

1/1923.

COBBETT V EAST LONDON HOSPITAL.

Judgment.

Knox C.J. *Gause, Ruffy & Rich*

By his will (clause 5) the testator devised his property known as Holebrook to his trustees upon trust for his brother Wilberforce Cobbett for his life and after his death to the use of the first and other sons of Wilberforce Cobbett severally and successively in tail male and in default of such issue to the use of the first and other daughters of Wilberforce Cobbett in tail male and in default of such issue to the use of his trustees during the lives of his cousin Hugh Cobbett and any wife of his and during the life of the survivor upon certain trusts for the benefit of Hugh Cobbett his wife and family during his life and for the benefit of his widow and family after his death and after the death or remarriage of Hugh Cobbett's widow to the use of the first and other sons of Hugh Cobbett successively in tail male and in default of issue to the use of the

first and other daughters of the said Hugh Cobbett in tail male and in default of such issue to the use of his trustees to hold and dispose of as part of his residuary estate.

By clause 6 the testator directed that the trust declared in respect of Holebrook should be read and construed as if they had been declared in respect of any property in Tasmania which he might purchase in lieu thereof for his personal residence.

Clause 7 of the will is as follows:- "I direct my trustees to set apart out of My Trust Fund (after providing for the bequest contained in paragraph 8 of this will) the sum of £20000 upon trust to invest the same in the names of my trustees in or upon any of the class of investments hereinafter mentioned with power to alter or vary such investments or any of the m from time to time for others of the same description And upon trust to pay the interest and income which may arise from the said sum of £20000 and the investments thereon from time to time to the said Wilberforce Cobbett during his life subject to any expense for upkeep of Holebrook payable by my trustees pursuant to Clause 5 hereof and after the death of the said Wilberforce Cobbett upon trust to pay his widow (if any

"during her widowhood an annuity of £100 and subject thereto Upon
 "trust to pay the said interest and income to the tenant in tail for
 "for the time being of Holebrook until determination of the estate
 "tail hereby created (whether by barring of entail or failure of heirs
 "of the body of the said Wilberforce Cobbett or by operation of law)
 "And upon such determination upon trust to pay the interest and income
 "which may arise from the said sum of £20000 and the investments there-
 "of from time to time to my cousin the said Hugh R N Cobbett upon con-
 "dition that he becomes domiciled in Tasmania and while he shall re-
 "main so domiciled until the determination of the Trusts hereinbefore
 "contained in his favour And I direct that during such time or times
 "as the said Hugh R N Cobbett shall not be domiciled in Tasmania such
 "interest and income shall fall into and form part of my residuary
 "personal estate And after the determination of the trusts hereinbe-
 "fore contained in his favour Upon trust to pay and apply the said
 "interest and income at such times and in such manner for the personal
 "support or otherwise for the personal benefit of the said Hugh R N
 "Cobbett and of his wife and family if any during his life and after
 "his decease for the personal support or otherwise for the personal
 "benefit of his Widow during her Widowhood and family if any during
 "her Widowhood as my trustees shall in the discretion of my Trustees
 "think fit And after the death of the said Hugh R N Cobbett and after
 "the death or re-marriage of his Widow Upon trust to pay the said in-
 "terest and income to the tenant in tail for the time being of Hole-
 "brook and after the failure or determination of all the estates tail
 "hereby created (whether by barring of entail or failure of heirs or
 "by operation of law) Upon trust to hold and dispose of the said sum

"of £20000 and the securities upon which the same may be invested
"as part of my residuary estate."

The testator retained Holebrook as described in the will
and codicil as his personal residence up to the time of his death. *in the*
year 1919
His brother Wilberforce Cobbett has never been married. At the date
of testators death his cousin Hugh R N Cobbett was married and his wife
and three daughters of whom the eldest is the appellant Helena Elsie
Cobbett, were living.

The property referred to in the will as Holebrook being
under the Real Property Act was subject to the provisions of sec.5
of the Real Property Act ~~§~~No.5 (50 Vic.No.8). That section is as
follows:- "Where any limitation which would heretofore have limited
"to any person an estate tail, whether legal or equitable, in any land
"under the Act, is made after the commencement of this Act, such
"limitation shall be deemed to give to such person an estate in fee
"simple (legal or equitable, as the case may be), in such land."

Doubts having arisen as to the true construction of clause 7 of the will the following questions were submitted by originating summons

for the determination of the Supreme Court ;-(10) Whether on the true construction of the Testator's Will and Codicils the gift of the income of the sum of £20,000 mentioned in Clause 7 of the said Will on the death of Wilberforce Cobbett to the tenant in tail for the time being of "Holebrook" until the determination of the estate tail by the said Will expressed to be created (whether by barring of entail or failure of heirs of the body of the said Wilberforce Cobbett or by operation of Law) is void on the ground that the said gift is dependent on the possibility of the existence of the estates tail male in "Holebrook" purported to be created by Clause 5 of the said Will and that by reason of Sec.5 of The Real Property Act No 5 the said estates tail male cannot arise or take effect ?

- (II) Whether on the true construction of the said Will and Codicils the said gift is void either in toto or as to all or any of the persons who might claim thereunder after the death of the person who would have been first tenant in tail male of "Holebrook" if "Holebrook" was not subject to the provisions of The Real Property Acts on the ground that the same tends to the creation of a perpetuity ?
- (12) Whether on the true construction of the said Will and Codicils the gifts of the income of the said sum of £20,000 subsequent to the said gift expressed to be made to the children of Wilberforce Cobbett as tenants in tail male or any of such gifts ~~expressed~~ are void on the ground that the same are limited to take effect upon the determination of the estates ~~male~~ tail male by the said Will expressed to be limited to the children of Wilberforce Cobbett or on the ground that the same tend to the creation of a perpetuity ?

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- (13) In the event of either Question (10) or Question (11) and of Question (12) being answered in the affirmative whether the said sum of £20000 (subject to the payment of the annuity given to the widow of W Cobbett) falls into and forms part of the testator's residuary estate.?

The fact that the amount of estate duty payable cannot be ascertained until it is ^{known} ~~decided~~ whether the gift over of the £20000 to the residuary estate - in effect a gift to the East London Hospital - is valid renders it expedient that these questions should be decided now without waiting until the death of Wilberforce Cobbett. The Supreme Court decided that the directions contained in clause 7 of the Will for payment of the income to the tenant in tail of "Holebrook" for the time being were ineffectual and that the £20000 was to be held and applied by the trustees as if those directions had been struck out ^{of the will} and made an order to this effect but did not in terms answer the several questions submitted.

This is an appeal on behalf of Helena Elsie Cobbett ^{against} so much only of that order as declares that after the death of Hugh Cobbett

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and after the death or remarriage of his widow the sum of £20000 and the securities therefore are to be held as part of the testators residuary personal estate. Consequently there is no question before this Court as to the propriety of the declaration made by the Supreme Court with regard to the gift contained in clause 7 for the benefit of Hugh Cobbett and his family including his widow.

The first question for consideration is what is the true construction of the direction to pay the income of the fund to "the tenant in tail for the time being of Holebrook". *that is to say:-*

What is the meaning to be attributed to these words in this Will having regard to the context ?

In our opinion the testator has by these words expressed his intention that the income should be paid to the person who for the time being held an estate tail in Holebrook. The alternative construction suggested by counsel for the appellant was that the income was to be paid to the person who but for the provisions of the Real Property Act would have been tenant in tail of Holebrook. These are not the words used by the Testator and we think the construction is inadmissible having regard to the provisions of this will. By the direction that the income should be paid to the tenant in tail for the time being until determination of the estate by barring of entail or operation of law we think the testator has already x clearly indicated that his intention was that the payment of the income to any person under the gift should be conditional on such person being the holder of an estate tail in Holebrook. From a perusal of paragraphs of 5 & 7 of the Will we think it is clear that

the dominant intention of the testator was to insure that so long as Holebrook devolved according ~~xxx~~ to the successive estates tail which he had endeavoured to create the person who was tenant in tail in possession for the time being should be provided with a certain income. This conclusion is ^{fortified} ~~justified~~ by the direction contained in Clause 7 that during such time as Hugh Cobbet should not be domicile in Tasmania the interest and income which would have been payable to him if so domiciled should fall into residue. It is conceded~~x~~ that in consequence of the provisions of Sec.5 of the Real Property Act which was in force at Testators death there is and was then no person who was or could be the holder of an estate tail in Holebrook, and it follows that in the view we have expressed as to the meaning of the Will the gifts of income to the tenant in tail for the time being of Holebrook never could arise or take effect. Question 10 should therefore be answered in the affirmative.

This disposes of the claim of the appellant but Mr Lodge who by leave of the Court appeared for certain of the next of kin of the testator though they were not respondents to the appeal argued that the ultimate trust to hold and dispose of the £20,000 as part of the residuary estate was void as infringing the rule against perpetuities and that after the death of Hugh Cobbett and the death or remarriage of his widow this fund should pass to the next of kin of the testator as on an intestacy. He founded this argument ~~mainly~~ if not entirely on the provisions of Clause 6a of the Will ~~contending that~~ contending that as the testator might have acquired property in which an estate tail might have existed, because the property was not under The Real Property Act there was a possibility that the gift of estate tail might take effect and if so the gift over of personalty after the determination of an estate tail would be *bad for remoteness*

But it is the state of facts at the testator's death which must be regarded and at that date the only property dealt with by clause 5 was

property in which it is conceded that no estate tail could exist.

The possibilities are to be considered as at the death of the testator and at that time the estates tail given by the will could never arise and it was impossible that any gift of the income of the fund to the tenant in tail for the time being of Holebrook could take effect.

The position then is that after certain dispositions of the income during the lives of Wilberforce and Hugh and the lives or widowhood of their respective widows, the validity of which is not open to discussion on this appeal, the direction is that after the failure or determination of all the estates tail created by the will (whether by barring of entail or failure of heirs or by operation of law) the trustees are to hold the fund as part of the residuary personal estate. It was argued that this gift over was obnoxious to the rule against perpetuities because it was conditioned to take effect only on the failure ^{and} determination of an estate tail which had arisen ~~and~~

or come into existence and therefore might not vest within the limits of the rule. But we think it is clear from the words of the will that the gift over was limited to take effect either in the event of none of the estates tail coming into existence or on the determination of all the estates tail which might come ~~into~~ into existence. The words used in this passage are "After the failure or determination &c". Some meaning should if possible be given to the words "failure" as distinct from "determination" especially as the testator has shown in an earlier portion of the same clause that he regarded determination as sufficient in itself to describe the cessation of an estate tail owing to any one of the ~~three~~ three causes specified. On the wording of this will we think "failure" in the phrase "failure or determination" should be read as indicating a failure of the estates tail to arise or come into existence. All these estates tail were incapable of ever coming into existence,

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The result is that at the death of the testator the gift of the £20,000 for the benefit of the residuary legatees was a vested gift free from the operation of the rule against perpetuities.

Moreover it is by no means clear on the terms of this will that even if "failure" means no ~~max~~ more than determination the expression "after the failure &c" imports anything more than a direction as to the order of succession in which the fund was to be enjoyed by the several beneficiaries.

The appeal must be dismissed and the Order of the Supreme Court affirmed, but in the special circumstances of this case ^{& all parties consenting} we feel justified in ordering that the costs of the appeal of all parties ~~was~~ to the appeal and of the next of kin represented by Mr Lodge be paid out of the fund of £20,000 - The cost of the Trustees to be taxed and ~~unpaid~~ as between Solicitor and Client.

*Order - appeal dismissed - order of Supreme Court affirmed
Costs of all parties & of W.B. Babbitt & Vincent Walker
to be paid out of £20,000 - (Cost of Trustees as between Solicitor & Client)*