REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1917-1918.

[HIGH COURT OF AUSTRALIA.]

HUNT AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

KORN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS AND PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1917.

SYDNEY, *Nov.* 29; *Dec.* 4.

Barton, Isaacs and Rich JJ.

Real Property—Grant of equitable estate—No words of limitation—Estate in fee or for life—Interpretation of deed—Intention of grantor.

Where by deed an equitable estate in land was granted without words of limitation,

Held, that an estate in fee was granted, there being in the deed a sufficient indication of the intention of the grantor to pass, not an estate for life, but an estate in fee.

In re Tringham's Trusts; *Tringham* v. *Greenhill*, (1904) 2 Ch., 487, and *In re Nutt's Settlement*; *McLaughlin* v. *McLaughlin*, (1915) 2 Ch., 431, followed.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Thompson* v. *Hunt*, 17 S.R. (N.S.W.), 543, reversed.

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APPEAL from the Supreme Court of New South Wales.

On 8th August 1874 an indenture was executed by John Korn, of the first part, his wife Susan Korn, of the second part, and Martin Tuohy and Frederick Eberlin, therein called "the trustees," of the third part, the material portion of which was as follows :—

"Whereas the said John Korn being seised of the lands and hereditaments hereinafter described is desirous of making such provision for his wife Susan Korn and their issue as is hereinafter contained Now this indenture witnesseth that for effectuating his said desire and in consideration of the natural love and affection of the said John Korn for his said wife and their issue and for other good considerations him hereunto moving and in consideration of the sum of ten shillings sterling now paid by the said trustees to the said John Korn (the receipt whereof is hereby acknowledged) he the said John Korn doth hereby grant bargain sell alien and release unto the said trustees and their heirs all those several pieces or parcels of land" (describing them) "and all the estate right title interest benefit property claim and demand at law and in equity of him the said John Korn therein and thereto to have and to hold the said lands hereditaments and premises hereby released or otherwise assured or intended so to be unto and to the use of the said trustees their heirs and assigns for ever upon the trusts and with under and subject to the powers provisoes agreements and declarations hereinafter declared concerning the same that is to say upon trust that the trustees or trustee for the time being of these presents shall during the joint lives of the said John Korn and Susan Korn collect get in and receive the rents issues and profits of the said lands hereditaments and premises as and when the same shall respectively become due and do and shall pay the same to or permit and suffer the same to be received by the said John Korn and Susan Korn and upon trust from and after the decease of either of them the said John Korn and Susan Korn to pay the same rents issues and profits to or permit and suffer the same to be received by the survivor of them the said John Korn and Susan Korn during the life of such survivor such survivor therewith and thereout educating maintaining and bringing up the children of the said John Korn and Susan Korn now born and hereafter to be born And from and

after the decease of such survivor as to the said lands hereditaments and premises and the rents issues and profits thereof upon trust for such child or children of the said John Korn and Susan Korn who being a son or sons shall attain the age of twenty-one years and who being a daughter or daughters shall attain that age or marry under that age and if more than one in equal shares as tenants in common Provided always and it is hereby declared and agreed that if any such child of the said John Korn and Susan Korn shall die in the lifetime of them the said John Korn and Susan Korn or the survivor of them and leaving issue then the share to which any such child would have been entitled under the trust lastly hereinbefore contained shall be held upon trust for the child or children of such child so dying equally to be divided among them if more than one and if there shall be but one such child then the whole of such share shall go to such one child so that the children shall take equally between them (and if only one child the whole of) the share which the parent would have taken under the said trust lastly hereinbefore contained."

Susan Korn, the wife of John Korn, died on 5th December 1908. John Korn died on 29th August 1916, having by his will dated 29th June 1916 devised and bequeathed the whole of his real and personal estate to his trustee, Ralph Mate Thompson, whom he also appointed his executor, upon the following trusts, namely, to divide his personal estate equally between his illegitimate son Frederick Korn and his wife Josephine Mary Korn, and to hold the whole of his real estate in trust for the said Josephine Mary Korn for her life and after her death for such of her children by the said Frederick Korn as should survive her and live to attain the age of twenty-five years, in equal shares. Ralph Mate Thompson having renounced probate of this will, administration with the will annexed was granted to Frederick Korn and his wife, Josephine Mary Korn. John Korn and Susan Korn had five children, namely, Elizabeth Hunt, John Joseph Korn, Henreich Korn, Barbara Bowden and Catherine Whiting, of whom John Joseph Korn and Henreich Korn predeceased John Korn.

An originating summons was taken out by Ralph Mate Thompson,

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the sole trustee for the time being of the indenture, for the determination of the following question: Whether on the true construction of the said indenture the shares and interests of the children of the settlor, John Korn, and his wife, Susan Korn, are absolute or for their respective lives only. The defendants to the summons were the three surviving children of John Korn and Susan Korn; Martha Jane Mulvihill, administratrix of the estate of John Joseph Korn; Frederick Korn and Josephine Mary Korn, administrators with the will annexed of the estate of John Korn; Lewis Hey Sharp, mortgagee of the share of Elizabeth Hunt; and Emma Jane Barberie, mortgagee of the share of Barbara Bowden.

The originating summons was heard by *Harvey* J. who made an order declaring that the shares and interests vested in the children of the settlor and his wife were for their respective lives only: *Thompson* v. *Hunt* (1).

From that decision Elizabeth Hunt, Catherine Whiting and Barbara Bowden now appealed to the High Court.

W. A. Parker, for the appellants. For the purpose of granting an equitable estate in fee it is not necessary to use technical words of limitation, but it is sufficient if there is an indication of an intention that an estate in fee shall pass.

[RICH J. referred to *In re Thursby's Settlement*; *Grant* v. *Littledale* (2); *In re Tringham's Trusts*; *Tringham* v. *Greenhill* (3).]

There is sufficient indication of such an intention in this deed. The gift to the children of a deceased child is a true gift over and not a substitutionary gift. The gift to each of the settlor's children was a contingent remainder which, as each child attained the age of twenty-one years, became a vested remainder, and, as there is a gift to the children of a deceased child of the share which the parent would have taken, that share must have been something which existed beyond the death of the parent, that is to say, it must have been an estate in fee. Other indications of an intention to give an estate in fee are the change in the language used in giving a life estate to the settlor and his wife and that in giving the estates to the children.

(1) 17 S.R. (N.S.W.), 543.
(2) (1910) 2 Ch., 181.
(3) (1904) 2 Ch., 487.

The words "leaving issue" in the gift to children of a deceased child suggest an intention to grant more than life estates.

[RICH J. In determining whether the grant is of an estate in fee the Court will not be astute to find reasons for a contrary view.]

That is borne out by *In re Tringham's Trusts*; *Tringham* v. *Greenhill* (1).

D. Wilson, for the respondents, the other defendants. There is nothing in the deed which is inconsistent with the grant being of a life estate only. The gift to the children of a deceased child of the share which the parent would have taken is inconsistent with an estate in fee. The gift to the children of the settlor must be taken to be contingent on their surviving the settlor and his wife. The class is then fixed and the only estate that is given to them is a life estate. There is no leaning against a resulting trust as there is against an intestacy. [Counsel referred to *Macintosh* v. *Macintosh* [No. 2] (2).]

Parker, in reply.

Cur. adv. vult.

Dec. 4.

The judgment of the COURT, which was read by BARTON J., was as follows :—

Harvey J., in the decision which is the subject of this appeal, acted, no doubt, upon the right principle. That principle has been stated in several recent cases, and the outcome of them, as stated by *Neville* J. in *In re Nutt's Settlement*; *McLaughlin* v. *McLaughlin* (3), is this :—"With regard to the granting of equitable estates a grant of land upon trust for A passes to A, if there is nothing more, only a life estate; but words of limitation with regard to an equitable estate are not, in my opinion, indispensable, because I think that what estate is given to a beneficiary depends upon the construction of the document purporting to give him the benefit and must be determined by the whole of the deed or document which has to be interpreted. I think, therefore, that if you can find in the documents themselves, or in the document itself that you have to examine,

(1) (1904) 2 Ch., at p. 494. (2) 17 S.R. (N.S.W.), 351.
(3) (1915) 2 Ch., 431, at p. 435.

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a sufficient indication of a desire to pass not a life estate, but an equitable estate in fee, that intention must prevail." The same principle had been expressed in several previous cases, among which was *In re Tringham's Trusts*; *Tringham* v. *Greenhill* (1). There *Joyce* J. (2) cited passages from *Butler's Notes to Coke upon Littleton*, from *Hayes's Introduction to Conveyancing*, and from *Lewin on Trusts*, which state the same principle in varying terms. In the last mentioned passage *Lewin*, at p. 117 of the 10th ed., puts it in a form which impels us to quote it because of its brevity and completeness: —" In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word 'heirs,' and an equitable entail without the words 'heirs of the body,' provided words be used which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument."

In the trusts now under consideration John Korn, the settlor, did not use the ordinary technical words of the common law in the trusts for the beneficiaries, and the learned Judge did not find within the four corners of the settlement, which was voluntary and post-nuptial, sufficient evidence of an intention to confer the fee on the settlor's children. His answer to the question put in the originating summons therefore declared that on the true construction of the deed the shares and interests thereby vested in the children of Korn and his wife, Susan, were for their respective lives only.

In *In re Tringham's Trusts* (3) *Joyce* J., speaking of a decision of *Chitty* J. (see *In re Whiston's Settlement*; *Lovatt* v. *Williamson* (4)) which had "not been universally approved," said: "It has been thought by some that if the Court had been astute to find in that case sufficient indication of an intention to confer absolute interests upon the children it might have succeeded in doing so." In a case like this, where we, in common with *Harvey* J., have little doubt of that which the settlor was endeavouring to express, we

(1) (1904) 2 Ch., 487.
(2) (1904) 2 Ch., at pp. 491, 492.
(3) (1904) 2 Ch., at p. 494.
(4) (1894) 1 Ch., 661.

feel ourselves entitled to scrutinize the words of the trusts with some closeness. The result of that scrutiny is that, with great respect, we find ourselves unable to agree in the conclusion arrived at by the learned Judge. If there were nothing more to be found in the deed than the several considerations which *Harvey* J. thought insufficient to establish the necessary intention, we should uphold his conclusion. But we think there is more. Of the several matters which we shall mention we do not rely on any by itself. But we think their effect is cumulative and conclusive.

The property settled is land. The settlor recites in the deed his desire to make such provision for his wife "and their issue" as was thereinafter contained. The estate in the lands which he confers on the trustees is to "their heirs and assigns for ever." In giving estates to his wife and himself for their joint lives he shows that when he means to give a life estate he expresses it as one. There is a distinct change of language between the passage giving the life estate to the settlor and his wife and that giving the estate, whatever estate it was, to their children. The life estates created *eo nomine* are given by exclusive reference to the rents, issues and profits of the lands, which the trustees are to receive and to pay to Korn and his wife and the survivor. But after the decease of the survivor all of the children who survive their parents and attain the age of twenty-one, being a son or sons, and who attain or marry under that age, being a daughter or daughters, are made tenants in common both of "the lands hereditaments and premises" and of "the rents issues and profits thereof," that is, both of the subject of the settlement and of its income. Then a child dying before both parents have died does not share personally, but, "if he leaves issue," the "share" to which he or she "would have been entitled" under the last-quoted trust is given to his or her child or children. No doubt that is a substitionary gift, but it is a gift of the same share as the settlor's child would have taken. As *ex facie* there could not be any such share in the case of a life estate, it being then exhausted, the inference is strong that the estate of the settlor's child was more than a life estate. It cannot be that there is a life estate in the grandchild or grandchildren, a position which Mr. *Wilson* sought to establish by analogy to the

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case of the children. For if there were more than one grandchild they would be given equal shares, that is, they would be tenants in common. Consequently, there would be several persons holding for life equal shares distinct as among themselves. But that again makes it quite clear that such a gift is not a gift of the share " which the parent would have taken " under the trust mentioned. Although this position appears from the substitionary gift, it nevertheless goes to show that the shares of Korn's children must have been greater than mere life estates. But if they are greater than life estates there is nothing to be found in restriction of them, and therefore they must be absolute estates in the shape of equitable tenancy in common in fee.

We think, therefore, that the cumulative effect of the various expressions we have pointed out is that they amount to an indication of intention which impels us to say that the question before the learned Judge should have been answered thus: On the true construction of the said indenture of settlement the shares and interests of the children of the settlor John Korn and his wife Susan Korn are absolute.

We think, therefore, that the appeal must be allowed, and the question answered accordingly. The costs of all parties as between solicitor and client to be paid by the respondent Ralph Mate Thompson out of the real and personal estate in his hands or vested in him as the sole trustee of the indenture of settlement.

The case to be remitted to the Supreme Court in Equity to be further dealt with.

Appeal allowed and question answered accordingly. Case remitted to Supreme Court in Equity. Costs of all parties as between solicitor and client to be paid out of the trust estate.

Solicitors, *Taylor & Mackenzie*, Tumut, by *G. H. Turner*.

B. L.