

27/1923

HIGH COURT OF AUSTRALIA

COURT COPY.

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TURNBULL V ELLIOTT.

JUDGMENT.

MR JUSTICE ISAACS.

MR JUSTICE-GAVAN-DUFFY.

MR JUSTICE STARKE.

Turnbull v Elliott.

Judgment.

...

Isaacs J.

Gavan-Luffy J.

Starke J.

By ante nuptial settlement, dated October 15, 1900, Walter Keith Elliott, about to be married to the appellant/then Charlotte Campbell Langtree, settled an annuity of £250 per annum, (which was subject to cesser pr abatement) and a legacy of £8,000. The settlement defined the "Trust Fund" as "the annuity and legacy intended to be hereby settled and all moneys which may be obtained by way of a composition for the said annuity and the interest thereon and the investments and securities for the time being representing the said premises respectively"

The trusts were primarily:-
(1) Until the marriage the whole trust fund for the settlor (2) Upon the marriage then (omitting immaterial provisions) "to pay the annuity and the interest dividends and annual income of the trust fund" to the appellant for life for her sole and separate use without power of anticipation (3) After the appellant's death - if there were issue of the marriage:- (a) If the settlor survived her and had not incurred a forfeiture then to pay "the dividends interest and income to him for life and afterwards (b) The whole "Trust fund and Income thereof" in trust for such issue born within 21 years of the death of the survivor as might be appointed by deed or will (c) In default of appointment the whole Trust Fund for the children by the marriage who being sons attained

21 or being daughters attained that age or married (d) Power to apply income of expectant shares of children towards maintenance and education.

Down to that point the deed had provided for the destination of the whole of the income during the life of the appellant, and also during the life of the settlor if there were issue of the marriage, and either appointment or attainment by children of 21 or (if daughters) marriage. ~~married~~ But there was no provision for the destination of either-(1) The corpus or (2) The income after the death of the appellant in case there were no issue of the marriage or in case there were issue but neither appointment nor attainment of the conditions of majority or marriage.

Then follows a clause which is the subject of dispute:- It is in these terms:- " And it is hereby agreed and declared that if there "shall be no child of the said intended marriage who being a son "shall attain the age of twenty-one years or being a daughter shall " attain that age or marry under that age then after the death of "either of them the Settlor and the said Charlotte Campbell Langtree "the Trustees shall stand possessed of the whole of the trust fund "and the dividends interest and income thereof or so much thereof "respectively as shall not have become vested or have been applied "under any of the trusts or powers herein contained if the Settlor "shall survive the said Charlotte Campbell Langtree UPON TRUST for "the Settlor but if the said Charlotte Campbell Langtree shall sur- "-vive the Settlor then as to one equal half part thereof UPON TRUST "for the persons who under the Statutes relating to the distribu- "-tion of intestate estates would have been entitled thereto if the "Settlor had died intestate and without having been married And as "to the remaining equal half part thereof UPON TRUST for the said "Charlotte Campbell Langtree."

That clause, it is seen, begins by conditioning an event so far unprovided for (unless there be an appointment) and contemplating the possibility of the death of either spouse, makes provision for such a case. It is true the provision embraces as a possibility "the whole of the trust fund and the dividends interest and income thereof", but it also limited the subject to a possible "so much thereof respectively as shall not have become vested or have been applied under any of the trusts or powers herein contained". But it proceeds to segregate the possible events as between the Settlor and the Appellant. It says:- "If the Settlor shall survive the said Charlotte Campbell Langtree, upon trust for the Settlor".

In that case, as the appellant's life interest had, by the hypothesis determined, the Settlor would take all immediately. The next provision of the clause causes the difficulty in this case, it is as follows:- "But if the said Charlotte Campbell Langtree shall survive the Settlor then as to one equal half part thereof upon trust" &c.

For the appellant it is said that the word "thereof" applies to and includes only so much of "the trust fund and the dividends and income interest thereof" as shall not at the death of the Settlor have become vested or have been applied under any of the ~~trusts~~ trusts or powers contained in the ante-nuptial settlement; that the appellant's life interest had become vested under such a trust; and that it therefore formed no part of the fund divisible between the appellant and the Settlor's next of kin. For the respondent it is said

that the word "thereof" applies to the whole of "the trust fund" and the dividends interest and income thereof without any deduction, or in the alternative without any deduction other than interests which may have vested in, or moneys which may have been applied for the benefit of the issue of the marriage.

It is difficult to see any ground for refusing to give to the words in question their ordinary literal meaning. They seem to have been inserted so as to make it clear that the clause in question was providing, not for a substituted destination of interests already settled but for a yet undetermined destination of the trust fund, and its income in-so-far as no prior destination had been indicated or attained, that is, as a residual provision, partly original and partly alternative.

In our opinion therefore the appellants view should prevail and the appeal allowed.

The decretal order of January 16, 1924, should therefore be varied by declaring that the appellant is entitled to the income of the property now subject to the trusts of the Indenture of October 15, 1900, during ~~her~~ her life, and that subject to that life interest, the appellant and the next of kin of the Settlor are each entitled to one half the corpus and income of the trust property.

Turnbull v Elliott.

ORDER OF COURT:

Appeal Allowed.

THE DECREEAL ORDER of January 16, 1924, should therefore be varied by declaring that the Appellant is entitled to the income of the property now subject to the trusts of the Indenture of October 15, 1900, during her life, and that subject to that life interest, the Appellant and the next of kin of the Settlor are each entitled to one half the corpus and income of the trust property.

August 11, 1924.