No 18 of 1940

IN THE HIGH COURT OF AUSTRALIA.

BURGE

V.

BURGE & ORS.

REASONS FOR JUDGMENT.

Judgment delivered at SYDNEY

on 21st August, 1940.

H. J. Green, Govt. Print., Melb.

C.11235

BURGE V BURGE AND OTHERS.

JUDGMENT. STARKE J.

The question raised by this appeal depends entirely upon the construction of the will of Stephen Belcher Burge. The testator died in 1924. His wife predeceased him but he was survived by several sons one of whom, Cecil, died in 1938 leaving his widow, who was his executrix and sole beneficiary, and also a son John, surviving him. The testator by his will gave the whole of his real estate and the residue of his personal estate to trustees to hold upon the trusts declared by his will as follows. He directed his trustees to hold in trust for the benefit of each of his sons (other than one named) a number of shares in Burge Bros. & Company Ltd. and to pay the total income or dividends arising from the shares so held in trust for him to such son in accordance with the provisions of his will. He also directed in regard to such shares that his trustees should hold the same upon the trusts declared concerning the same during his wife's lifetime or for a period of 21 years after his decease whichever should be the longer and upon the happening of the longer of the two periods that his trustees should transfer the said shares to the son entitled thereto. An absolute interest was thus vested in each son in the number of shares to which he was entitled. Further he directed his trustees to hold certain other shares, called the Annuity Fund, during his wife's lifetime or for a period of 21 years after his decease (whichever should be the longer) with power to apply the dividends and certain other income in making up any deficiency in an annuity bequeathed to his wife and to accumulate the surplus and add the same to the Annuity Fund. And that at his wife's death or at the end of the said period of 21 years, whichever should be the longer, his trustees should divide his Annuity Fund between certain sons then living. The testator, after making certain provisions for his daughters, gave and

bequeathed the balance of the net proceeds of his real and residuary personal estate to and equally between all his sons living at his wife's death.

Then follows the provision in the will which raises the question in issue upon this appeal:- "And I direct that if any child of mine benefiting under this my will shall die in my lifetime or before the time hereinbefore provided for the distribution of my Annuity Fund leaving a child or children surviving me and living at the period or respective periods of the vesting of my real and residuary estate or my said Annuity Fund as the case may be then such last mentioned child or children shall take and if more than one equally between them the shares or benefit which such parent should have taken under this my will had he or she survived me and been living at the aforesaid periods of vesting respectively".

The appellant John Burge bases his claim upon the provisions of this clause. He contends that his father Cecil was a child of the testator benefiting under his will who died before the time provided for the distribution of the Annuity Fund leaving a child, the appellant John Burge, surviving him and living at the period or respective periods of the vesting of his real and residuary estate or his Annuity Fund, as the case might be. It is not enough, I think, to say that the shares of the sons were indefeasibly vested, for the question is whether the clause relied upon by the appellant divests them in the contingencies therein set forth. But Dudley Williams J. was of opinion that the clause did not apply to the shares vested in the sons. In this I agree and for the reasons assigned by the learned judge. The structure of the will and the gift by the clause already mentioned to a grandchild or grandchildren surviving the testator and living at the period or respective periods of the vesting of his real and residuary estate or his annuity fund supply the clue to the intention of the testator.

The appeal should be dismissed.

BURGE

v.

BURGE & OTHERS

JUDGMENT DIXON J.

BURGE v. BURGE & OTHERS

The testator died on 13th November 1924 leaving seven sons him surviving. His wife predeceased him and he died a widower. The appellant, John Burge, is his grandson. He was born in the testator's lifetime. He is the only son of Cecil John Burge, who died recently and was one of the testator's seven sons who survived him.

The question for decision concerns a parcel of shares that are the subject of specific dispositions contained in the testator's will. The question is whether, under these dispositions, the appellant became entitled, upon his father's death, to the income and corpus of the shares or, on the contrary, they devolved as part of his father's estate upon his legal

personal fepresentative.

The will is constructed on a plan that distinguishes between, on the one hand, shares held by the testator in a company bearing his name and, on the other hand, his other property. The income from his other property was to have been the primary source of an annuity to his wife. His shares he divided into two parts. A number, ascertainable in a manner presribed by the will, was made the subject of a trust in favour of his sons except one who was excluded as having been already provided for. The balance of his shares were to be held as, what the testator called, his annuity fund, during his wife's liftime or for a period of twentyone years after the

testator's death, whichever should be the longer. The dividends were to be accumulated and the fund applied to make up deficiencies, if any, in payments of the annuity and, at the end of the period, distributed. The fund was to be supplemented by the amount of dividends exceeding a specified rate on the shares held for the benefit of any of the testator's sons who might not for the time being be exclusively engaged and employed in the business of the testator's company in some practical capacity (a thing of which the trustees were to be the sole judges), and the fund might be also supplemented by any bonus shares distributed in respect of such a son's shares. Thus the will divided the estate into three distinct parts, -

(1) shares held upon trusts in favour of the sons, (2) shares and dividends forming the annuity fund, and (3) realty and other personal property. With the qualifications already stated, the trusts declared in respect of the first class of shares are to pay the dividends to the respective sons and to hold the shares upon the trusts stated, during the lifetime of the testator's wife or for a period of twentyone years after his own death, whichever should be the longer, and then to transfer the shares to the respective sons. The annuity fund forming the second part of the estate is to be held during the same alternative periods and at the end of the longer period divided among the sons (other than the son excluded) then living. The

trusts of the real and remaining personal estate are to convert at the death of the testator's wife and, after raising two pecuniary legacies which are settled upon daughters, to divide the balance of the proceeds of conversion equally among all his sons living at his wife's death. The period of twentyone years from the testator's death will expire on 13th November 1945. After making these various dispositions the will goes on to make some general provisions. Standing first among them is the provision which gives rise to the present question. But before setting out its terms it is necessary to state what, in its absence, would have been the result in the present case of the trusts of the first of the three

classes of property, namely the trusts of the shares in favour of the testator's sons.

The trusts apply the dividend in making payments to the sons and contributions to the annuity fund, as the testator's wife predeceased him, formed a trust in respect of income for a definite period of twentyone years. Subject to that trust, on the hypothesis stated, the shares would have been held simply for the sons, who would have taken indefeasibly vested interests. If any of them died before the end of the period of twentyone years, his interest would have devolved upon his executors as part of his estate.

Thus, in the events which have happened, if the trusts of the shares in favour of the testator's sons stood unqualified by any further provision of the will, Cecil John Burge's personal representative would take his share as part of his estate, as an ordinary transmissible future vested interest. His son John Burge would take no interest.

The question, therefore, is whether the general provision, which it is now necessary to set out, has the effect of so qualifying or controlling the trusts of the shares for the sons that, instead of Cecil John Burge taking an indefeasibly vested interest, he took either a contingent interest or an interest liable to be divested on his death

before the period specified, with a substitution of his son in his stead.

The provision is in the following terms :- "AND "I DIRECT that if any child of mine benefiting under this "my Will shall die in my lifetime or before the time "hereinbefore provided for the ~~xxxxing~~ distribution of "my annuity fund leaving a child or children surviving "me and living at the period or respective periods of

"of the vesting of my real and residuary estate or my said annuity
"fund respectively as the case may be then such last-mentioned
"child or children shall take and if more than one equally
"between them the share or benefit which such parent should
"have taken under this my Will had he or she survived me and
"been living at the aforesaid periods of vesting respectively."

The appellant says that, within the meaning of this clause, his father was a child benefiting under the testator's will who died before the time thereinbefore provided for the distribution of the annuity fund leaving a child, namely the appellant. Accordingly he says, as he is still alive and, on any view, by now the property has vested, he is entitled to his father's shares, income and corpus, by substitution.

In my opinion the appellant's contention is ill-founded. It gives to the clause a construction by which it defeats interests that apart from its provisions would be indefeasibly vested. It is a construction which makes it cut down, or impose a divesting condition on, interests otherwise unconditionally vested. It ought not, I think, to receive such ~~xxxxxxxxxxxx~~ an interpretation. Its meaning is that where, through lapse or through death before the period at which, under the other provisions of the will, an interest would become indefeasibly vested in a child of the testator, that interest fails, then children of the child shall be substituted and take their parents share. That this

is the true meaning of the clause is,-I think, shown by the words "the share or benefit which such parent should have "taken under this my Will had he or she survived me and been "living at the aforesaid periods of vesting respectively." In any event it is a construction of which the clause is clearly capable and it would not be in accordance with principle to give it unnecessarily a meaning wide enough to divest interests otherwise indefeasibly vested.

For these reasons I think that the appeal should be dismissed.

In my opinion, the appeal should be dismissed. I agree with the reasons of my brother Dixon.