[HIGH COURT OF AUSTRALIA.]

MACPHERSON AND ANOTHER . . . APPELLANTS;
DEFENDANTS,

AND

MAUND AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 23, 24; *Dec.* 16.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Rule against Perpetuities—Prior gift void for remoteness—Validity of ultimate gift—Dependency upon prior gift.

By a settlement and in a will made at or about the same time and containing limitations expressed in substantially the same terms trust premises were limited in the first place upon a trust as to the income which was void for remoteness; "and subject thereto as to one half" upon a trust which was also void for remoteness, and as to the other half upon a valid trust; "and subject as aforesaid upon trust as to the whole of the trust premises for the children" of a named person "who shall attain the age of twenty-one years in fee simple in equal shares."

Held that the ultimate gift was not dependent or expectant upon the preceding void limitations and was valid.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) affirmed, subject to a variation.

APPEAL from the Supreme Court of New South Wales.

On 5th February 1936 Tertius Horatio Macpherson executed a will and a power of attorney to which was annexed a draft deed of settlement of all his property. The deed of settlement was executed by his attorney on 10th February 1936, and Macpherson died on 5th

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June 1936 without having altered the will or exercised the power of revocation contained in the settlement. In the will and the deed Macpherson, in terms which in both documents were substantially identical, gave his estate to his trustees upon trust to pay certain specific legacies and to stand possessed of the residue upon trust to pay £500 to Peter Dunn "and subject to the trusts of the foregoing provisions and as is herein provided" to "stand possessed of the net income of the trust premises until the death of the last surviving child of" his brother Septimus Wharrie Macpherson and his daughter Isabel Winifred Bird upon trust to pay the income to or for the maintenance, &c., of certain persons "and subject thereto as to one half of the trust premises upon trust for the child or children who shall attain the age of twenty-one years *per capita* of the child or children of the said Septimus Wharrie Macpherson and upon trust as to the other half for the child or children if more than one in equal shares of" his said daughter Isabel Winifred Bird "and subject as aforesaid upon trust as to the whole of the trust premises for the children of" Peter Dunn "who shall attain the age of twenty-one years in equal shares." A number of questions concerning the settlement and the will were raised by originating summons before *Nicholas* J., who held, *inter alia* : (*a*) that the trusts of income in the will and settlement were void for remoteness ; (*b*) that the trusts in the will and settlement for the child or children of the child or children of Septimus Wharrie Macpherson were void for remoteness ; (*c*) that the property which would have been subject to the last-mentioned trusts of the will if they had been valid passed under the trust for the children of Peter Dunn who should attain the age of twenty-one and not as upon an intestacy ; (*d*) that the property which would have been subject to the last-mentioned trusts of the settlement if they had been valid was held by the trustees upon the trust for the children of Peter Dunn who should attain the age of twenty-one and not upon a resulting trust for the estate of the testator.

The two daughters of the testator appealed to the High Court from so much of the order of *Nicholas* J. as dealt with the destination of the property subject to the void trusts.

Hardie, for the appellants. The disposition of one half of the corpus has been held void for remoteness. Therefore the subsequent disposition of that half is also void, because it is a gift which is ulterior to and dependent upon a gift void for remoteness. The testator disposed of all his property by dividing it into two moieties and giving them to two classes of persons who were not then in existence and who he contemplated might never come into existence. He therefore went on to provide for the destination of these moieties in that case, and the final gift is ulterior to and dependent upon a gift void for remoteness. The testator has dealt with the whole of the corpus, and then there is the provision " and subject as aforesaid " ; therefore this is not a residuary gift, and by regarding it as such *Nicholas* J. failed to deal with the real point. The expression " and subject as aforesaid " here means " and in the event of there being no such child of a child of Septimus Wharrie Macpherson upon trust as to the first moiety for the children of Peter Dunn." The testator has meant to deal with the position arising if there should be no children of the children of Septimus Wharrie Macpherson, which cannot be ascertained until a point of time beyond that allowed by the rule against remoteness. Therefore the later gift is void (*In re Hewett's Settlement* ; *Hewett* v. *Eldridge* (1)). Even if the expression is wider, and means " subject to and in default of the previous limitations taking effect " or " except in so far as this property has previously been effectually given," and so would cover the case of the prior gift failing through invalidity, the final gift is still void (*Jarman* on *Wills*, 7th ed. (1930), vol. 1, pp. 324-326, 329, 331 ; *Theobald* on *Wills*, 8th ed. (1927), p. 679 ; *Robinson* v. *Hardcastle* (2) ; *Re Thatcher's Trusts* (3) ; *In re Davey* ; *Prisk* v. *Mitchell* (4) ; *Harris* v. *King* (5)). This is a gift subject to the failure of the two previous trusts, and not an independent or alternative gift.

[DIXON J. referred to *In re Canning's Will Trusts* ; *Skues* v. *Lyon* (6).]

That case does not cut down the general principle (*In re Coleman* ; *Public Trustee* v. *Coleman* (7)). The earlier gift in *In re Canning's*

(1) (1915) 1 Ch. 810.
(2) (1788) 2 T.R. 241 ; 100 E.R. 131.
(3) (1859) 26 Beav. 365, at p. 370 ; 53 E.R. 939, at p. 941.
(4) (1915) 1 Ch. 837, at pp. 843, 844, 846.
(5) (1936) 56 C.L.R. 177.
(6) (1936) Ch. 309.
(7) (1936) Ch. 528, at p. 535.

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Will Trusts (1) was a gift of the income of residue for a certain number of years (See per *Farwell* J. (2)). That case is similar to *In re Abbott*; *Peacock* v. *Frigout* (3). The testator has used a short phrase which, even if it has the wider meaning suggested, covers the possibility of failure by reason of the happening of events at a date beyond the period allowed by the rule against remoteness, and the final gift therefore is void.

Eastman, for the respondent Cora Ann Macpherson, the widow of the testator, adopted *Hardie's* argument.

Miller (with him *Amsberg*), for the respondent Patricia Dunn, daughter of Peter Dunn. The final gift is not dependent upon the events contemplated in the void gift not occurring. It is either independent or alternative as a gift of residue. " Subject as aforesaid " governs the quantity of the property passing by the final gift ; if it has the meaning alleged by the appellants, then similar phrases in these instruments have similar meanings and the gift of the trust premises and the income thereof is expectant upon the gift of £500 to Peter Dunn, which clearly is not the fact. Also, the gift of the one half as to which there is no appeal and which is valid would be dependent upon an earlier gift which is void. The expression will not bear the meaning alleged. The final gift is not expressed to be dependent upon the prior gifts, and the court would require clearer language before it came to the conclusion that the final gift is so dependent (*Ridgeway* v. *Munkittrick* (4)). In *In re Davey* (5) *Joyce* J. was not dealing with the point that arises here. The testator intended the children of Peter Dunn to take whatever was not effectually disposed of by the earlier dispositions. The final gift is dependent on the earlier only to the extent that what the beneficiary takes varies according to whether the earlier gifts are effectual or not (*In re Canning's Will Trusts* (6)).

Kitto, for the respondent trustees.

Hardie, in reply.

Cur. adv. vult.

(1) (1936) Ch. 309.
(2) (1936) Ch., at pp. 313, 314.
(3) (1893) 1 Ch. 54.
(4) (1841) 1 Dr. & War. 84, at p. 93.
(5) (1915) 1 Ch. 837.
(6) (1936) Ch., at p. 314.

The following written judgments were delivered :—

LATHAM C.J. Tertius Horatio Macpherson on 5th February 1936 made a will in which he dealt with all his property. On 10th February 1936 by his attorney he executed a settlement of certain real and personal property being substantially all his property at that time. Except for the reservation of a life estate to himself by the settlement, the limitations in the settlement and the will were identical. He died on 5th June 1936 without having altered the will or having exercised the power of revocation contained in the settlement. The ultimate gift in both the settlement and the will is in the following terms : " And subject as aforesaid upon trust as to the whole of the trust premises for the children of the said Peter Dunn who shall attain the age of twenty-one (21) years in equal shares."

If this provision is effective as a part of the settlement, which operates antecedently to the will, there is little or nothing left upon which the same provision, contained as a residuary clause in the will, can operate.

This gift, considered simply in itself, does not transgress any rule as to remoteness. The gift, if it vests at all, must necessarily vest within lives in being and twenty-one years after.

This gift, however, is preceded by other gifts to which it is declared to be subject. Two of these gifts have been declared to be invalid on the ground of remoteness, and there is no appeal against this decision. One is a gift of the income of the trust premises and the other is a gift of half of the trust premises. The question which arises is whether the ultimate gift must, according to the terms of the instruments, await the too remote event involved in the limitation of the preceding gifts, so that it might become vested only at a time beyond the prescribed period. If so, the ultimate gift is " ulterior to and dependent upon " the prior gifts and is, therefore, itself invalid (*Re Thatcher's Trusts* (1) ; *In re Hewett's Settlement* (2)). If, on the other hand, the ultimate gift, according to the words of the instrument, is so expressed as to take effect upon the failure of the prior gifts from whatever cause, e.g., upon the ground of invalidity, then the ultimate gift is valid. *Nicholas* J. made an

(1) (1859) 26 Beav. 365 ; 53 E.R. 939. (2) (1915) 1 Ch. 810.

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order in accordance with the latter view and, in my opinion, his order was right.

The decision of the question depends upon the interpretation of the words " and subject as aforesaid." These words mean, in my opinion, " subject to the operation of preceding dispositions, so far as they do operate." This, I think, is the natural meaning of the words. If so, they provide that the ultimate gift is to take effect if the preceding dispositions fail for any reason, e.g., by reason of invalidity. The limitation follows, but does not depend upon, the preceding void limitations and, therefore, is not affected by their invalidity. As in *In re Canning's Will Trusts* (1), " the gift . . . is independent of the earlier trust although intended to be made subject to it." The gift is one which " must necessarily become not only vested but indefeasibly vested within the limits of the rule against perpetuities," and also " it is in no way dependent on or affected by the manner in which the income is applied " or the corpus held under the prior invalid dispositions. Such a gift is not dependent or expectant upon a prior limitation which is void for remoteness (*In re Coleman* (2)).

In my opinion, therefore, the decision of the Supreme Court should be affirmed. The order as expressed does not, however, fully state the effect of the decision and the declarations made should be varied in order to do so.

RICH J. I agree with the judgment of *Dixon* J.

STARKE J. " It is settled," said *Stirling* J. in *In re Abbott* (3), " that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid."

The only question for determination in this case is whether a limitation which follows limitations which have been held void for remoteness is also invalid. The limitations in question here are contained in a settlement which Tertius Horatio Macpherson made in 1936 and also in his will. The limitations which have been held and declared void are to pay income of trust premises to certain

(1) (1936) Ch., at p. 314. (2) (1936) Ch., at p. 534.
(3) (1893) 1 Ch., at p. 57.

persons or to apply it for their benefit and subject thereto as to one half of the trust premises upon trust for the child or children who shall attain the age of twenty-one years *per capita* of the child or children of a living person. And then follows the limitation in question here: "And subject as aforesaid upon trust as to the whole of the trust premises for the children of Peter Dunn who shall attain the age of twenty-one years in equal shares."

These interests are not in themselves void for remoteness. If the limitation is intended to take effect if there is no one to take under the prior limitations, or in other words are dependent or expectant upon them, then they are void for remoteness. On the other hand, if the limitation is intended to take effect unless displaced by or prevented from taking effect by the prior limitations, then it is not void for remoteness and is consequently valid. It is a mere question of construction. In my opinion the natural meaning of the words is that the children of Peter Dunn are to take the trust premises unless the prior limitations operate so as to displace or prevent the limitation in their favour taking effect.

In my opinion the judgment of *Nicholas* J. was right and ought to be affirmed.

DIXON J. The testator made, at or about the same time, a settlement of his property and a will, both containing what for all purposes presently material are limitations expressed in substantially the same terms. The settlement included a power of revocation and reserved a life estate for the settlor anterior to the limitations reproduced in the will and the property to which the settlement related was specific. But the evident purpose of the settlement was by an instrument *inter vivos* to produce the same effect as otherwise would result when the will came into operation. Probably a settlement was made as well as a will with the object of meeting in advance the possibility of an application under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916.

Some of the limitations contained in both instruments are void for remoteness and have been declared invalid. The question for decision upon this appeal is whether there is a partial failure of an ulterior limitation because of the invalidity of preceding gifts or

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whether, on the contrary, it embraced the share dealt with by the void limitation. The operation of the settlement is, of course, prior to and, in respect of the property it includes, paramount over the will; the question ought, therefore, first to be considered in relation to the trusts of the settlement. By that instrument the trust premises are limited in the first place upon a void trust to apply the income for the maintenance, support and advancement of certain persons, "and subject thereto as to one half of the trust premises upon trust for" the grandchildren of a living person who shall attain twenty-one (and so void) and upon trust as to the other half upon a valid trust for a class; "and subject as aforesaid upon trust as to the whole of the trust premises for the children" of a named person "who shall attain the age of twenty-one years in fee simple in equal shares." The question concerns this last limitation.

In selecting a class of objects defined as the children of a living person who shall attain twenty-one, the final limitation or trust does not, of course, offend the rule against perpetuities. So far, therefore, as its validity depends upon the ascertainment of the persons who fall within the class and are to take under it, the last trust is open to no objection. But it is an ulterior limitation following limitations some of which are void. The two preceding trusts of corpus, each of a half share, would between them dispose of the entire trust premises if they were both valid and both took effect as vested interests. Thus, except as the result of the invalidity of a preceding disposition, nothing could pass under the ultimate limitation of the trust premises, unless one or other of the two classes to whom the half shares of corpus were respectively given failed for want of objects filling the description defining the class. This means that in the case of each half share it might be uncertain, until all possibility had ceased of the description being filled by anyone, whether the half share would pass under the ultimate trust. Since, in the case of the half share the trusts of which have been held invalid, the contingency which the clause specifies, viz., grandchildren of a living person attaining twenty-one, might remain uncertain beyond the period of limitation allowed by law, it would follow, if the provision took effect according to its meaning, that the question whether the half share would pass under the ultimate

trust of the trust premises would depend upon a contingency that might occur at too remote a time. In this view, the operation of the ultimate trust upon the half share invalidly given would be the same as if the provision, instead of saying " and subject as aforesaid," ran " and with respect to the first half share, if there shall be no grandchildren who attain 21." In other words, it would be treated as a limitation over depending upon the same contingency. Differing reasons have been assigned for the general rule that ulterior limitations following limitations void for remoteness and dependent upon them are themselves void, even although no person is born who could possibly take under the prior limitation. Sometimes it is said that it is because the ulterior limitation in substance depends on the same contingency, that is, takes effect on the other aspect of the contingency (*Proctor* v. *Bishop of Bath and Wells* (1) ; *Palmer* v. *Holford* (2)). Sometimes it is put upon the ground that the settlor or testator never intended the ultimate gift to apply except on the failure of objects designated in the prior gift. Thus, in *In re Abbott* (3) *Stirling* J. said :—" It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted ; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation." These seem but two ways of regarding the same thing, although the former makes the result flow directly from the remoteness of the contingency and the other from the interdependence of the limitations. Under each, the failure of the ultimate disposition arises from the fact that implicitly or explicitly its operation is restricted to the case of the events contemplated in the preceding limitation not occurring. If, upon its proper construction, the ulterior limitation shows an intention that the property shall pass under it in other events, its validity must depend on the nature of those events. Again, if an intention is disclosed that the ulterior

(1) (1794) 2 Bl. H. 358 ; 126 E.R. 594.
(2) (1828) 4 Russ. 403 : 38 E.R. 857.
(3) (1893) 1 Ch., at p. 57.

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limitation shall operate if for any reason at all there is a failure of any of the preceding gifts, different considerations at once arise. For, in such a case, the intention is that the ultimate gift shall take effect except in so far as the prior gifts may actually operate to prevent it. The subsequent gift, in other words, is then a disposition of so much of the beneficial interest as has not already been effectively withheld or diverted. Upon such a construction, it includes what may be called prior lapsed interests, whether the lapse occurs from the happening of events or the initial invalidity of the attempt to dispose of them.

The question in the present case is whether the words "and subject as aforesaid upon trust as to the whole of the trust premises for," etc., should receive such an interpretation. On the whole I think they should be so interpreted. The subject matter of the gift is expressed as "the whole of the trust premises," that is, an indiscriminate mass constituting, so to speak, a balance remaining. There is no specific reference to any of the shares or interests antecedently given, but the clause involves a supposition that they will not or may not exhaust the trust premises. The intention seems to be to treat the trust premises as subjected to various dispositions which, in the settlor-testator's scheme, ought to have priority. No doubt the words "subject as aforesaid" are capable of meaning "subject to the intention to the contrary already expressed" or "subject to whatever effectual dispositions have been already made." But the more probable intention was to give whatever remained howsoever it came to be disposed of. Upon this construction the initial invalidity of the prior limitation of the half share left that share free to pass under the ultimate gift. This construction applies *a fortiori* to the same limitation expressed in the will, where, of course, it may be regarded as a residuary gift. It is the interpretation adopted by *Nicholas* J. in the Supreme Court.

In my opinion the appeal should be dismissed.

Certain variations in the decree as drawn up have been suggested by the trustees and I agree that these should be made.

McTIERNAN J. I agree that the appeal should be dismissed.

Appeal dismissed. Order of Supreme Court varied by omitting the fifth and sixth declarations therein contained and substituting the following:—5. *Declare that upon the*

true construction of the said will and the said deed of settlement respectively and in the events which have happened the plaintiffs hold the said testator's residuary estate and the property comprised in clause 7 *of the said deed of settlement upon trust as to the one half thereof for the children of Peter Dunn who shall attain the age of twenty-one years in equal shares, and as to the other one half thereof for the child or children if more than one in equal shares of the said testator's daughter Isabel Winifred Bird by any husband other than her present husband Douglas Bird whether by or during their present marriage or any re-marriage, and in default of any such children of the said Isabel Winifred Bird for the children of Peter Dunn who shall attain the age of twenty-one years in equal shares.* 6. *Declare that the intermediate income of the said last-mentioned one half of the said residuary estate and property arising before any such child of the said Isabel Winifred Bird is born is to be held upon trust for the said children of Peter Dunn in equal shares. Appellants to pay costs of appeal of respondent trustees and one set of costs of respondents other than Joselyn Wharrie Macpherson as between party and party. The respondent trustees to take out of the residuary estate of the testator, and, in so far as that residuary estate is insufficient, out of the property dealt with by the last provision in clause* 7 *of the deed dated the* 10*th February* 1936 *and made between Tertius Horatio Macpherson of the one part and John Williams Maund, John Williams Maund junior and Richard Hunter Maund of the other part, the difference between any amount received from the appellants and the costs of such respondents of the appeal as between solicitor and client.*

Solicitors for the appellants, *Minter, Simpson & Co.*

Solicitors for the respondent trustees, *J. W. Maund & Kelynack.*

Solicitor for the respondent Cora Ann Macpherson, *Robert Lloyd.*

Solicitor for the respondent Patricia Dunn, *J. H. Yeldham*, North Sydney, by *McTague & McTague.*

J. B.