[HIGH COURT OF AUSTRALIA.]

EMILY MARIA EDWARDS . . . . APPELLANT;
DEFENDANT,

AND

ALICE MAUD EDWARDS . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1918.

HOBART, *Feb.* 18, 19.

Griffith C.J., Barton, Gavan Duffy and Rich JJ.

Deed—Interpretation—Ambiguity—Falsa demonstratio—Extrinsic evidence.

By a deed of conveyance executed in 1886 expressed to be made between the grantor of Circular Head, of the one part, and "John Edwards of the same place gentleman," of the other part, the grantor purported, in consideration of the natural affection which she had "for her nephew the said John Edwards" and of five shillings paid to her by "the said John Edwards," to convey certain land "to the said John Edwards" for life with remainder for the benefit of his widow and children, if any. The deed was expressed to have been executed by "the parties to these presents" and to have been "signed sealed and delivered" by the grantor and "the said John Edwards," who signed his name as "John Edwards, Jnr." The person who so signed his name was the brother of the grantor, and he had a son named John Ernest Edwards, who was then eight years of age. The word "nephew" was written over a careful erasure, but the alteration was not initialled by the parties or the witness. The presence of the word "nephew" in the deed was not discovered until the death of John Ernest Edwards in 1915.

Held, that there was an ambiguity on the face of the deed as to the person to whom the life estate was given, that extrinsic evidence was admissible to explain the ambiguity, and that on the evidence that person was the brother of the grantor.

Decision of the Supreme Court of Tasmania reversed.

APPEAL from the Supreme Court of Tasmania.

An originating summons in the Supreme Court of Tasmania was taken out by Charles Edwards, the trustee of an indenture of conveyance and declaration of trust dated 4th October 1886, registered in the Registry of Deeds at Hobart on 29th October 1886, for the determination of the question: Who is presently entitled to the benefit of the trusts by the said deed declared of and concerning the lands and hereditaments thereby assured?

The indenture, so far as is material, was as follows:—"This indenture made 4th October 1886 between Maria Edwards of Circular Head in Tasmania spinster of the one part and John Edwards of the same place gentleman of the other part witnesseth that in consideration of the natural love and affection which the said Maria Edwards hath and beareth to and for her nephew the said John Edwards and for other good causes and considerations her hereunto moving and in consideration of the sum of five shillings upon the execution hereof paid to the said Maria Edwards by the said John Edwards the receipt whereof is hereby acknowledged she the said Maria Edwards doth grant bargain sell release and confirm unto the said John Edwards and his heirs all that allotment or piece of land" (the land was then described) "to have and to hold the said land hereditaments and premises hereby granted and released or intended so to be unto the said John Edwards and his heirs to the use of the said John Edwards and his assigns for the term of the natural life of the said John Edwards without impeachment of waste And subject thereto to the use of Charles Edwards of Circular Head in Tasmania storeman his heirs executors administrators and assigns upon trust for the widow (if any) of the said John Edwards during widowhood and subject thereto and upon the decease or marriage of such widow (if any) which shall first happen then upon trust for all the children if more than one equally or only child if only one of the said John Edwards who shall live to attain the age of twenty-one years and the heirs executors administrators and assigns of each of such children or only child (as the case may be) . . . In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first hereinbefore written. Maria Edwards.—Signed sealed and delivered

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by the said Maria Edwards in the presence of Chs. Tho. Smith J.P. Circular Head. John Edwards Jnr.—Signed sealed and delivered by the said John Edwards in the presence of Chs. Tho. Smith J.P. Circular Head."

At the date of the execution of the indenture there were living the father of Maria Edwards, who was named John Edwards, his son, who was also named John Edwards, and a son of the latter who was named John Ernest Edwards and who was then about eight years of age. John Edwards, senior, died on 24th July 1891. Maria Edwards died on 17th February 1900. John Edwards, junior, died on 7th March 1907, leaving him surviving his widow, Emily Maria Edwards, and their son, John Ernest Edwards. John Ernest Edwards died on 3rd June 1915, leaving him surviving his widow, Alice Maud Edwards.

The defendants to the summons were Emily Maria Edwards and Alice Maud Edwards.

The other material facts are stated in the judgment hereunder.

The summons came on for hearing before *Crisp* J., who referred it to the Full Court, which made an order declaring that upon the true construction of the indenture by the words "her nephew the said John Edwards" the settlor meant to describe her nephew John Ernest Edwards.

From that decision Emily Maria Edwards now appealed to the High Court.

P. L. Griffiths, for the appellant. On the evidence the person to whom the life estate was intended to be given was John Edwards, the brother of the grantor, and not his son John Ernest Edwards. The fact that the alteration of the deed by the insertion of the word "nephew" is not authenticated indicates that it escaped the attention of the grantor and the witness. The execution of the deed by John Edwards, in the absence of any other evidence, must be taken to have been a solemn act in law, and by signing it he delivered it and must be taken to have been the party described as the party of the other part. The persons mentioned in the deed and concerned in its execution having been identified, an ambiguity at once appears on the face of the deed, and extrinsic evidence is admissible for the

purpose of solving the ambiguity and interpreting the deed (*Henderson* v. *Henderson* (1)). Under sec. 45 of the *Trustee Act* 1898 (62 Vict. No. 34) this question may properly be determined on originating summons.

Tasman Shields, for the respondent. The question raised here is not one for originating summons but the appellant's proper remedy is to ask for rectification (*Miller* v. *Travers* (2)). There is no ambiguity on the face of the deed. The description of the person to whom the life estate is given sufficiently describes the grantor's nephew, and extrinsic evidence is not admissible to show that he was not intended to be the beneficiary (*In the Goods of Brake* (3)). When there is a disputed question of fact the matter cannot properly be determined on originating summons (*In re Johnson*; *Reed* v. *Reed* (4); *In re Brewster*; *Munro* v. *Brewster* (5); *In re Bridge*; *Franks* v. *Worth* (6); *In re Davies*; *Davies* v. *Davies* (7); *Re Ellis*; *Kelson* v. *Ellis* (8)).

[RICH J. The respondent did not object or demur *ore tenus* at the hearing (*cf. In re Turcan* (9)).]

Griffiths, in reply.

Cur. adv. vult.

Feb. 19.

GRIFFITH C.J. The deed upon which the question for decision arises is a common law conveyance dated 4th October 1886 which was made between Maria Edwards of Circular Head, of the one part, and a party described as "John Edwards of the same place gentleman," of the other part. The operative words purport to convey the land in question, which is one rood of land at Stanley, to "the said John Edwards" for life with remainder for the benefit of his widow and children, if any. The deed is expressed to have been executed by "the parties to these presents," and to have been "signed sealed and delivered" by "the said Maria Edwards" and

(1) (1905) 1 I.R., 353.
(2) 8 Bing., 244, at p. 248.
(3) 6 P.D., 217.
(4) 5 Tas. L.R., 92.
(5) 10 Tas. L.R., 4.
(6) 56 L.J. Ch., 779.
(7) 57 L.J. Ch., 759.
(8) 59 L.T., 924.
(9) 58 L.J. Ch., 101, at p. 102.

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Griffith C.J.

" the said John Edwards," who signed his name as " John Edwards Jnr.," in the presence of a witness who in an affidavit spoke of them in language indicating that they were both present. The person who signed his name as " John Edwards Jnr." was the brother of the settlor, and the appellant is his widow. His father, who was living, was also named John Edwards, which accounts for the use of the " Jnr." in the signature " John Edwards Jnr."

So far there appears to be no difficulty. But in the recital of the consideration for the deed it is described as " the natural love and affection which the said Maria Edwards hath and beareth to and for her nephew the said John Edwards " and of five shillings paid to her by " the said John Edwards." John Edwards who signed the deed as " John Edwards Jnr." had an infant son, then eight years of age, named John Ernest Edwards. The respondent is the widow of John Ernest Edwards. The question which we have to determine is to whom did the estate pass, which depends upon the intention of the settlor as expressed by the deed. Did she mean her brother, or her nephew ? The appellant desires to call in aid extrinsic evidence. Whether such evidence is admissible or not depends upon whether an ambiguity appears upon the face of the deed interpreted by applying the evidence to identify the persons named in it. In my opinion the statement in the attestation clause that the deed was executed by " the said John Edwards " would, standing alone, be a sufficient designation of the person who actually executed the deed as the purchaser. Is, then, this result excluded by the circumstance that the purchaser is also described as " her nephew," which words also, if standing alone, would be a clear and sufficient description of a different person? In my opinion the conflict raised a case of ambiguity which permits of the admission of extrinsic evidence. I should say at this point that I regard the evidence of the identity of the person who signed the deed not as extrinsic but as ordinary evidence applicable to the interpretation of deeds. I turn then to this evidence as to the use of the word " nephew." It appears on inspection to have been written both in the deed and in the sworn copy for registration (under the then existing law) on a very careful and complete erasure, and in the same handwriting as the rest of those documents. The

registered copy was also signed by the same two persons. I think that the proper inference is that the alteration was made in the solicitor's office in Hobart before the deed was sent to the country for execution. The alteration was not initialled by the parties or the witness, and I think it may fairly be inferred that it passed unnoticed by them. It may, perhaps, be accounted for as an intended but unauthorized emendation made by the solicitor or his clerk owing to some mistake as to the true relationship of the parties. On the execution of the deed it was delivered into the custody of the appellant's husband, who built a house upon the land in which he resided till his death in 1907. The fact that the word "nephew" was in the deed was not discovered until after the nephew's death in 1915. The result is that the description of the purchaser is applicable in part to two different persons but is not a complete and accurate description of either of them. With the aid of the extrinsic evidence I come to the conclusion that the use of the word "nephew" was inadvertent on the part of the settlor, and must be treated as *falsa demonstratio*. I think therefore that the appeal must be allowed, and that the judgment must be varied by substituting a declaration that upon the true interpretation of the deed by the words "the said John Edwards" in the gift the settlor meant her brother of that name.

As there is no question of credibility of witnesses or of conflict of evidence, I think that the question may properly be determined on originating summons.

BARTON J. I agree.

GAVAN DUFFY J. I agree to the order proposed by the Chief Justice.

RICH J. I agree with the conclusion arrived at.

Appeal allowed. Order appealed from varied by substituting a declaration that by the words "her nephew the said John Edwards" in the deed the settlor meant her brother John Edwards. Costs of appeal of both parties out of estate.

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Solicitor for the appellant, *K. Laughton*, Stanley, by *Griffiths & Crisp.*

Solicitors for the respondent, *Shields & Heritage*, Launceston, by *Page, Hodgman & Seager.*

B. L.

Appl *Fairmont Homes Pty Ltd, Re* (1990) 7 SR(WA) 363

Aff *White v Licensing Court South Australia* (1919) 26 CLR 257

[HIGH COURT OF AUSTRALIA.]

THE LICENSING COURT (SOUTH AUSTRALIA) APPELLANT;

AND

WHITE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1918.

MELBOURNE, *Feb.* 27.

Griffith C.J., Barton and Rich JJ.

Licensing—Local option—Adoption of resolution that number of licences be not increased or reduced—Effect of resolution—Jurisdiction of Licensing Bench—Objection to renewal of licence on ground that premises not required for accommodation of public—Licensing Act 1908 (*S.A.*) (8 *Edw. VII. No.* 970), *secs.* 44, 47, 59, 183, 199, 200, 203—*Licensing Acts Further Amendment Act* (*No.* 2) 1915 (6 *Geo. V. No.* 1236).

Sec. 44 of the *Licensing Act* 1908 (S.A.) provides that a Licensing Bench "shall hear, inquire into, and determine" all applications for licences and for renewal of licences and also all objections which are made to any such applications. Sec. 47 provides that one of the objections that may be taken to an application for a grant or a renewal of a publican's licence is "that the licensing of the premises is not required for the accommodation of the public." Sec. 59 provides that "(1) No licence shall be renewed nor shall any application be granted as a matter of course; and upon the hearing of any application for the grant, renewal, transfer, or removal of a licence, whether notice of objection has been delivered or not, and whether objection is taken at the hearing or not, the Bench shall hear, inquire into, and determine the application and all such objections (if any) on the merits, and shall grant or refuse the application