[HIGH COURT OF AUSTRALIA.]

SEXTON . . . . . APPELLANT;
RESPONDENT,

AND

HORTON AND OTHERS . . . . . RESPONDENTS.
APPLICANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Aug.* 11, 12, 27.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

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

By a deed of settlement made in New South Wales in 1865 the settlor granted certain land unto A and his heirs to have and to hold unto and to the use of A and his heirs during the life of the settlor's wife in trust to allow her and her assigns to hold the same for her separate use without impeachment of waste, and from and immediately after her decease to the use of the eldest son of the settlor and his wife living at the time of her death, and in the event of there being no such son then to the use of the wife, her heirs and assigns for ever.

Held, that according to technical rules of construction the settlement conferred upon the eldest son an estate for life, and not an estate in fee simple, in equity, and that the Court was not entitled to consider the intention of the settlor as gathered from other parts of the instrument.

In re Bostock's Settlement; *Norrish* v. *Bostock*, (1921) 2 Ch. 469, followed.

Hunt v. *Korn*, (1917) 24 C.L.R. 1, overruled.

Decision of the Supreme Court of New South Wales (*Long Innes* J.): *Ex parte J. Horton*, (1926) 43 N.S.W.W.N. 160, reversed.

APPEAL from the Supreme Court of New South Wales.

By a post-nuptial settlement made in New South Wales on 28th November 1865 between William Arthur Evans, Mary Evans (his

wife) and George Richards, William Arthur Evans granted unto George Richards and his heirs certain land in the City of Goulburn, to have and to hold unto and to the use of George Richards and his heirs during the life of Mary Evans without impeachment of waste, "and from and immediately after her decease to the use of the eldest son of the said William Arthur Evans and Mary Evans living at the time of her death and in the event of there being no such son then to the use of the said Mary Evans her heirs and assigns for ever." William Arthur Evans died on 2nd January 1890 having made a will dated 1st February 1886, and his wife, Mary Evans, died on 18th February 1873. Their eldest son living at the time of her death was William Arthur Evans jun., who on 3rd July 1896 granted the land by way of mortgage to Diana Elizabeth Charteris. This mortgage was assigned to Augustine Matthew Betts, who died on 15th September 1924 and whose executors were Ernest Augustine Betts and Selwyn Frederick Betts. By an indenture of marriage settlement William Arthur Evans jun. on 7th February 1898 granted the land in question to Frank Wall and his heirs to have and to hold unto Frank Wall and his heirs upon certain trusts including trusts in favour of his intended wife, Stella Elizabeth Horton, whom he afterwards married. John Horton was subsequently appointed to be trustee of this settlement. There was, at all material times, a hotel erected on the land, and on 13th October 1924 it was determined by the Licences Reduction Board, pursuant to the *Liquor (Amendment) Act* 1919 (N.S.W.), that the hotel should be closed and that the compensation money payable to the owner of the hotel should be £840.

On 24th March 1925 an application was made on summons to the Supreme Court in its equitable jurisdiction, on behalf of John Horton, Ernest Augustine Betts and Selwyn Frederick Betts, for payment out to them of the compensation money. The summons was served on Anne Sexton, a daughter of William Arthur Evans sen., and she was subsequently appointed to represent all persons interested under his will. The summons was heard by *Long Innes* J., who, following the decision of the High Court in *Hunt* v. *Korn* (1), held that under the settlement of 28th November 1865 William

(1) (1917) 24 C.L.R. 1.

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Arthur Evans jun. acquired an equitable estate in fee simple in the land; and he accordingly made an order for payment out to the applicants: *Ex parte J. Horton* (1).

From that decision Anne Sexton now appealed to the High Court.

Nicholas, for the appellant. By the settlement of 28th November 1865 an equitable estate for life only was given to the eldest son of the settlor, for the trust is executed and technical words are used which according to a rule of law give no more than a life estate. The case is within the decision in *In re Bostock's Settlement*; *Norrish* v. *Bostock* (2). That decision overruled *In re Tringham's Trusts*; *Tringham* v. *Greenhill* (3), upon which the High Court's decision in *Hunt* v. *Korn* (4) was founded. In *Bostock's Case* the rule was for the first time discussed by a Court of Appeal, and the Court thoroughly examined it and showed how the error in *Tringham's Case* had arisen. The Court should follow *Bostock's Case* in preference to *Hunt* v. *Korn*. If the Court is entitled to look at the rest of the settlement in order to discover the settlor's intention, there is nothing which indicates an intention to create more than a life estate in his son.

Flannery K.C. (with him *Weston*), for the respondents. The decision in *Hunt* v. *Korn* (4) was correct and has been followed in *In re S. R. Lorking* (5). In *Bostock's Case* (2) too much stress was put upon the idea that the rules of common law and those of equity as to creating estates are the same, and the common law principle was applied to the case as if it had a decisive effect. The original feudal rule that an estate greater than a life estate cannot be passed without words of inheritance does not apply to equitable estates. It is true that if in a limitation of an estate there are technical words they must be given their technical meaning; but, as is pointed out in *Lewin on Trusts*, 12th ed., p. 124 (cited in *Bostock's Case* (6)), in a document dealing with equitable interests an estate in fee is created if it is made clear that that is the estate intended to be created. *Bostock's Case* was a case in which the

(1) (1926) 43 N.S.W.W.N. 160.
(2) (1921) 2 Ch. 469.
(3) (1904) 2 Ch. 487.
(4) (1917) 24 C.L.R. 1.
(5) (1924) 25 S.R. (N.S.W.) 46.
(6) (1921) 2 Ch., at p. 483.

settlement dealt only with equitable interests which had already been created. That was so also in *In re Whiston's Settlement*; *Lovatt* v. *Williamson* (1). Neither of those cases applies where the equitable interests are created by the settlement itself, as is the case here. [Counsel also referred to *Land Purchase Trustee Northern Ireland* v. *Beers* (2).]

[KNOX C.J. referred to *In re Oliver's Settlement*; *Evered* v. *Leigh* (3).]

The whole settlement discloses an intention to give more than a life estate to the eldest son of the testator.

Nicholas, in reply. There is no ground for drawing a distinction between settlements of existing equitable interests and settlements which themselves create equitable interests.

Cur. adv. vult.

Aug. 27

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. By a post-nuptial settlement dated 28th November 1865 and made between William Arthur Evans, Mary (his wife) and George Richards, William Arthur Evans granted unto Richards and his heirs certain lands to have and to hold unto and to the use of Richards and his heirs during the life of Mary Evans in trust to allow her and her assigns to hold the same for her separate use without impeachment of waste, and from and immediately after her decease to the use of the eldest son of the said William Arthur Evans and Mary Evans living at the time of her death, and, in the event of there being no such son, then to the use of the said Mary Evans, her heirs and assigns for ever. The eldest son of William Arthur Evans and Mary (his wife) living at the time of her death was William Arthur Evans jun.

Long Innes J. held that there were sufficient indications in the settlement of an intention to limit an equitable estate in fee simple in remainder in the lands to William Arthur Evans jun. The limitation to the use of William Arthur Evans jun. is perfected and declared by the settlement and is in technical terms. In *Bostock's*

(1) (1894) 1 Ch. 661. (2) (1925) N.I. 191.
(3) (1905) 1 Ch. 191.

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Case (1) the Court of Appeal held in such circumstances that the construction of the document did not depend upon intention gathered from other parts of the instrument, but was governed by a rule of law operative in equity no less than at law. "According to technical rules a limitation to A and his heirs to the use of or in trust for B confers on B a legal estate for life only. Where . . . an equitable estate is dealt with it must . . . confer on B an equitable estate for life only, and the Court is not . . . entitled to regard an intention gathered from the terms of other parts of the instrument" (*Warrington* L.J. (2)).

At common law the word "heirs" was necessary for the limitation of a fee simple to a natural person (*Challis' Law of Real Property*, 2nd ed., at pp. 194-196). It follows from the decision of *Bostock's Case* (1) that an estate in fee simple in equity was not limited to William Arthur Evans jun., but only a life estate; but *Long Innes* J. was nevertheless constrained by a decision of this Court in *Hunt* v. *Korn* (3) to consider the intention of the settlor gathered from the terms of the whole instrument and to hold, as he found a sufficient indication to pass an estate in fee simple, that an estate in fee simple did pass to William Arthur Evans jun. We have found some difficulty in gathering from the settlement any indication of intention on the part of the settlor other than is found in the words of limitation themselves; but it will be more satisfactory to deal with this case on broader grounds. In this Court we are not bound by the decisions of the Court of Appeal, but uniformity of decision upon the law of property in force both in England and in Australia is paramount. It is a sufficient reason for reconsidering *Hunt* v. *Korn* that the Court of Appeal has acted upon a different rule of law.

Unless some manifest error is apparent in a decision of the Court of Appeal this Court will render the most abiding service to the community if it accepts that Court's decisions, particularly in relation to such subjects as the law of property, the law of contracts and the mercantile law, as a correct statement of the law of England until some superior authority has spoken. *Bostock's Case* (1)

(1) (1921) 2 Ch. 469.
(2) (1921) 2 Ch., at p. 484.
(3) (1917) 24 C.L.R. 1.

accords, if we may say so, with the stronger body of authority in England; and the examination of the cases by, and the reasoning of, the learned Lords Justices satisfy us that the decision in *Hunt* v. *Korn* (1) was based upon an erroneous view of the law, induced, no doubt, by some English decisions that have now been overruled; but it cannot and ought not now to be determined whether the principle enunciated in *Bostock's Case* (2) extends to a limitation such as was discussed in *Land Purchase Trustee Northern Ireland* v. *Beers* (3). *Bostock's Case* dealt with a limitation in trust which was perfected and declared in technical terms by the settlor. We act upon the rule laid down for that type of case and express no opinion upon any other case (cf. *Bostock's Case*, per *Younger* L.J. (4)).

The judgment below should be reversed and the case remitted to the learned Judge for further hearing.

ISAACS J. The proceeding out of which this appeal arises is a statutory summons created for a special purpose and assigned to the equitable jurisdiction of the Supreme Court by sec. 29 of the *Liquor (Amendment) Act* 1919, No. 42, as amended by later legislation (No. 42 of 1922, sec. 3 (12)).

As to whether the mortgages, on the facts of this case, are properly within the scope of the section is a matter which I must be understood as leaving entirely unconsidered. The matter debated, namely, whether the decision in *Hunt* v. *Korn* (1) should be adhered to, is much too important to be passed over merely because of the uncertainty just expressed. It is, I think, incumbent on the Court, in view of what appears in that case, to state its present opinion as to its accuracy. The mere recognition of *Bostock's Case* (2), as will be seen, is not sufficient in the circumstances.

Hunt v. *Korn* (1) was a case of strict trust. *Bostock's Case* (2) was not. Whether the present case is of one category or the other depends upon the construction of the deed of settlement. *Hunt* v. *Korn* was decided primarily upon the principle stated by *Neville* J. in *In re Nutt's Settlement*; *McLaughlin* v. *McLaughlin* (5),

(1) (1917) 24 C.L.R. 1.
(2) (1921) 2 Ch. 469.
(3) (1925) N.I. 191.
(4) (1921) 2 Ch., at pp. 489, 490.
(5) (1915) 2 Ch. 431, at p. 435.

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as to which, though cited, nothing was said in the judgment in *Bostock's Case* (1); but it most likely shares the fate of *In re Tringham's Trusts*; *Tringham* v. *Greenhill* (2). *Nutt's Case* (3) was decided eleven years after *Tringham's Trusts Case*. In the meantime, some eminent Judges and text-writers had dealt with *Tringham's Trusts Case* without questioning its accuracy. However, a powerful Court of Appeal has, in *Bostock's Case*, overruled *Tringham's Trusts Case*, and we are now called upon to reconsider the relevant law.

The actual point insisted upon in *Bostock's Case* (1) by all the learned Lords Justices was this:—An equitable estate being, by a document complete and perfect in its terms, conveyed in the technical language of legal limitations, the effect of the grant in equity was the same as at law, and could not be overridden by a contrary general intention of the grantor gathered from reading the document as a whole. Lord *Sterndale* M.R. makes that view particularly clear at pp. 480 and 481. On the latter page he says: "I think here strict legal conveyancing language has been used, and it must receive its legal meaning." *Warrington* L.J. says (4): "The limitations are complete and perfect; technical terms and forms of conveyancing are used and the principles applicable to executed trusts are those which must be applied." Those principles are that the construction in equity must be the same as at law. *Younger* L.J. (5) finds the instrument not of an executory but of an executed nature, and then adds: "In these circumstances all that the Court can do is to construe it according to the import of the words used." This the Lord Justice explains thus (6): "Here we have an executed document complete in its terms, expressed in the language of legal limitations," and an extract is given from the judgment of *Sargant* J. in *In re Monckton's Settlement*; *Monckton* v. *Monckton* (7), relative to a *conveyance* of an equitable estate.

My reconsideration of the whole matter, by the light of the judgments in *Bostock's Case* (1) and the later Northern Ireland case of *Land Purchase Trustee Northern Ireland* v. *Beers* (8), leads to

(1) (1921) 2 Ch. 469.
(2) (1904) 2 Ch. 487.
(3) (1915) 2 Ch. 431.
(4) (1921) 2 Ch., at p. 484.
(5) (1921) 2 Ch., at pp. 488, 489.
(6) (1921) 2 Ch., at p. 490.
(7) (1913) 2 Ch. 636, at p. 642.
(8) (1925) N.I. 191.

the conclusion that the decision in *Hunt* v. *Korn* (1) cannot be supported. But the reason that it cannot be supported is not simply that *Bostock's Case* (2) is in itself a necessary negation of *Hunt* v. *Korn*, because there are additional considerations which, added to those directly involved in *Bostock's Case*, invalidate the former decision of this Court.

To state affirmatively my reason for departing from *Hunt* v. *Korn* (1), it is this: "There were no words formal or informal by way of limitation, and their place could not be supplied, as it was then thought it could, by the general intent of the document." In other words, and quoting with reference to the relevant trust the language of *Romilly* M.R. in *Lucas* v. *Brandreth* [*No.* 2] (3), "there is in it an entire absence of *any words* of *limitation* or *anything importing an estate of inheritance*." For instance, there are no words referential to an absolute interest either in the same instrument (*Garde* v. *Garde* (4)) or in another instrument (*Pugh* v. *Drew* (5)); nor words making it clear that there was to pass all interest of the grantor holding in fee simple the lands conveyed (*Re Hudson*; *Kühne* v. *Hudson* (6)). In both such cases words, however informal, would suffice; and this not merely on the authority of the cases quoted, but also on the authority of *Buckley* J. in *In re Irwin*; *Irwin* v. *Parkes* (7), and *Younger* L.J. in *Bostock's Case* (8). See also per *Farwell* L.J. in *In re Thursby's Settlement*; *Grant* v. *Littledale* (9), and per *Warrington* L.J. in *Bostock's Case* (10)— "either executory trusts or dispositions of equitable interests in an informal manner, in both of which cases effect was given to sufficient expressions of intention." Now, while it is quite true that technical words where used must receive the same construction with respect to equitable estates as with respect to legal estates, and while it is equally true that, at all events as a general rule, equitable limitations by way of trust executed have the same construction as legal limitations, yet the effect of informal words expressing the intention to create in fact the same limitations as would be created by technical

(1) (1917) 24 C.L.R. 1.
(2) (1921) 2 Ch. 469.
(3) (1860) 28 Beav. 274, at p. 279.
(4) (1843) 3 Dr. & War. 435.
(5) (1869) 17 W.R. 988.
(6) (1895) 72 L.T. 892.
(7) (1904) 2 Ch. 752, at pp. 764-765.
(8) (1921) 2 Ch., at pp. 489-490.
(9) (1910) 2 Ch. 181, at p. 189.
(10) (1921) 2 Ch., at p. 486.

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words, cannot be ignored according to the undoubted authorities cited. It may have to be determined whether the informal expressions referred to are to be treated as exceptions while still retaining for the instrument in which they are found the full character of executed trust, or whether, as considered by *Warrington* L.J., such a case as *Pugh* v. *Drew* (1) is only a declaration of trust (2) or executory (3), and similarly as to the second case postulated by *Buckley* J. in *Irwin's Case* (4). But whether the one doctrine or the other be maintained is comparatively immaterial—so long as the intention of the settlor or grantor is effectuated. In either case it is a mere matter of words.

So long as the Court gives effect to words, not words of limitation, but "that express that the grantee is to have all the estate and interest that the grantor had" (per *Buckley* J. (4)) lawyers may harmlessly and without practical injury to those really interested, differ as to the appropriate technical label to attach to the occasion. Probably this is at the root of the decision in *Land Purchase Trustee Northern Ireland* v. *Beers* (5). Lord *St. Leonards* in *Egerton* v. *Earl Brownlow* (6) says, in a classical passage, that the test of an executed trust is "Has the testator been what is called, and very properly called, his own conveyancer?" Lord *Westbury* in *Sackville-West* v. *Viscount Holmesdale* (7) said: "The subject of an executory trust, properly so called, is the particular deed or instrument which is to be made, and not the property which is comprised in it." And for a fuller exposition see the other judgments in that case and *Fearne's Contingent Remainders*, 8th ed., at pp. 142, 143.

It may be an interesting problem some day to accommodate the admittedly effectual settlement of equitable estates by informal words in the instances quoted, with the accepted definitions and demarcations of executory and executed trusts. But while that is outside the scope of this appeal, it is necessary to advert to it lest my reasons for departing from the decision in *Hunt* v. *Korn* (8) should be misunderstood.

(1) (1869) 17 W.R. 988.
(2) (1921) 2 Ch., at p. 475.
(3) (1921) 2 Ch., at p. 485.
(4) (1904) 2 Ch., at p. 764.
(5) (1925) N.I. 191.
(6) (1853) 4 H.L.C. 1, at p. 210.
(7) (1870) L.R. 4 H.L. 543, at p. 565.
(8) (1917) 24 C.L.R. 1.

The appeal should be allowed and the case remitted to the Supreme Court.

HIGGINS J. This case brings into prominence the distinction, which we are all too apt to forget, between rules of law and principles of construction. The distinction was luminously put by Mr. *Vaughan Hawkins* in the preface to his first edition of his treatise on the *Construction of Wills* (1863). He speaks of rules of construction, determining the construction which the Courts are bound, in the absence of a sufficiently declared intention to the contrary, to put upon particular words, expressions, and forms of dispositions occurring in wills. "Rules of law, which are not rules of construction, are not included in the present treatise . . . A rule of law, which is not a rule of construction (as, the rule in *Shelley's Case* (1), the rules as to perpetuity, mortmain, lapse, &c.), acts *independently of intention*, and applies to dispositions of property in whatever form of words expressed. This difference is fundamental."

Here we have to deal with a rule of law as to the effect of words in a deed—that in a grant of land by deed, a conveyance to A, or to the use of A, without mention of the "heirs" of A, conveys only a life estate. This rule has been happily abolished by our Wills Acts for more than eighty years, since 1837; and it has been abolished in New South Wales as to deeds executed after 1st July 1920 (*Conveyancing Act* 1919 (N.S.W.), sec. 47). As to deeds executed after that date, it is provided that "(1) in a deed it shall be sufficient in the limitation of an estate in fee simple to use the words in fee or fee simple without the word heirs . . . (2) Where land is conveyed to or to the use of any person without words of limitation, such conveyance shall be construed to pass the simple . . . unless a contrary intention appear by such conveyance."

But the deed in this case was executed in 1865, and effect must be given to the rule. The origin of the rule is clearly explained in *Williams' Real Property*, 8th ed., pp. 140-141; it is rooted deep down in the history of feudal tenures and of the long struggle for the right to alienate real estate. Here, the limitation in the deed

(1) (1581) 1 Rep. 93b.

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was to the use of Richards and his heirs during the life of the settlor's wife for her sole use, and after her decease to the use of the eldest son living at the time of her death, and in the event of there being no such son then to the use of the wife, her heirs and assigns for ever. There was such a son, William Arthur Evans jun., and he survived his father and his mother; and the gift over to the mother does not take effect. But there is no limitation to the heirs of the son; and therefore his estate was only a life estate.

I fully appreciate the attitude taken by the learned Judge of the Supreme Court, *Long Innes* J., in following the case of *Hunt* v. *Korn* (1), and in leaving it to this Court to overrule its own decision if it thought fit, in view of the recent decision in England in *In re Bostock* (2). This Court decided *Hunt* v. *Korn* in reliance on decisions in England by Judges of first instance in which effect was given to the intention instead of to the rule of law as to limitations, because the beneficiary took only an equitable interest. But there is no ground for refusing to apply to equitable gifts the same rules as to limitations of real estate as are applied to gifts of legal estates. "Equity follows the law" is the principle; and there is no doubt that this principle applies in particular to rules as to limitations of real estate. The position is different where the interests created are only executory—not executed as here. The exception in favour of executory interests was explained by the House of Lords in *Sackville-West* v. *Viscount Holmesdale* (3). Lord *Cairns* (4) quoted aptly the preamble of the decree in *Earl of Stamford* v. *Hobart* (5): "This Court doth declare that in matters executory, as in the case of articles or a will directing a conveyance where the words of the articles or will are improper or informal, this Court will not direct a conveyance according to such improper or informal expressions in the articles or will, but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intent of the parties; and in this case his Lordship doth conceive the true intent of the will to be, that the estates should be secured, as far as the rules of law will admit, to the issue male of the respective devisees, and that it was designed to be as strict a settlement

(1) (1917) 24 C.L.R. 1.
(2) (1921) 2 Ch. 469.
(3) (1870) L.R. 4 H.L. 543.
(4) (1870) L.R. 4 H.L., at pp. 571, 572.
(5) (1710) 3 Bro. Parl. Cas. 31, at p. 33.

as possible by law." Mr. *Flannery* admits that if *Bostock's Case* (1) is good law he cannot succeed. We are not bound to follow decisions of the Court of Appeal in England; but it is most desirable that we should not apply a different rule in our Court, affecting, as it must, others as well as the parties before us, and titles to property, unless we see that *Bostock's Case* is clearly wrong. But we have been referred to a recent case decided by the Lords Justices of Northern Ireland, in which *Bostock's Case* has been said to be distinguished (*Land Purchase Trustee Northern Ireland* v. *Beers* (2)). In the Irish case, treating the trust as executed, not executory, the learned Lords Justices had to deal with a case in which the actual intention as to the nature of the estate was obvious; for the words "in tail male" were used. The temptation to give effect to such an obvious intention would be very great; but there is no such obviousness here, and it is our duty to follow the ordinary rule in a case where there are no such clear words defining the estate given. For my own part, however, I may say that I should not have felt justified in departing from the rule as to limitations of estates. It is not a question of intention, but of the effect of certain legal terms used. In my opinion, the *Bostock Case* is clearly right, in its result; and the appeal should be allowed.

The appeal is from an order made in equity; but counsel have not addressed themselves to the facts, or to anything but the point of law with which I have dealt. We are told that there are questions still to be settled when we have given our decision as to the point of law; and, at the request of counsel on both sides, we remit the cause to the Equity Court after stating our view of the law.

RICH J. I agree that the appeal should be allowed and the matter remitted to the learned primary Judge.

Appeal allowed. Order appealed from discharged. Case remitted to the Supreme Court for further hearing.

Solicitors for the appellant, *Hughes & Hughes.*

Solicitors for the respondents, *Betts & Son*, Goulburn, by *Pigott, Stinson, Macgregor & Palmer.*

B. L.

(1) (1921) 2 Ch. 469.

(2) (1925) N.I. 191.