13/1934

8 May 1936

THE UNION TRUSTEE CO. OF AUSTRALIA LTD AND ANOTHER

v

MEREWETHER AND OTHERS

O R D E R

Appeal dismissed.

Costs of the trustees as between solicitor and client to be paid out of the estate.

Respondents other than the trustees to have one set of costs as between party and party out of the estate. Taxing Master to certify how the same should be allocated among such respondents.

Appellants to abide their own costs of the appeal.

THE UNION TRUSTEE CO. OF AUSTRALIA LTD AND ANOTHER

v

M E R E W E T H E R AND OTHERS

JUDGMENT

LATHAM C.J.

DIXON J.

EVATT J.

McTIERNAN J.

THE UNION TRUSTEE CO. OF AUSTRALIA LTD AND ANOTHER

v

M E R E W E T H E R AND OTHERS

The appellants are the legal personal representatives of an assign of Hamilton McCabe Merewether. The assignment comprised the beneficial interests which Hamilton McCabe Merewether took in the estates of his late father and of his late uncle under their respective wills.

His father, Henry Alfred Mitchell Merewether, bequeathed to him one fourth of his residuary estate. His uncle, Hugh Hamilton Mitchell Merewether, bequeathed to him two-nineteenth

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parts of his residuary estate. His father and his uncle were sons of Edward Christopher Merewether, who died in 1893 leaving a will made sixteen years before his death. Under the provisions of that will disposing of residue the testator distinguished between his general residue and a large area of coal bearing land which he called his Burwood estate.

The question at issue in this appeal is whether under the dispositions of the Burwood estate the testator's two sons already mentioned, Henry Alfred Mitchell Merewether and Hugh Hamilton Mitchell Merewether, took indefeasibly vested interests.

Both of them attained full age and survived the testator,but both predeceased his widow,their mother,who died in 1922. The testator was in fact survived by nine children,the youngest of whom attained the age of twenty-one in 1898,before either of the above mentioned sons died. The will devised the Burwood estate to trustees. Under the trusts the widow was entitled to the income therefrom during her life. The trustees were directed to stand possessed of the Burwood estate until the youngest surviving child of the testator's widow should attain the age of twenty-one years and immediately upon that event

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happening to sell the same and to stand possessed of the net proceeds in equal shares for all her children who should then be living and the issue of such of them as should have died, such issue taking only their parent's share.

If the direction to sell and so hold the proceeds was intended, upon the true interpretation of the will, to take effect only after the widow's death, then neither of the two sons who predeceased the widow, their mother, took a vested interest in the Burwood estate. For the trust of proceeds is in favour of children " then living " and the time intended for the ascertainment of the class would be after

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the widow's death. On the other hand,if the direction was meant to take effect independently of the widow's death whenever the event specified might happen,namely,whenever the youngest surviving child might attain twenty-one years of age,then the two deceased sons would have taken indefeasibly vested interests which would form part of their estate.

Harvey C.J. in Eq. decided that no child took a vested interest who did not survive the testator's widow. In our opinion that decision is correct.

The question depends altogether upon the interpretation of the dispositions of residuary realty read

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as a whole. They begin by an immediate trust for sale of all the residuary real estate with an express exception of the Burwood estate. Powers of postponement and management are then given. The trustees are directed to stand possessed of the proceeds to invest the same, after providing for a legacy of £10,000 to the widow. They are then directed to stand possessed of the investments and any unsold realty and " the rents and royalties arising from the said Burwood " estate " upon trust, subject to a special provision in case it be necessary to resort to mortgaging the property in order to raise the widow's legacy of £10,000, to pay the total interest, dividends, rents and royalties, and annual income arising 66

therefrom, as they shall respectively accrue and become payable ~~payable~~, to the testator's widow during her life. So far the scheme of the will is to direct conversion of the realty except the Burwood estate and to give the widow for life the income of all the realty, converted and unconverted. In our opinion the directions which follow are all subject to these provisions and take effect only on the determination of the widow's life interest. The will at once proceeds - " and " from and immediately after her decease ". These words appear to me to govern all the ~~xx~~ ensuing directions in respect of the realty. Those directions fall into two parts,

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namely, the direction affecting the realty other than the Burwood estate, and the directions affecting the Burwood estate. The former come first, and, because they intervene, the absolute language in which the latter are expressed has been treated by the appellants as detached from the initial words " from and immediately after her decease ". Thus it has been supposed that a sale of the Burwood estate was intended on the attainment of full age by the youngest living child although the widow should/then be alive. The initial words are, however, so placed as naturally to govern all the limitations subsequently expressed, and there is more than one consideration confirming the view that they were intended to do so. In the first place,

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there is no gift to the widow of the income of the proceeds of the Burwood estate ; what is given to her is the rents and royalties arising from that estate. When the proceeds arise as a result of sale,they are to be held for the children then living. Of course if it were quite clear that in some contingency the estate was to be sold in her lifetime,it would not be difficult to treat the reference to " annual income " in the direction to pay her the total interest,dividends,rents and royalties and annual income arising from the investments of the converted realty and from the Burwood estate as enough to give her the income from the proceeds of the latter. But when the

language of the provisions at least suggests that conversion of the Burwood estate was not to take place in the widow's life time, the absence of any express provision giving her the income of the proceeds is a matter of some weight.

In the next place, the direction to convert on the youngest child attaining twenty-one and to hold the proceeds in trust for the children then living, suggests that distribution or appropriation of shares of corpus forms the reason for conversion. This inference is supported by directions which follow as to how the trustees are to deal with the shares of males between the ages of twenty-one and twenty-five and with the shares of females. To direct a

conversion of the Burwood estate during the life of the widow, and before the necessity arose for distribution or appropriation of the proceeds, for no better reason than that the youngest child attained twenty-one years, seems almost capricious and involves a departure from the policy which evidently actuated the testator in excepting his valuable coal bearing estate from the general trust for conversion.

In the third place, the word " surviving " in the phrase " until the youngest surviving child of my said wife " shall attain the age of twenty-one years " bears a natural meaning if it refers to outliving the widow,

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the tenant for life. It is quite true that it is capable of meaning -" living for the time being " - that is, surviving inter se. No doubt the argument advanced for the appellants is correct/if that, the direction was intended to take effect independently of the death of the tenant for life, the clause would be construed as meaning that whenever a time arrived when there was no longer any child of the widow under twenty-one years of age, then the estate should vest in the children at that time living and the issue of deceased children per stirpes as tenants in common in equal shares. But again, inasmuch as there are other indications of an intention that the direction should take effect only after the death of the

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life tenant, that interpretation obtains additional support from the use of the word " surviving " which should then be understood as meaning " outliving the tenant for life."

The direction to which we have already referred as to how the trustees are to deal with the shares of males under twenty-five and with the shares of females, begins - " upon trust if " my said wife shall have previously departed this life."

The contingent form of the expression and the word " previously " cause some difficulty. But, whatever is the explanation of the phrase, it does not imply that sale and distribution may take place before the widow's death. We are inclined to think the phrase is a clumsy way of saying that

the trust is to arise in the event of the widow's death taking place before the state of things is over and spent in which the direction is to operate. Thus,in the case of sons, the phrase produced the effect of makingthe direction operate, if she left any under twenty-five , and,in the case of daughters,if she left any her surviving.

These considerations lead us to the conclusion that no child of the testator's widow could share in the proceeds of the Burwood estate unless he survived his mother.

The positive considerations on which reliance was placed in support of the contrary conclusion included the unqualified and imperative terms in which the direction to

convert and hold the proceeds of the Burwood estate is expressed and the employment of the simple future tense in describing the event when the direction was to be carried into effect. But, once the initial or introductory words " and from " and immediately after her decease " are understood as governing the subsequent dispositions of the Burwood estate, these considerations appear to us to lose all or nearly all their weight.

For these reasons we think the appeal should be dismissed.

Harvey C.J. in Eq. arrived at the decision under

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appeal before the appellants were joined as separate parties. A representative party had advanced the argument which favours their interests. The learned Judge directed, however, that notice should be given to the executors of the deceased children and that the time for appealing should be extended so as to give them an opportunity of informing their beneficiaries and of considering the question. It appears that the administration of the trusts had proceeded on the assumption held to be erroneous, namely that all the children of the testator who were alive at the date when the youngest attained twenty-one took indefeasibly vested interests. In

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these circumstances we think it would be right to dismiss the appeal without costs and to order that there should be paid out of the estate the costs of the trustees as between solicitor and client and one set of costs to the respondents. It may be left to the taxing master to certify how the one set of costs should be allocated among the respondents.

UNION TRUSTEE COMPANY OF AUSTRALIA LTD. and anor. V. MEREWETHER and ors.

JUDGMENT STARKE J.

This appeal depends upon the proper interpretation of the will of Edward Christopher Merewether. Its terms are stated in the preceding judgment, and I shall not repeat them. The structure of the will satisfies me that the decision of Harvey J., when Chief Judge in Equity of the Supreme Court of New South Wales, was correct. The direction in the will to the testator's trustees to sell the Burwood estate and stand possessed of the proceeds arising therefrom for the children of his wife is introduced by the words "and from and immediately after her decease", that is, the decease of his wife, and only takes effect or becomes operative upon the happening of that event. The consequence, as the learned Chief Judge declared, is that the sons of the testator who predeceased his widow were not entitled at their respective deaths to any interest in the Burwood estate.

The appeal should be dismissed.

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