No. 2 of 1938. 2

IN THE HIGH COURT OF AUSTRALIA

Original

BONE AND OTHERS.

v.

EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA AND ORS.

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on 8th April 1938

BONE AND ORS. v. EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA AND ORS.

Order

Appeal dismissed. Judgment of Supreme Court affirmed. Appellant to pay costs of appeal to High Court of respondent the Executor Trustee and Agency Company of South Australia Limited and of respondent the Public Trustee, the said company to be entitled to take out of the estate of the deceased the difference between its costs of the appeal recovered by it from the appellants and its costs of the appeal as between solicitor and client.

BONE AND ORS. v. EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED AND ORS.

Reasons for Judgment — The Chief Justice.

BONE AND ORS. v. EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED AND ORS.

The Supreme Court of South Australia (Angas Parsons and Richards JJ., Murray C.J. dissenting) has held that under the will of Charles Mallen deceased the beneficiaries who were entitled to the income rents issues and profits arising from shares of the rest and residue of the testator's estate were properly paid sums representing 85 per centum of the profits of the testator's business which was carried on by his creditors under the directions contained in the will. An appeal from this decision is brought to this court.

The testator gave all his real and personal estate to his trustee upon the trusts declared in the will. Provision was made for certain specific lagacies and annuities. A trust to carry on the testator's business as a brewer was declared. The business was to be carried on during the joint and several lives of the testator's five named children. The trustee was directed to deduct from the net annual profits 15 per centum thereof for the purpose of forming a special fund for the use of the said business and for the purpose of extending and increasing it. The business has been profitable and has been carried on for many years, the testator having died in 1909. The question which arises upon this appeal relates to the disposition of the remaining 85 per centum of the profits of the business. Directions were given by the will as to the management of the business. After the decease of the five children the trustees were directed to invest any monies belonging to the estate in such securities as would tend to increase and prosper the business. Then follow the provisions which raise the question for determination of the Court :-

> " And as to all the rest and residue of my estate not hereinbefore specifically bequeathed but subject nevertheless to the annuities and payments hereinbefore directed to be paid upon trust as to one eleventh part or share thereof for my grandson ~~(Chas.Mallen Witnesses F.C. Scammell A.J.E.Boulden)~~ William Bone absolutely and upon trust as to a two eleventh part or share thereof for the said Amelia Bone for and during the term of her natural life the income rents issues and profits arising therefrom to be paid to the said Amelia Bone half yearly and from and immediately after the decease of the said Amelia Bone upon trust for such person or persons to such uses for such estates and generally in such manner as the said Amelia Bone shall by her last will and testament appoint and in default of such appointment or in so far as the same if incomplete shall not extend upon trust for all the children

> of my said daughter Amelia Bone absolutely share and share alike the children of deceased children taking deceased parents' shares....."

Four other shares of two elevenths each were given to the four other children for their respective lives with a similar direction that the income rents issues and profits arising therefrom should be paid to them half-yearly. In three cases the provisions were the same in detail as those relating to Amelia Bone which have been quoted, but in the case of one daughter there was no power of appointment and after the death of the daughter the share passed to her children or grandchildren.

By a codicil the testator made the following provision:-

> " I direct that the following words shall be inserted in my said will on the fourth page thereof and in the thirty third line of such page after the word bequeathed (including eighty five per cent. of the nett. profits arising from the carrying on of my said business) and that my said will shall be read and construed as if the said words had been originally inserted therein."

The result of this provision is that the words of the provision as to the rest and residue of the estate to which I have referred assume the following form :-

> " And as to all the rest and residue of my estate not hereinbefore specifically bequeathed (including 85 per cent. of the nett profits arising from the carrying on of my said business) but subject etc. upon trust as to one eleventh part for William Bone and upon trust as to a two eleventh part or share thereof for Amelia Bone for and during the term of her natural life" the income arising therefrom to be paid to her half yearly.

The testator expressly directs that his will shall be read and construed as if the interpolated words had been originally inserted therein, and there is no reason why full effect should not be given to this direction.

The result is that the testator gives to, for example, Amelia Bone, for her life, two elevenths of the rest and residue of his estate including 85 per centum of the net profits arising from the carrying on of the brewery business. These words of gift are followed by a direction as to the time when the income rents and profits arising from the part or share are to be paid to Amelia Bone. The payment is to be made half yearly. The later words which bring about this result are not words of gift. Under the preceding words "for the said Amelia Bone for and during the term of her natural life", Amelia Bone became entitled to receive the

income of her share. The later words merely direct half yearly payments. They cannot be read as limiting or controlling the words of direct gift. The question which is to be answered therefore reduces itself to this - "What is the meaning of a gift to a person for life or a share in property including specified income of part of that property?" It is contended for the appellant that the gift is a gift only of the income of the property and of the income of the specified income. In my opinion this interpretation should not be adopted. The gifts to Amelia Bone and her brother and sisters are essentially gifts of income. So far as the gifts relate in terms to corpus they are gifts of the income of that corpus, because the gifts are only for life. So far as the gifts relate in terms to income, they are gifts of that income.

The testator might have directed that the 85 per centum of profits should be accumulated and that the children should receive only the income of the accumulated fund. He did specifically direct an accumulation and setting aside and special use of 15 per centum of the profits. This circumstance rather emphasises the fact that there is no such express direction with respect to the 85 per centum of profits. The more natural interpretation of the words interpolated by the codicil is that the testator desired to provide that the children who had life interests were to receive those profits as income. The words are readily capable of this interpretation. There is nothing in the provision as it stands, with the added words, which prevents corpus being treated as corpus and income as income. The result might have been different if the only words of gift were to be found in the direction to pay income "arising therefrom". The provision would then have been to the effect that the children were to receive the income of property comprising corpus and income. If the provision had taken this form the argument for the appellant would have been very much stronger. But the argument is, I think, met, as the will actually stands, by the fact that the gift is made is a gift for life of a share of the property including income thereof not already dealt with. The gift of corpus to a person for life gives that person the income of that corpus, and the gift of income to a person for life gives

that person that income as long as he lives. For this reason, in my opinion, the judgment of the Supreme Court was right and should be affirmed.

It was argued for the trustee and executor that the appellants are estopped by a judgment of the Supreme Court given in 1929 from supporting the contention which they submit to this Court. In the view which I have taken of the construction of the will and codicil it is unnecessary to deal with this question.

The appellants took out the originating summons. They failed in the Supreme Court and have appealed to this Court. They should pay the costs of this appeal of the executor and trustee of the will and of the Public Trustee. The executor and trustee of the will should have out of the estate the difference between costs ~~received~~ recovered by it from the appellants and costs as between solicitor and client.

IN THE ESTATE OF CHARLES MULLEN; BONE AND OTHERS v. EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED.

JUDGMENT STARKE J.

This appeal depends upon the proper construction of a residuary gift contained in the testamentary dispositions of Charles Mullen.

They are fully set out in the opinion of the Chief Justice and repetition on my part is undesirable.

The question is whether the words "and as to all the rest and residue of my estate not herein before specifically bequeathed including 85% of the net profits arising from the carrying on of my said business" direct that the 85% of the net profits should be added to the capital of the residuary gift and dealt with accordingly or give it to the tenants for life of the residuary estate as income.

If it be added to the capital of the residuary the result follows as pointed out by Angas, Parsons and Richards JJ. in the Court below that the life tenants commence with little income but it progressively increases as the profits are accumulated and invested.

A testator, however, is at liberty so to provide subject to the provisions of any law restricting accumulation. The profits mentioned in the testator's will are included by its terms in the residuary estate and that taken alone means, I should think, that they are added to and form part of the residuary estate which is in its nature and effect a gift of capital. Cf. re Hawkins White v. White 1916 2 Ch. at 576-7. It is not a gift "as well the capital as the income" in the ordinary form but the gift of an aggregated or capital fund which the testator divides into shares.

We must go further, however, and ascertain whether a contrary intention is expressed in the will. The gifts to the testator's daughters provide that the income rents issues and profits arising there - from, that is from the share given to the daughter, shall be paid to them half yearly. But that does not to my mind disclose any contrary intention. The share is a share of the capital fund called the"rest and residue" of the testator's estate. It is not legitimate, I should think, to inquire into the particular assets constituting the capital fund and then reconstruct the fund clause and assert that the direction is to pay the tenant for life the income of 85 per centum of the

income arising from the particular asset, namely the business of the testator. In truth the only direction is to pay the income arising from the shares of the tenants for life in the aggregated or capital fund called in the will the "rest and residue of my estate."

The result is that I agree with the opinion of Murray C.J. in the Court below and am in favour of allowing the appeal.

B O N E A N D O T H E R S

v

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD & ORS

JUDGMENT

DIXON J.

McTIERNAN J.

BONE AND OTHERS

v

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD & ORS

The testator, who carried on business as a brewer, died on 26th October 1909. By his will and codicils he imposed upon his trustees a trust to carry on his brewing business until the death of the last survivor of five named children. He directed them during that time to prepare half-yearly balance sheets of the business for submission to the children. From the profits appearing in the balance sheets he directed that they should deduct fifteen per cent per annum to form a special fund for the use of the business and for the purpose of extending it. Upon the death of the five

children the trustees were required to hold his unconverted estate , which of course included the business,upon trust for conversion. As specific bequests, pecuniary legacies and annuities were the subject of prior gifts these directions,in substance and effect, related to residue.

The scheme of the will was to divide residue into eleven parts or shares,to give one eleventh to a grandson absolutely, two elevenths to a son absolutely and two elevenths to each of four daughters but to settle their shares. The limitations contained in the will with respect to the two eleventh shares of three of the daughters were to the daughter for life with a

general power of appointment and, subject to the power, with remainder to her children and the children of deceased children in equal shares per stirpes. The share of the fourth daughter was limited to her for life with remainder to her children living when her youngest child should attain twenty one and the children of the deceased children in equal shares per stirpes.

By a codicil the testator amended the description of the trust premises to be held subject to these trusts.

The question for decision is whether the amendment does not bring about a capitalization of the income from his business, that is, of the income remaining after the deduction of fifteen per cent of the annual profits carried to reserve, with the consequence that

the life tenants of the settled shares were not entitled to receive that income.

From the death of the testator, until apparently the death of the last survivor of the five children which occurred on 23rd February 1937, the estate was administered on the footing that the will, as amended, did not direct such a capitalization of income. The trustees proceeded upon the assumption that no such capitalization was intended and distributed the income of the estate among the daughters who were life tenants as well as the son and grandson who were entitled absolutely, and included in the income so distributed the profits from the business after carrying fifteen

per cent to reserve. On 23rd February 1937 the last survivor of the five children died, and some of the remaindermen then raised the question in a definite form. The existence of the question had been pointed out by Murray C.J. in some proceedings in reference to the will which came before him in 1933 : re Mallen 1933 S.A.S.R. 50 at p.56.

The description of the trust premises before the amendment by the codicil read :- " as to all the rest and residue of my estate " not hereinbefore specifically bequeathed but subject nevertheless " to the annuities and payments hereinbefore directed to be paid " Upon Trust " &c. The codicil directed that after the word " bequeathed " there should be inserted the following words - " (including eighty five per cent of the net profits arising from

" the carrying on of my said business)" and that the will should be read and constfued as if such words had been originally inserted therein. The limitations of the shares of the three sisters to whom powers of appointment are given do not differ from one another, and the effect produced in one case must be the same in the others. After the gift of one eleventh to the grandson, whose name is William Bone, there follows a gift to one of the daughters named Amelia Bone. To make clear exactly what is the question of interpretation arising out of the amendment and what are the considerations affecting its decision, it is enough to set out so much of the text incorporating the amendment as covers the description of the trust premises and

the limitation of William Bone's share and of Amelia Bone's share. It reads as follows :-

" And as to all the rest and residue of my estate not hereinbefore
" specifically bequeathed (including eighty five per cent.of the
" nett profits arising from the carrying on of my said business)
" but subject nevertheless to the annuities and payment hereinbefore
" directed to be paid upon trust as to one eleventh part thereof
" for my grandson William Bone absolutely and upon trust as to a
" two eleventh part or share thereof for the said Amelia Bone for
" and during the term of her natural life the income rents issues
" and profits arising therefrom to be paid to the said Amelia Bone
" half yearly and from and immediately after the decease of the
" said Amelia Bone upon trust for such person or persons to such
" uses for such estates and generally in such manner as the said
" Amelia Bone shall by her last will and testament appoint and in
" default of such appointment or in so far as the same if incomplete
" shall not extend upon trust for all the children of my said
" daughter Amelia Bone absolutely share and share alike. "

The remaindermen, who are the appellants, contend that eighty five per cent of the net profits of the business are made part of the residue, a two eleventh part or share of which is to be held for Amelia Bone for life and after her death, in default of appointment, for her children and the children of her deceased children per stirpes in equal shares. The result, it is said, is that eighty five per cent of the income of the business must be held as part of the corpus which, as to the daughters' two eleventh shares, is limited to life tenant and remaindermen. Further it is claimed on behalf of the remaindermen that in the expression " the " income rents issues and profits therefrom ", the " therefrom " goes back to the word " share " and that that word denotes

a two eleventh part of the trust premises comprising eighty five per cent of the income from the business capitalized.

It is almost needless to remark upon the improbability of such an intention. It would mean that after requiring that fifteen per cent of the profits should be put aside, the testator had gone on to direct that during the period for which the trust to carry on his business operated the remaining eighty five per cent should also be withheld and should be invested, the interest only being paid to the tenants for life. His business, including in that expression the capital assets employed therein or in connexion therewith, formed for practical purposes the residue of the estate and the consequences of such an interpretation would

be that his four daughters would be without much income from his estate until with the passing of years enough capitalized profits had accumulated to return an income, when invested outside the business. The object of accumulating the income would be difficult to imagine. For in the case of three of his daughters the accumulations, apart from the possible effect of statutory and other restrictions on remoteness of disposition, would pass under a general power of appointment and, in default of its exercise, to a class composed of grandchildren and children of deceased grandchildren. In the fourth case a power of appointment is not interposed. If accumulations and capitalization were really intended fuller and more explicit directions would be expected.

No doubt it is not easy to say with confidence for what purpose or with what motive the amendment was made by the codicil. But it may be that a fear existed lest the will had not sufficiently excluded the rule which withholds from the tenant for life the excess income from a hazardous investment pending conversion, and that it was to insure its exclusion that the words were inserted. These and some further considerations of a general nature which are mentioned in the judgment of Angas Parsons J. and of Richards J. tell strongly against an interpretation resulting in capitalization. But, in any event, we do not think that, when examined, the words of the will as amended carry the meaning ascribed to them by the appellants. The bracketed words inserted by the codicil do no more than include

eighty five per cent of the profits of the business in the residue. They do not say that, as between life tenant and remainderman, the profits are capital, any more than they say that they are to remain income. When by the words creating a trust in favour of Amelia Bone the provision declares a trust " as to a two eleventh part or " share thereof for the said Amelia Bone for and during the term " of her natural life " the part or share referred to relates to income and capital. It is evident that no separation of capital assets is intended. It is an undivided share in a corpus, the income from which is to be shared. To give a two elevenths share in a fund and the income of that share to a tenant for life and remaindermen means that the former gets the income and the latter the capital represented by the share.

The next statement " the income rents issues and profits " therefrom to be paid to the said Amelia Bone half yearly ",no doubt,means grammatically that the income rents issues and profits of the two elevenths share shall be paid to Amelia Bone as life tenant half yearly. It is said that this means the income etc, of two elevenths of, inter alia, the eighty five per cent of the profits and it therefore imports a capitalization of those profits so that they may earn income. But it at all events means the income rents issues and profits of two elevenths of, inter alia, the business which forms part of the residue.

Now the profits of a two elevenths undivided part of the business cannot be paid to Amelia Bone and also capitalized.

Yet, when the word " therefrom " is replaced by its antecedent, the provision amounts to an express and specific direction that the profits arising from a two elevenths part or share of the rest or residue of the estate comprising the business shall be paid over half yearly to Amelia Bone. It appears to us that the explicit direction contained in these words according to their ~~literal~~ literal grammatical meaning is inconsistent with the inference or implication in favour of capitalization which it is sought to make from the fact that literally the income from those profits may be also covered by the direction inasmuch as the " therefrom " refers to " part of share " as its antecedent and

that is a part or share in what is defined to include eighty five per cent of the profits of the business.

In emphasising the inclusion of the income arising from the profits as a consequence of this literal application of the word " therefrom " , the appellants appear to us to have disregarded the simultaneous inclusion of the profits themselves. In the accumulation of income or profits in the form of corpus, the continual conversion of income into capital is inherent. But it must begin as income and, therefore , any provision for the payment over of the income earned by the fund must literally apply to it and so prima facie intercept it before it is converted into capital. If there be also a description of the fund which

defines it as including its own income, then there are two provisions which are necessarily in conflict. We think that it is only through subordinating or overlooking this consideration that the word " therefrom " has been taken as favouring the appellants' contention that eighty five per cent of the profits of the business are capitalized. The words of the will do not appear to us to require the conclusion that the income from the business is to be withheld from the life tenants. We, therefore, agree in the interpretation which commended itself to the majority of the Supreme Court.

It is perhaps desirable to add that the next of kin, as such,

are not represented by any of the parties to the originating summons and that, if the contrary view were adopted, it is by no means clear that they would not be interested as much as or more than the remaindermen.

BONE & OTHERS V. EXECUTOR TRUSTEE & AGENCY CO. OF SOUTH AUSTRALIA

JUDGMENT EVATT J.

In this case the majority of the Supreme Court of South Australia held that on the true construction of the will, the trusts as to the residue of the estate (including 85%of the net profits arising from the carrying on of the testators business) did not require that the said 85%of profits should be dealt with as corpus or added to the corpus but required that such 85% of profits should be dealt with as profits and distributed to the designated life tenants at the times specified.

In my opinion the judgment of the majority should be affirmed. Before the codicil, the 85% of the profits was clearly to be distributed among the life tenants in the proportion indicated, the remaining 15% being funded for the use or extension of the same business. Accumulation or capitalization of any part of the 85% was quite out of the question. The codicil was inserted to place it beyond all argument that the children who were to become life tenants should have the benefit of the business profits during their lives. The inclusion of a recurring annual receipt with the residue as part thereof does not suggest funding or accumulation or capitalization of such annual receipt It is closely analogous to the well known form cited by Mr Cleland "...as to as well the capital as the income of the said moneys and investments...upon trust to pay the income thereof..." (Hayes & Jarman 11th ed. p. 170). Here too the income of the business is dealt with by the testator as income and coming into residue impressed with that form, it emerges therefrom in precisely the same form ready to be paid over. The words of gift are "for...A B for and during the term of her natural life... and (then) upon trust for such person...as the said A B shall by her last will...appoint". Thus A B gets the enjoyment for life of the same interest over which she alone has the power of appointment by will. Now that interest consists of the prescribed share of the business profits not merely the income arising from such. If so, she is to enjoy the same share of the business profits during her lifetime. To enjoy business profits for life is to receive them.

The phrase "the income rents issues and profits arising therefrom to be paid to the said A B half yearly" is merely parenthetical but it reinforces the prima facie view that the obligation to hand copies of the half yearly profit and loss account is of significance and suggests that the children are to have something more than an academic interest in the resulting fugures. In other words A B who is to enjoy the income is to enjoy it by half yearly payments.

Mr. Ligertwood said everything possible in favour of the contrary view but in my opinion the construction he favours would defeat the clearly expressed intention of the testator.

The appeal should be dismissed.