(8)

IN THE HIGH COURT OF AUSTRALIA.

C O N W A Y & A N O R.

V.

C O N W A Y & A N O R.

Original

REASONS FOR JUDGMENT.

No. 21 of 1941

Judgment delivered at MELBOURNE

on 27th October 1941.

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

C.2774

No 21 of 1941

(11)

IN THE HIGH COURT

OF AUSTRALIA

ON APPEAL FROM THE SUPREME COURT OF

THE STATE OF VICTORIA

IN AN ACTION NO.527 of 1940

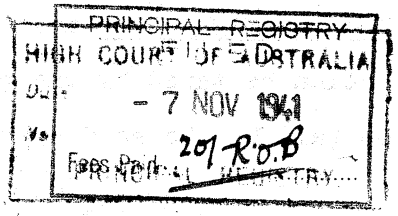
BETWEEN

MARGARET CONWAY
and JAMES CONWAY APPELLANTS

- and -

JOSEPH CONWAY and
GRACE SARAH TRIGGER RESPONDENTS

O R D E R



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IN THE HIGH COURT)
OF AUSTRALIA)

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF VICTORIA IN AN ACTION NO. 527 of 1940

B E T W E E N

MARGARET CONWAY and JAMES CONWAY APPELLANTS

- and -

JOSEPH CONWAY and GRACE SARAH TRIGGER RESPONDENTS

BEFORE THEIR HONOURS THE ACTING CHIEF JUSTICE, MR JUSTICE STARKE, MR. JUSTICE McTIERNAN AND MR. JUSTICE WILLIAMS.

MONDAY THE 27th DAY OF OCTOBER 1941.

UPON MOTION made the 7th day of October 1941 on behalf of the abovenamed Respondents for an Order that the Notice of Appeal dated the 16th day of August 1941 and filed herein be set aside UPON HEARING -- Mr. Dean of Counsel for the said Respondents and Mr. Eggleston of Counsel for the abovenamed Appellants AND UPON READING the Notice of Motion dated the 26th day of September 1941 the Affidavit of James Atkinson sworn the 26th day of September 1941 and filed herein on behalf of the said Respondents and the exhibits thereto and the Affidavit of John Desmond Byrne sworn the 7th day of October 1941 and filed herein on behalf of the said Appellants and the exhibit thereto THIS COURT DID ORDER that the said Motion should stand for Judgment and the same standing for Judgment this day accordingly in the presence of Counsel for the said Respondents and the said Appellants respectively THIS COURT DOTH ORDER that the said Motion be and the same is hereby allowed and that the said Notice of Appeal be and the same is hereby set aside AND THIS COURT DOTH FURTHER ORDER that the costs of the said Respondents of the said Motion be taxed by the proper officer of this Court and when so taxed be paid by the said Appellants to the said Respondents.

BY THE COURT

DEPUTY REGISTRAR.

CONWAY AND ANOTHER v. CONWAY AND TRIGGS.

O R D E R.

Motion allowed with costs.

CONWAY AND ANOTHER V. CONWAY AND TRIGGS.

Judgment. Rich A.C.J.

CONWAY AND ANOTHER V. CONWAY AND TRIGGS.

Judgment. Rich A.C.J.

This is a motion to set aside a notice of appeal on the ground that the judgment of the Supreme Court in respect of which the notice of appeal has been filed does not fall within section 35 of the Judiciary Act 1903-1940. The judgment in question was given in an action brought by two plaintiffs against the surviving trustee of a will and the purchaser from him of land sold by the trustee in the course of administration. The plaintiffs are two of eleven beneficiaries entitled to the residuary estate under the will of their deceased father and they claimed that the sale should be set aside on the grounds that the sale was not bona fide but was in fact a sale by the trustee to himself and that the price was much below the true value of the land. Under the provisions of the will the proceeds of the sale were divisible among eleven beneficiaries of whom the plaintiffs were two. The remaining beneficiaries were not parties to or represented in the action. Seven of these beneficiaries have been paid their respective shares of the proceeds of sale and have given releases in respect

thereof to the trustee. The action was founded on a breach of trust and all the beneficiaries should have been made parties to the action or been otherwise represented. In their absence the action is concerned only with 2/11 shares of the proceeds of sale. That is the issue involved in the action. As the evidence in the case shows that these 2/11ths are not worth £300 the appeal is incompetent and the notice of motion should be allowed.

CONWAY AND ANOTHER V CONWAY AND ANOTHER.

JUDGMENT. STARKE J.

Motion to set aside a notice of appeal on the ground that the judgment, in respect of which the notice of appeal was given, did not involve directly or indirectly any claim demand or question to or respecting any property or civil right amounting to or of the value of three heudred pounds. Judiciary Act 1903-1940 Sec.35(1)(a)(2).

The plaintiffs, the appellants here, brought an action in the Supreme Court of Victoria alleging that a sale of certain land containing 98 acres or thereabouts made by the respondent Conway, who was the surviving executor and trustee of the will of Patrick Conway, to the respondent Trigger, was not a bona fide sale and was in fact a sale indirectly to himself, the respondent Trigger being an agent or trustee for him, and claiming a declaration that the sale was void and that the land was held by Trigger for the said Conway as executor and trustee and the cancellation of the contract of sale. An alternative claim was made for compensation or damages in lieu of setting aside the sale. The action was dismissed and judgment entered for the defendants.

The land, it appears, was of a value exceeding £300, for the sale prive stipulated in the contract of sale was £10 per acre. The land was devised by Conway deceased to his wife, who is now dead, for life, and after her death to his children in equal shares, and his will authorised his trustees to sell the same and divide the proceeds amongst his children equally. The testator had eleven children, of whom the appellants were two. It appears that the purchase money for the land was found by the respondent Conway for the respondent Trigger and that most of the children had received their shares of the proceeds of sale and executed releases to the executor and trustee. Apparently, the children who had not received their shares

were the appellants and the representatives of two other children who had died. The appellants had not made any of the other children or the representatives of those who had died parties to the action, and the propriety of joining them stood over, apparently with the sanction of the learned judge who tried the action, until after the determination of the facts. But it did not become nedessary at the trial to consider the question of the joinder of parties, for the facts were determined adversely to the appellants and judgment entered for the respondents.

The sale alleged by the appellants is not void but voidable ex debito at the instance of a beneficiary if he comes forward in due time and has done nothing whereby he has lost his right. This right is independent of any advantage to the trustee and without proof of any loss or injury. But the terms upon which a sale will be set aside depend upon the circumstances of the case. See Lewin on Trusts 14th. Edition pp.832 et seq. The appellants' case is that the purchase by Conway of the trust property cannot stand and must be set aside and that the property should be reconveyed by Trigger to him as executor and trustee of Conway deceased. The judgment under appeal denies this right and therefore, it is contended, involves directly or indirectly a claim demand or question respecting property, namely the land, to or of the value of £300.

In estimating appealable value, regard should be had, it has been held, to the whole matter involved in the suit, and not the value of a fractional part of the property sought to be recovered. Mussumat Khatoor 12 Moo. 470; Tipper v Moore 13 C.L.R. 248. Beard v Perpetual Trustee Company 25 C.L.R.1, concerned the value of a right to elect but the construction given in that case to Sec.35(1)(a)(2) of the Judiciary Act is in conflict with the decision in Tipper v Moore and omits perhaps to give full weight to the words of the section which give

appellate jurisdiction to the High Court - "from every judgment .....which involves directly or indirectly any claim, demand, or question to or respecting any property ..... of the value of Three hundred pounds". See Webb v Hanlon 61 C.L.R. at pp.321, 326-7.

The fact that several of the beneficiaries have received their shares and released the executor and trustee and are not parties to the suit cannot, I think, preclude the appellants from relief if the facts they allege were established. The question of parties stood over until the facts were determined, but if they had been resolved in favour of the appellants I do not doubt that the trial judge would and ought to have directed the joinder of any parties necessary to the suit and the appropriate relief. Again, the fact that some of the beneficiaries have been paid their shares and released the executor and trustee may preclude them from complaining of the action of the executor and trustee, but it would not prevent a pecuniary adjustment between them and the other beneficiaries if the property were reconveyed to the executor and trustee and resold.

This case may, I think, be decided upon its own facts without resolving the difficulties above mentioned. The relief sought by the appellants, if they established their case, could only be granted on the terms of repaying the price at which the executor and trustee bought with interest and the executor and trustee accounting for rents and profits or being charged with an occupation rent; Hall v Hallet 1 Cox at p.139; Lewin on Trusts 14th. Edition pp.832-833. The land was put up at auction and no better bid than £7 per acre was obtained. The respondent Trigger, who it is alleged was acting for the executor and trustee, bid this sum. Later, a contract was entered into between the executor and trustee with Trigger

for the sale of the land at £10 per acre, or nearly £1000, and this sum was found by the executor. The property can only be restored to the estate on payment of this sum, It is in the nature of a charge or lien upon the property. The trial judge was satisfied that this sum was "a very good price for the property", though the appellants assert that they are willing to give £15 per acre for the land. The sum of £10 per acre is, I think, on the evidence adduced in this Court, the value of the property free from encumbrances.

It is, I think, impossible in these circumstances to maintain that a judgment dismissing the appellant's suit involved directly or indirectly any claim demand or question to or respecting any property to of of the value of £300, for the value of the property is affected by the terms upon which relief would be granted, namely the repayment of nearly £1000 to the executor or trustee, and it reduces it necessarily below the sum of £300. The appellants might have appealed as of right to the Supreme Court, but they chose to appeal to this Court, which is incompetent for the reasons already given.

The motion should be allowed.

Conway & anor v Conway & anor.

Judgment. McTiernan J.

CONWAY & ANOR. v CONWAY and TRIGGER.

JUDGMENT. McTIERNAN J.

I agree that the motion should be allowed.

The plaintiffs in the action were two of eleven cestui qui trust of the land sold by the trustee. They sued on their own behalf only, none of the other cestui qui trust was a party to the action. The Court dealt with the matter in controversy so far as regards the rights and interests of the parties actually before it, See Order XV1, Rule 11. The matter in issue in respect of which the judgment was given was no larger than the plaintiffs rights and interests in the land. These did not exceed in value 2/11 of the value of the land which was £980. The judgment therefore is not within part 1 of Sec. 35 (1) (a). It follows also in this case that the judgment does not involve any claim, demand or question to or respecting property of the value of £300, and is not within part 2 of Sec. 35 (1) (a).

CONWAY & ANOTHER V CONWAY & ANOTHER.

Judgment. Williams J.

In this motion the respondents seek to set aside a notice of appeal filed by the two plaintiffs against the judgment of the Supreme Court of Victoria given in an action which they brought against the respondents, the surviving trustee of a will and the purchaser, to impeach a sale of land forming part of the estate by the trustee to the purchaser for the sum of approximately £980, the allegation being that the purchaser was a dummy for the trustee and the sale was really a sale by the trustee to himself.

The relief claimed in the action was an order to rescind the contract of sale and a declaration that the land was held by the purchaser on behalf of the trustee in his capacity of trustee of the will.

The learned trial Judge dismissed the action with costs.

The ground on which the respondents rely in support of the motion is that the judgment was not given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of £300, and the same did not involve directly or indirectly any claim demand or question to or respecting any property or any civil right amounting to or of the value of £300; Judiciary Act 1903-1940 sec.35(1)(a)(2).

Under the trusts of the will the proceeds of sale were divisible into 11 parts, of which the plaintiffs were entitled to two, and the beneficiaries interested in the other 9 parts were not made parties to the action. The beneficiaries entitled to 7 of these parts have been paid their shares of the proceeds of sale and have given releases to the trustee. As the relief sought was based on breach of trust all the beneficiaries should have been made parties and it is unfortunate that the action was allowed to proceed in their absence. Roberts v. Tunstall 4 Hare 257 at p.261; 67 E.R. 645 at p.647.

The evidence established that the purchase money was provided by the trustee; so that, if the action had succeeded, a condition of the relief sought being granted would have been that the shares of the purchase money paid to the beneficiaries interested in the 7 parts should be refunded to the trustee with interest, but the Court would not have been able to order this in an action to which they were not parties. In re Worsam Hemery v. Worsam 51. L.J. ch. 669 at p.671. It is clear of course that where a trustee purports to sell

trust property to himself or to a dummy for himself all the beneficiaries are entitled either to have the sale set aside completely, the trustee being repaid his purchase money with interest, or to have the land put up for sale, and, if a higher sum is offered than the addition of the purchase money paid by the trustee and the value of any repairs and improvements which he has made, it is sold for that figure but if not the trustee is held to his purchase. But the actual relief granted may vary according to the circumstances of each particular case, and it may happen that where there are a number of beneficiaries interested in the proceeds of sale some of them may be satisfied to confirm the sale whereas others may desire it should be set aside. For instance in Campbell v. Walker 5 Ves.Jr 678 at p. 681 (31 E.R. 801 at p.803) the Master of the Rolls approved of the decision in Whelpdale v. Cookson where the bill was filed by a creditor against the defendant trustees to set aside a sale to themselves and the Court ordered the creditors to elect whether they would abide by the purchase. If the majority of them elected not to abide by the purchase, then it was to be put up again and sold before the Master; the trustee to account for the profits and to be allowed his principal money with interest at 4%: if the majority elected to abide by the purchase, the trustee was to account for the purchase money with interest.

Smedley v. Varley 23 Beav. 358. 53. E.R. 141

In the present case there is nothing to indicate the wishes of the beneficiaries interested in the other 9 parts. They may all have desired to confirm the sale and accept their shares of the purchase money. If so the litigation would be confined to the 2 shares owned by the plaintiffs. The sale could be set aside at their behest and the land resold. They would receive their shares of the proceeds of the new sale, whether more or less than the amounts which they would have received under the challenged sale. But the other beneficiaries would not be interested in the resale.

These considerations show that the action as framed could only relate to the 2 shares of the plaintiffs in the land. Indeed the appellants counsel relied on Rule 11 of Order 16 of the Supreme Court Rules (Victoria) as a justification for the action proceeding in spite of the respondents' objection that it was defective for want of parties. This rule provides, so far as material, that no cause or matter shall be defeated

by reason of the misjoinder or nonjoinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as the rights and interests of the parties actually before it are concerned. This rule does not in my opinion justify the Court in departing from the settled practice that all beneficiaries should be made parties to a suit in which the trustee is charged with a breach of trust. But, if the action is allowed to proceed to judgment in the absence of some of the beneficiaries, it can only be because the rights and interests of the parties before the Court can be dealt with separately from those of the absent beneficiaries. The present action could only be justified on this basis and the evidence shows the 2 shares were of less value than the sum of £300.

The appellants sought to justify their claim to an appeal as of right by contending that the relief sought was to have a sale of a piece of land valued at £980 set aside so that the judgment involved a claim demand or question to or respecting property of the value of £300. There is no doubt that the previous decisions of this Court raise two apparently conflicting views as to the proper method of determining the appealable interest, one being that you ascertain the value of the property to which the judgment relates and the other that the judgment is to be looked at as it affects the interest of the party who is prejudiced by it and who seeks to relieve himself from it by appeal. Webb v. Hanlon 61 C.L.R 313 at pp. 321 & 327. But it is unnecessary in the present case to attempt to decide between or reconcile these decisions because for the reasons already given if the first view is correct the two shares are not worth £300 while if the second is adopted the evidence shows the appellants were not prejudiced to that extent.

The notice of appeal should therefore be set aside.