

IN THE HIGH COURT OF AUSTRALIA.

.....DOWIE.....

V.

THE PERPETUAL TRUSTEES EXECUTORS AND
AGENCY COMPANY OF TASMANIA LIMITED
& ORS.

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on Wednesday, 23rd October, 1946

DOWIE

v.

THE PERPETUAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF TASMANIA
LIMITED & ORS.

ORDER.

Appeal allowed. Order of the Supreme Court varied by deleting the answer to Question 1 of the originating summons and in lieu thereof answering Question 1(a) in the affirmative and also answering Question 3 in the affirmative. Costs of all parties of this appeal as between solicitor and client out of the estate.

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LATHAM C.J.

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REASONS FOR JUDGMENT.

LATHAM C.J.

By a third codicil to his will Denis Normoyle, who died on 28th March 1922, gave, subject to a certain condition, a one-tenth interest in the net income of his estate to, among other persons, his niece Mrs. Julia Dowie. By a subsequent codicil this interest was altered to one-eleventh of the net income. Mrs. Dowie died on 21st October 1943. Under the provisions of the will Mrs. Dowie was not entitled to have any share of the income paid to her unless she became a widow, an event which did not happen. If she had not been a married woman a sum of £4,131:5:3 would have been paid to her during her life. Her son Francis Thomas Dowie, the appellant, claims that he was entitled to be paid this sum during the life of his mother, and that it should now be paid to him. It was held by Mr. Justice Clark in the Supreme Court of Tasmania that upon the true construction of the will the result was that this sum should be retained by the trustee and accumulated until the period of distribution specified in the will. F.T. Dowie now appeals to this court.

The provisions of the third codicil dealing with the net income are as follows:-

"AND I DIRECT my Trustees to stand possessed of the net income to arise from my whole Estate (which in my said Will I directed them to divide into four equal parts and by my said first Codicil into nine equal parts) UPON TRUST subject to the payment of the annuities or other yearly sums and legacies bequeathed by my said Will or any Codicil thereto to divide the same into ten equal parts and to pay one of such parts to each of the following persons during their respective lives but as regards my unmarried Nieces so long as they shall continue unmarried namely my Brother the said Michael Normoyle and my Nieces and Nephew following namely Ida Osborne Minnie Margaret Osborne Florence Leonard (wife of Martin Leonard of New South Wales) Joseph Osborne Margaret Normoyle Bridget Normoyle and Catherine Normoyle (the last three named being children of my Brother the late John Normoyle) Julia Dowie (the Wife of Henry Dowie) and Luch Dove (the wife of Percy Dove) but conditionally as regards the said Julia Dowie and Lucy Dove that they shall respectively at the date of my death be or shall at any time thereafter become widows and their shares of the said income shall be payable only from the date of my death if they are respectively
then /

then widows or from the date on which they shall respectively become widows as the case may be PROVIDED ALWAYS that if any one of my said unmarried Nieces shall marry and shall thereafter become a widow then as from the date of such widowhood her share in the said income shall again become payable to her as if she had remained unmarried my desire and intention being to make provision for such Nieces during discoverture."

This provision does not divide a sum equally between the beneficiaries (the testator's brother and nieces) but gives separate shares of one-tenth of the net income to each of them. Upon these provisions the following observations may be made:- As to the unmarried nieces it is plain that their share of the income is payable only so long as they are not married women and during periods during which they are not married women. In the next place, no condition as to coverture is imposed in the case of the niece Mrs. Leonard. In the third place, as to Julia Dowie and Lucy Dove, two other nieces, the gift is conditional "that they shall respectively at the date of my death be or shall at any time thereafter become widows and their shares of the said income shall be payable only from the date of my death if they are respectively then widows or from the date on which they shall respectively become widows as the case may be".

The clause of the will under which the appellant makes his claim is the following provision:-

"And from and after the death of my said Brother Nieces or Nephew respectively before the period of distribution hereinafter mentioned and during any coverture of my said nieces respectively I DIRECT my Trustees to pay until such period of distribution the share in the said income hereinbefore bequeathed for the benefit of such Brother Niece or Nephew so dying or becoming subject to coverture as the case may be to the same person or persons as would be entitled to receive the benefit of the said share if the said period of distribution had arrived."

The next words in the codicil fix the "period of distribution" as "upon the death of the survivor of them my said brother nieces or nephew". This provision deals with two sets of circumstances - first the death of a brother, niece or nephew, and secondly "during any coverture of my said nieces". The first limb of the provision referring to "the death of the survivor of them my said Brother Nieces or Nephew" plainly refers to all the nieces.

The question which arises is whether in the second limb of the provision "during any coverture of my said Nieces respectively" the /

the words "my said Nieces" also apply to all the nieces or whether some limitation is to be placed upon them. Prima facie the same words should be given the same meaning unless there is some other provision which excludes such a construction. In the first place it may be observed that Mrs. Leonard, a niece, is entitled to receive a share of income notwithstanding coverture. There is no condition relating to coverture applying to her corresponding to that applied to Mrs. Dowie and Mrs. Dove. Accordingly it must be conceded that she is excluded from the words "my said Nieces" in the second limb of the provision to which I have referred. Then, is this provision limited to the unmarried nieces, or should it be construed so as to include Mrs. Dowie and Mrs. Dove? Prima facie one would expect it to deal with income which has not been paid by reason of coverture and therefore it should apply both to the unmarried nieces and to the other two beneficiaries, Mrs. Dowie and Mrs. Dove. So construed the operative provision corresponds to the two sets of circumstances upon the occurrence or continuance of which it is to become operative.

The argument against this view is based upon the words "or becoming subject to coverture". These words, it is said, are suitable to refer only to a future event. But they are words which are dealing with first a death and secondly a period of coverture. They are dealing with^a failure to receive income owing to a death or owing to the continuance of a period of coverture. They should, therefore, I think, be construed as intended to provide for all cases in which income which would otherwise be payable to all nieces is not so payable by reason of the coverture of a particular niece. So construed they include the case of Mrs. Dowie as well as the case of the nieces who were unmarried at the time of the testator's death. On any other view there is a disparity in the treatment of the children of the various nieces for which no intelligible reason can be assigned. If "becoming subject to coverture" is read so as to include the case of "continuing to be subject to coverture", then the difficulties in the construction of the will disappear and an inherently reasonable result is brought about.

Upon this construction of the will no difficulty arises as to the Thellusson Act as there is no direction for accumulation.

For these reasons in my opinion the appeal should be allowed and the order of the Supreme Court should be varied by deleting the answer to Question 1 of the originating summons and in lieu thereof answering Question 1(a) in the affirmative and also answering Question 3 in the affirmative. The costs of all parties of the appeal as between solicitor and client should be paid out of the estate.

DOWIE

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JUDGMENT.

STARKE J.

This appeal concerns the construction of some unusual provisions in a will and several codicils and I had better say no more than that I agree with the order prepared by my brother Williams.

DIXON J: I agree.

McTiernan J: I agree.

DOWIE

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JUDGMENT.

WILLIAMS J.

The appeal depends upon the proper construction to be placed upon the third codicil modified slightly by the fourth codicil which increases the shares of residue from ten to eleven during Mrs. Osborne's lifetime. The disposition of residue falls into two periods. The income is first disposed of until the death of the survivor of the brother, nieces, nephew and Mrs. Osborne. The corpus of residue is then distributed in ten equal shares. There is no express provision for any accumulation of income in the first period, the dispositions of which are so elaborate that it is manifest that the testator intended to dispose of the whole income and leave nothing to implication. The crucial provisions ^{are those} /which provide that after the death of the brother, nieces or nephew before the period of distribution and during any coverture of the nieces the trustees are to pay the shares of income of the brother, niece or nephew so dying, or becoming subject to coverture to the persons who would be entitled to receive the benefit of the share if the period of distribution had arrived. These two provisions must be read together the intention being that the trustees should pay the income to the secondary beneficiaries from the occurrence of the death of the primary beneficiary and from time to time during the disqualification by coverture of those primary beneficiaries who are nieces. When these provisions are read together effect can only be given to them both by construing the word "becoming" as "being". I see no reason to exclude Mrs. Dowie's children from those intended to be benefited during such a period of disqualification. As she was covert the whole time between the death of the testator and her death, and the appellant was her only child, her share became payable to him from the death of the testator as the person who would have been entitled to the corpus of this share if the period of distribution had then arrived. I agree that the appeal should be allowed.