, it would be necessary only to discharge the second part of the order. But the two parts in reality form only one order, and therefore the whole of it must be discharged, and the judgment of the Judge of first instance must be restored. The respondents Cock and Howden must pay the appellants' costs in the Courts below and of this appeal.

Appeal allowed.