[HIGH COURT OF AUSTRALIA.]

AINSLIE AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

THE TRUSTEES, EXECUTORS AND AGENCY COMPANY LIMITED AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 25, 26; *Nov* 13.

Knox C.J., Powers and Starke JJ.

Will—Construction—Devise of land—Power to trustees to raise money on land on trust that fails—Charge on land or exception from devise—Duty of trustees to raise money.

A testator devised certain land to trustees upon trust to permit one of his daughters to receive the rents and profits for life, with remainder to such of her children as she should by deed or will appoint, and in default of appointment upon certain trusts for her children. He directed that out of the rents and profits of the land the trustees should raise a certain annuity for each of two grandchildren, children of another of his daughters. He also directed that on the death of each of these grandchildren his trustees should have power to raise a certain sum of money by way of mortgage of the land, and should hold such sum on certain trusts for the children and grandchildren of such grandchild, and that in default of issue of such grandchild attaining a vested interest in such sum of money it should fall into his residuary estate. The will contained a general residuary devise and bequest. The gifts of the sums of money to the grandchildren of the testator's two grandchildren were void for remoteness, and the direction that those sums of money should fall into the testator's residuary estate consequently failed.

Held, that, assuming that the power given to the trustees to raise such sums of money amounted to a direction to raise them, each of such sums was intended

by the testator to be a charge upon the land and not an exception from the devise of the land; and therefore that, on the death of one of those two grandchildren of the testator without ever having been married, the sum directed to be raised in favour of his children and grandchildren sank into the land directed to be charged for the benefit of the devisees of the land, and the trustees were under no duty to raise such sum.

Decision of the Supreme Court of Victoria (*McArthur* J.) reversed on this point.

APPEAL from the Supreme Court of Victoria.

By his will John Robert Murphy, who died on 4th August 1891, provided as follows:—"I devise such allotments and hereditaments (subject nevertheless to the allowances to Felix Mueller and Elsa Mueller the children of my daughter Annie Mueller hereinafter mentioned) . . . unto and to the use of my trustees upon such trusts and with and subject to such powers and provisions in favour of or for the benefit of my daughter Margaret Grace Ainslie and her children and issue as shall correspond as near as circumstances will permit with the trusts powers and provisions hereinbefore contained with respect to the land and hereditaments hereinbefore devised for the benefit of my said daughter Mary Martha Steavenson and her children and issue I direct that my trustees shall by and out of the rents and profits of the said land and premises in Collins Street being part of Allotment No. 12 of Section 2 City of Melbourne" (known as "The Olderfleet") "or by mortgage or sale of the said land and premises or any part thereof raise the clear annuity or yearly sum of £500 for each of them the said Elsa Mueller and Felix Mueller during his or her life to be paid by quarterly payments the first payment to be made three months after my decease and shall during their respective minorities apply the yearly sum of £250 portion of the said annuity in or towards his or her maintenance education or benefit as my trustees shall think fit or pay the same to his or her guardians for that purpose and shall accumulate the balance of £250 of each such annuity at compound interest by investing the same and the resulting income thereof and shall pay over such accumulations to the said Elsa Mueller and Felix Mueller respectively on their respectively attaining the age of twenty-one years but so nevertheless that in the event of the said Elsa Mueller

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and Felix Mueller or either of them marrying without the consent of her or his father or dying under the age of twenty-one years all accumulations to which such annuitant or respective annuitants so dying or marrying would otherwise be entitled shall sink into and be deemed to form part of my residuary estate And at the death of each of them the said Felix Mueller and Elsa Mueller I direct that my trustees shall have power to raise the sum of £10,000 (that is to say £20,000 in all) by way of mortgage of all or any part of the said allotment of land and premises in Collins Street Melbourne being part of Allotment No. 12 of Section 2 City of Melbourne but not of any other of my properties and shall hold each such sum raised as aforesaid upon or with the like or corresponding trusts and provisions for the benefit of the children of the said Felix Mueller and Elsa Mueller respectively and their respective children as are hereinbefore contained with respect to the land and hereditaments hereinbefore devised for the benefit of my said daughter Mary Martha Steavenson and her issue or as near thereto as circumstances will permit And in default of any issue of the said Felix Mueller and the said Elsa Mueller respectively attaining a vested interest in the said moneys then I direct that the money to which such issue would if of age have respectively been entitled shall sink into and become part of my residuary estate."

Felix Mueller and Elsa Mueller, mentioned in the will, were enemy subjects, and the former died on 5th September 1918. Upon an originating summons taken out in 1903 by the Trustees, Executors and Agency Co. Ltd., the trustee of the will, an order was made which reserved to the parties liberty to apply; and, pursuant to that liberty, the trustee applied in 1921 for the determination by the Supreme Court of certain questions in respect of which *McArthur* J., on 11th May 1922, ordered and directed substantially as follows:—

1. The plaintiff as trustee of the will of the testator John Robert Murphy has now a duty to raise by mortgage of the property mentioned in the said will and known as "The Olderfleet" a sum of £10,000 as mentioned in the said will in the event of the death of Felix Mueller, which has happened.

2. The sum of £10,000 so to be raised should be increased by such a sum as represents interest at £5 per centum per annum on

the said sum of £10,000 from the fifth day of September 1918 up to the date upon which such sum shall be raised.

3. The persons beneficially entitled to the said sum of £10,000 and interest thereon as aforesaid are the defendant Michael Murphy and the representatives of the estate of Edward Murphy (now deceased) as the residuary legatees under the said will and codicil.

4. The costs of all parties appearing on this motion be taxed as between solicitor and client and be paid or retained out of the residuary estate of the testator, that is to say, the said sum of £10,000 and interest to be raised as aforesaid.

From that decision Margaret Grace Ainslie (the younger), Ada Mary Ainslie and Adolphus James Ainslie, the children of the testator's daughter Margaret Grace Ainslie mentioned in the will, who had died on 2nd January 1921, now appealed to the High Court.

Other material facts are stated in the judgment hereunder.

Latham K.C. (with him *A. H. Davis*), for the appellants. Upon the proper construction of the will it was intended by the testator that the power to raise £10,000 should be exercised only upon a contingency which has not occurred. All the interests which could arise upon the exercise of the power are void by reason of the rule against perpetuities, and the power itself is consequently invalid. The property upon which the money is directed to be raised is given to the Ainslie family in terms which are absolute. The charge failing by reason of the rule of law, it falls into the property charged for the benefit of the devisees. [Counsel referred to *Brown* v. *Higgs* (1); *Farwell on Powers*, 3rd ed., p. 535; *Halsbury's Laws of England*, vol. XXII., pp. 353, 357; *Blight* v. *Hartnoll* (2); *Jackson* v. *Hurlock* (3); *Re Cooper's Trusts* (4); *Tucker* v. *Kayess* (5); *Hancock* v. *Watson* (6).]

[KNOX C.J. referred to *Frazer* v. *Frazer* (7).]

(1) (1801-03) 8 Ves., 561.
(2) (1881) 19 Ch. D., 294, at p. 300.
(3) (1764) 2 Eden, 263.
(4) (1853) 4 DeG. M. & G., 757.
(5) (1858) 4 K. & J., 339.
(6) (1902) A.C., 14, at p. 21.
(7) (1901) S.R. (N.S.W.) (Eq.), 247.

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If this view is not correct, the words of the residuary gift do not cover a sum to be raised in the future, but only cover things which were in existence at the death of the testator, and therefore there is an intestacy as to the sum.

Pigott, for the respondent Michael Murphy. The power to raise the £10,000 is a trust which is required to be exercised not only for the benefit of the children of Felix Mueller but also for the benefit of the residuary legatees. The gift to the Ainslie family is a gift of the land with an exception of the sums directed to be raised, and those sums are not merely a charge on the estate devised (*Cooke* v. *Stationers' Co.* (1)). The doctrine of *Lassence* v. *Tierney* (2), therefore, does not apply. The mere fact that the trust proves ultimately to be void does not prevent the power to raise the sum from being a trust (*Tregonwell* v. *Sydenham* (3)). [Counsel also referred to *Jenkins* v. *Stewart* (4) ; *Sidney* v. *Shelley* (5).] As the trust fails, the sum raised goes to the residuary legatees, not by reason of the gift to them, but by reason of a resulting trust in their favour.

Herring, for the respondent the Public Trustee, representing the persons entitled under an intestacy (if any) of the testator. The power to raise the sums of money is coupled with a trust, and the money must be raised irrespective of the fact that the trust fails; and the trust as to this particular £10,000 failing, there is an intestacy as to it. [He referred to *Permanent Trustee Co.* v. *Redman* (6).]

Weigall K.C. (with him *Russell Martin*), for the respondent the Trustees, Executors and Agency Co. Ltd., referred to *Jarman on Wills*, 6th ed., vol. I., pp. 441, 444.

[KNOX C.J. referred to *Sutcliffe* v. *Cole* (7).]

Latham K.C., in reply, referred to *In re Currie's Settlement*; *Rooper* v. *Williams* (8).

Cur. adv. vult.

(1) (1831) 3 My. & K., 262.
(2) (1849) 1 Mac. & G., 551.
(3) (1815) 3 Dow, 194, at p. 209.
(4) (1906) 3 C.L.R., 799.
(5) (1815) 19 Ves., 352, at p. 362.
(6) (1916) 17 S.R. (N.S.W.), 60.
(7) (1855) 3 Drew., 135.
(8) (1910) 1 Ch., 329.

THE COURT delivered the following written judgment:—

By his will the testator, John Robert Murphy, disposed of certain real estate, being part of Allotment 12 Section 2 City of Melbourne, in the following words:—[The portion of the will above set out was then stated.] The trusts declared by the will with respect to the land devised for the benefit of Mrs. Steavenson and her children were to permit Mrs. Steavenson to receive the rents and profits for life, remainder among her children as she should by deed or will appoint; and, in default of appointment, among such of her children as being sons should attain twenty-one or being daughters should attain that age or marry, in equal shares as tenant in common. The will contained a general residuary devise and bequest. Felix Mueller died without ever having been married. It was conceded that the gift of the £10,000 for the benefit of the grandchildren of Felix Mueller was void for remoteness, and that consequently the direction that the money should sink into and become part of the testator's residuary estate also failed.

In these circumstances the trustees of the will sought the direction of the Supreme Court upon the question who were or would be the persons beneficially entitled to the sum of £10,000 which the trustees were empowered to raise for the benefit of the issue of Felix Mueller. In the view which we take of this question it is unnecessary to refer to the other questions raised by the trustees. The motion was heard by *McArthur* J., who decided that on the death of Felix Mueller it was the duty of the trustees to raise the said sum of £10,000 and that the residuary legatees under the will and codicil were the persons beneficially entitled to that sum. It is from this decision that this appeal is brought.

On the argument of the case before this Court a number of authorities bearing on the question were cited, to none of which had the attention of the learned Judge of the Supreme Court been directed. But, applying the principle of these authorities to the provisions of this will, we think his decision cannot be supported.

For the purpose of deciding this appeal it may be assumed that the power to raise £10,000 on the death of Felix Mueller amounts to a direction to raise that sum. On this footing the question whether the £10,000 goes to the residuary legatees under the general

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residuary gift, or to the next of kin as on an intestacy, or sinks into the property directed to be charged, for the benefit of the devisees of that property, depends upon whether the testator excepted £10,000 out of the devised property—that is, gave the property minus the £10,000, or only charged the £10,000 upon the property (*Tucker* v. *Kayess* (1)). Unless the testator intended to sever the gift from the devise for all purposes so as to make it an exception from the devise, the devisee will take the benefit of its failure, whether the failure is caused by lapse or by any other means (*Jarman on Wills*, 6th ed., vol. I., p. 445). The question, therefore, is one of intention to be ascertained from the language of the will. What is there in this will to indicate any intention on the part of the testator to do more than charge the property devised for the benefit of Mrs. Ainslie and her children with the payment of £10,000 for the benefit of certain other persons? The gift of the property—subject only to the allowances to Felix and Elsa—for the benefit of Mrs. Ainslie and her children was clearly absolute in the first instance. Having so given the property, the testator directed his trustees on the death of Felix Mueller to raise by mortgage of it the sum of £10,000 and to hold such sum on certain trusts. The words of the testator contain no express exception of the sum of £10,000, but rather throw the burden of the sum directed to be raised upon the devised property. As *Kindersley* V.C. said in *Sutcliffe* v. *Cole* (2), there is here a devise of the property subject to a charge for the particular purpose of a benefit to some individuals, and that is a devise of the whole property and not of the property less something. In *Re Cooper's Trusts* (3) *Wood* V.C. pointed out that he could not find a single case in the books where a sum of money to be paid out of an estate had ever been held to be an exception. The decision in that case was affirmed by the Lords Justices on appeal (4). In our opinion it is impossible, consistently with the principle of the authorities to which we have referred, to hold that this sum of £10,000 is an exception from the property given as distinguished from a charge on that property.

(1) (1858) 4 K. & J., 339.
(2) (1855) 3 Drew., 135.
(3) (1853) 23 L.J. Ch., 27 (n.).
(4) (1853) 4 DeG. M. & G., 757.

Consequently the appeal should be allowed, and the order of *McArthur* J. of 11th May 1922 varied by substituting for the order and directions numbered 1, 2, 3 and 4 secondly contained therein a declaration that the charge of £10,000, which the trustee was empowered by the said will to raise on the death of Felix Mueller by mortgage of the property known as "The Olderfleet," has in the events which have happened sunk for the benefit of the persons beneficially interested under the trusts in the said will declared in favour of Mrs. Ainslie and her children, and that the trustee is under no duty to raise the said sum; and an order that the costs of all parties (those of the trustee as between solicitor and client) of the proceedings in the Supreme Court and of this appeal should be raised and paid out of the property known as "The Olderfleet."

Order accordingly.

Solicitors for the appellants, *Blake & Riggall.*

Solicitors for the respondents, *H. R. Hamer*; *Smith & Emmerton*; *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.